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# THE ENGLISH REPORTS

KING'S BENCH DIVISION

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LORD CHIEF JUSTICE OF ENGLAND

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LATELY ATTORNEY-GENERAL

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BARRISTERS-AT-LAW



THE  
ENGLISH REPORTS

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NOTES of OPINIONS and JUDGMENTS DELIVERED in Different COURTS, by the Right Honourable SIR JOHN EARDLEY WILMOT, Knt., late LORD CHIEF JUSTICE of the COURT of COMMON PLEAS, and One of HIS MAJESTY'S Most Honourable PRIVY COUNCIL. 1802.

[1] IN CHANCERY.

THE ATTORNEY GENERAL, at the Relation of the University of Cambridge, *against* LADY DOWNING AND OTHERS. 1767.

[S. C. Ambl. 571 ; see *Robson v. Flight*, 1864-65, 34 Beav. 119 ; on appeal, 4 De G., J. & S. 608 ; *In re Smith, Bilke v. Roper*, 1890, 45 Ch. D. 638.]

Sir George Downing, of Gamlingay, in the county of Cambridge, Baronet, being seised of, or otherwise entitled in fee-simple to divers freehold, copyhold, and leasehold estates, in the counties of Cambridge, Bedford, and Suffolk, by his will, bearing date the 20th of December 1717, gave and devised all his manors, lands, tenements, and hereditaments, both freehold and copyhold, as well as leasehold for years, situate, lying, and being, in the several counties of Cambridge, Bedford, and Suffolk, and elsewhere, with their rights, members, and appurtenances, unto James Earl of Salisbury, Charles Earl of Carlisle, the Honourable Nicholas Lechmere, Chancellor of the Duchy of Lancaster, John Pedley and Robert Pullyn, Esquires, to hold all such of the said manors, hereditaments, and premises, whereof he was seised of any estate of [2] inheritance, or freehold, unto them and their heirs, upon the uses, trusts, intents, and purposes in his said will after declared, limited, and appointed, concerning the same ; and to hold all such of the said manors, hereditaments, and premises, whereof he had any estate for any term or terms of years, unto the said trustees, their executors and administrators, upon the uses, trusts, and purposes, therein likewise after declared, limited, and appointed, concerning the same : and he did by his said will limit and appoint all such of his said manors and hereditaments, whereof he was seised of any estate of inheritance or freehold, to the use of his cousin Jacob Garret Downing, son and heir apparent of his uncle Charles Downing, for the term of his natural life, without impeachment of waste ; and immediately from and after the determination of that estate, to the use of the said trustees, and their heirs, to preserve contingent remainders ; and from and after the decease of him the said Jacob Garret Downing, to the use of the first son of the body of the said Jacob Garret Downing, in tail male ; and for default of such issue, to the use of the second, third, fourth, fifth, and every other son and sons of the body of the said Jacob Garret Downing, severally and successively in tail male ; and for default of such issue, to the use of the second, third, fourth, fifth, and every other son and sons of the body of the said Charles Downing, successively in tail male ; and for default of such issue, to the use of Thomas Barnardiston, of Bury St. Edmund's, in the county of Suffolk, Esquire, son and heir apparent of his aunt ——— Barnardiston, wife of Thomas Barnardiston, during the term of his natural life, without impeachment of waste ; remainder to trustees, to

preserve contingent remainders ; remainder to the use of his first and other sons [3] successively in the same manner ; and for default of such issue, to the use of his cousin Charles Peters, then or late of the University of Oxford, for the term of his natural life, without impeachment of waste ; and immediately after the determination of that estate, to the use of the said trustees, to preserve contingent remainders ; and immediately from and after the decease of the said Charles Peters, to the use of the first and other sons of the body of the said Charles Peters, in the same manner ; and for default of such issue, to the use of his cousin John Peters, then or late of the same university, brother of the said Charles Peters, during the term of his natural life, without impeachment of waste ; and from and immediately after the determination of that estate, to the said trustees, to preserve contingent remainders ; and immediately after his decease, to the use of the first and other sons of the body of the said John Peters, in the same manner ; and for default of such issue, to the use of the said trustees, and their heirs, in trust, "that they do and shall, so soon as may be, by, with, and out of the rents, issues, and profits of the premises, buy and purchase the inheritance and fee-simple of some piece of ground, lying and being within the town of Cambridge, proper and convenient for the erecting and building a college, and thereon shall erect and build all such houses, edifices, and buildings, as shall be fit and requisite for that purpose ; which college shall be called by the name of Downing College ; and my will is, that a charter-Royal be sued for and obtained for the founding of such college, and incorporating a body collegiate by that name, in and within the University of Cambridge, which college or collegiate body, shall consist of such head or governors, and of such fellows, scholars, members, and other persons for the time being, [4] and shall be maintained, governed, and ordered by such laws, rules, and orders, and in such manner, and therein shall be professed and taught such useful learning as my said trustees, or their heirs, by and with the consent and approbation of the most reverend the Archbishops of Canterbury and York, and the masters of Saint John's College and Clare Hall, in the said University of Cambridge, in being at the time of the founding of the said college, shall direct, prescribe, and appoint ; and immediately from and after the founding and incorporating such college or body collegiate as aforesaid, the said " trustees, "and their heirs, shall stand and be seised of all and singular the said manors, lands, tenements, and hereditaments, in trust for the said collegiate body and their successors for ever." And as for and concerning such of the said manors, hereditaments, and premises, whereof he was possessed of any estate for term or terms of years, he declared and appointed that the said trustees, and their executors and administrators, should from time to time assign and convey the same unto such person and persons as should be entitled to the actual possession of his said lands of inheritance, by virtue of the limitations thereof in his said will before mentioned : provided always, that if any of the said lands and premises should come to or be vested in any male person or persons, whose surname should not be Downing, then such person or persons should thenceforth take the name of Downing only ; and upon refusal or neglect to take the said surname of Downing in manner aforesaid, then the uses and limitations to the person or persons so refusing or neglecting, to be void, and the premises to go and remain to such person and persons, and to such uses, as the same would or should do by virtue of any of the limitations before mentioned, in case the [5] person or persons so refusing or neglecting to take the surname of Downing had been naturally dead ; and as for his personal estate, he gave all his goods and chattels unto his said cousin Jacob Garret Downing, whom he constituted sole executor of his will. By a codicil to his will, the said testator gave two annuities, and charged all his lands with the payment thereof.

The testator, Sir George Downing, died on the 20th of June 1749, without issue, leaving Sir Jacob Garret Downing his heir at law, who entered upon the freehold, copyhold, and leasehold estates of the testator, and enjoyed them till his death in 1764. He never had any issue ; and Thomas Barnardiston, Charles Peters, and John Peters, died in his life-time, without having had any issue ; nor was there any other son of Charles Downing, or of the testator's aunt, ——— Barnardiston. All the trustees died in the life of the testator Sir George Downing.

Sir Jacob Garret Downing, by his will, dated the 12th of August 1763, gave to his wife, Lady Downing, and to her heirs, executors, administrators, and assigns, all his real and personal estate, charged with the payment of several legacies and annuities, and appointed her sole executrix. Upon his death in 1764, she entered



upon all the freehold, leasehold, and copyhold estates, devised by Sir George Downing.

On the 9th of May 1764, the information was filed against Lady Downing, and the heirs at law of Sir Jacob Garret Downing, and the other proper parties; praying that the will of Sir George Downing might be established, and the trusts thereof carried into execution; that an account might be taken of the money received by Lady Downing from the rents and profits of the said freehold, [6] copyhold, and leasehold estates, become due after the death of Sir Jacob Garret Downing, and that a receiver might be appointed.

This cause was heard before the Lord Chancellor Camden, assisted by Sir Thomas Sewell, Master of the Rolls, and Lord Chief Justice Wilmot, on the 19th and 27th of May, and the 18th of July 1767; and on the 17th of June 1768, Lord Chief Justice Wilmot delivered his opinion as follows:

This case, on which your Lordship has done me the honour of asking my opinion, comes before the Court upon an information, brought by His Majesty's Attorney General, to have an execution of the trusts of the will of Sir George Downing; and in order to deliver my sentiments to your Lordship with as much perspicuity as I can, I will, first, very shortly state the case, and then mention the questions, under which I mean to consider it.

Sir George Downing, seised of an equitable estate in fee, and having several relations, by his will, 20th December 1717, devises all his manors, messuages, lands, tenements, and hereditaments, to five trustees and their heirs, to the use of his nephews and other relations, and their issue male, in strict settlement; and for default of such issue, he directs that his trustees should buy a piece of ground in Cambridge, and build a college upon it, to be called Downing College; and that a charter-Royal should be sued for and obtained for the founding such college, and incorporating a body collegiate by that name, in and within the University of Cambridge, to consist of such persons, and to be governed by such rules, and to profess and teach such useful learning therein, as his trustees, or their heirs, [7] with the consent of the Archbishops of Canterbury and York, and the masters of St. John's and Clare Hall, in being at the time of founding such college, should direct and appoint; and immediately after such foundation, he directed that his trustees should stand seised in trust for such collegiate body and their successors for ever. He then directs, that such of the persons in the succession, whose surnames were not Downing, should take that surname upon them; and makes Jacob Garret Downing, who was the first person named in the succession, his executor.

Sir George died the 10th of June 1749, thirty-two years after making the will, and the five trustees all died in his life-time, and consequently the devise to them, whether of the legal or equitable estate, became a lapsed devise.

The devisees named in the will, are also all dead without issue male, and the present information is now brought, at the relation of the Chancellor, Masters, and Scholars of the University of Cambridge, against the devisee and heirs at law of Sir Jacob Downing, who was heir at law of Sir George Downing, and against the two archbishops and the masters of St. John's and Clare Hall, for the establishing the will of Sir George Downing, to have the trusts thereof performed and carried into execution, and for directions relating thereto.

The defendant, Lady Downing, the devisee of Sir Jacob Downing, who was the heir of Sir George Downing, insists, by her answer, that she is entitled to the inheritance of the estates devised by the will of Sir George Downing, and that the trusts for founding and endowing a college are void.

[8] The heirs at law put in the common answer, claiming the estates, if the wills are not well proved.

The archbishops, and masters of St. John's and Clare Hall, by their answers, declare they are ready to act, as this Court shall judge proper, for the founding and establishing a college, according to the directions of the will of Sir George Downing.

I think every thing urged at the Bar in this cause will fall under three general questions.

1. First, whether the trusts are illegal and void.

2. Second, if not illegal and void, whether they are of such a nature, as that a Court of Equity, under the particular circumstances of this case, ought to aid



and assist them, or leave them where they lie, or at least not interpose till a college is incorporated, and a licence to take in mortmain is obtained.

3. Third, supposing the trusts illegal and void, or of such a nature as not fit to be carried into execution by a Court of Equity, whether this Court will apply the estate to some other charity, ejusdem generis, and as near the testator's intention as the rules of law and equity will permit.

1. As to the first question,

It is agreed, that this devise in the will is not affected by the 9 Geo. II. which passed in 1736, nineteen years after making the will, and indeed *Ashburnham's case* (a)<sup>1</sup>, which was said in that case to be warranted by an antecedent determination of a similar nature on the Statute of Frauds, has settled the law on this point; and therefore, if the trust was not illegal and void when the will was made, that statute will not make it so; but it must be considered [9] exactly in the same manner as it must have been if that statute had never been made.

I will consider the use made of that statute, against this Court's supporting or reviving the trusts, under the second question, as I wish to keep the questions separate, and not to confound reasons, which apply to the discretion of the Court against executing the trust, with reasons urged to evince the illegality of it.

In order to examine the legality of this trust, it is necessary to enquire, how the law stood, before the 9th Geo. II. was made, as to alienations in mortmain? And they were certainly first prohibited to be made to the clergy by conditions inserted in the deeds of private persons. Magna Charta was the first public legislative injunction against them.

It was the interest of the King and the lords, in respect of the tenures, and for the benefit of the community, to check them.

The 7th of Edward I. extended the prohibition to all secular and lay corporations as well as religious, and was intended to prevent all devices, by which lands might be got into their hands.

13th Edward I. c. 32, guards against collusive recoveries.

18th Edward I. Quia Emptores Terrarum, repeats the general prohibition to prevent any construction or inference being drawn from that statute in their favour.

15th Richard II. c. 5, puts uses exactly in the same predicament as legal estates.

But it is observable, that these alienations in mortmain were never made void, so as to let in the grantors or their heirs at law, but the laws only gave a right to the mesne lords and the King to seize [10] them as forfeited; and, therefore, if they remitted their right, the alienation was good; and that option produced those dispensations with these laws, called licences to alien in mortmain, which continued till the Revolution, and were revived again by 7 & 8 William III. c. 37, and are so fully sanctioned by that Act, that it would be a vain and futile disquisition, either to run through the history of those licences, and trace their progress from their commencement, or to examine the legality of them upon the principles of the constitution. It is sufficient to say, that, except in the interval between the Bill of Rights and the 7 & 8 Wm. III. c. 37, a power of alienating in mortmain with licence has always been an exercised power of property, and that Statute of 7 Wm. III. shews it to be the sense of the Legislature, that it was fit it should continue so. And alienations in mortmain differed very materially from alienations to superstitious uses, prohibited by the 23d Hen. VIII. c. 10; for they are declared to be utterly void, and of no virtue, strength, or effect in law; and if estates given to such uses had not been afterwards given to the King, the grantors and their heirs, in consequence of the nullity, would have been let into the estates: whereas the grantors and their heirs were bound by alienations in mortmain, and the lords and the King only could avoid them.

And before the Statute of Wills, where there was a custom of devising, a licence was necessary to legitimate such a devise, unless the custom authorized it; and Year-Book, 45 Edw. III. 26, proves that position, where the King seized, because the devise was in mortmain, and the deviser was not such a person, as was within the custom of devising in mortmain, which extends only to those who [11] are natives and inheriting lands within the city, or resiants and taxable to scot and lot (a)<sup>2</sup>; and as the deviser did not fall under those descriptions, the custom did not extend to him.

(a)<sup>1</sup> *Ashburnham v. Bradshaw*, 2 Atk. 36. Barnard. Ch. Rep. 6.

(a)<sup>2</sup> "A ceux queux sont nées & inherites en mesme la citie per voye de heritage. ou que sont resiaunts & taxables al scot & lotte."

The 32d Hen. VIII. c. 1, gives a general liberty of devising at the devisor's free will and pleasure, but the explanatory Act of 34 Hen. VIII. c. 5, excepts bodies politic and corporate: so that devises to corporations were void; they could not be dispensed with, and the heir at law took the estate.

The 1st and 2d Ph. and M. c. 8, s. 50, took off this restraint in favour of spiritual corporations for 20 years; and colleges were so much the favourites of the law at that time, that a devise to Trinity College, though a lay corporation, was held to be within the protection of that law, because divinity was studied in it. Dyer, 255. 1 Roll. Rep. 166, 418. Hob. 122 & 123. 11 Co. 71. But when 20 years expired, spiritual corporations, as well as others, were incapable of taking by devise. And from that time to the 43d Eliz. corporations could not take by devise at all (except under custom of devising in mortmain) either with licence or without it.

But then comes the statute of 43 Eliz. c. 4, with such medicinal qualities in it, as to heal every imperfection in a charitable disposition, provided the party had a legal capacity to give at all.

The title of the Act, and the principal object in the view of the Legislature, was to redress misemployments of real or personal estates given to charitable uses.

But the Judges in Queen Elizabeth's time, having in *Porter's case*, 1 Coke (which was followed by another of *Martidal and Martin*, Cro. Eliz. 288) made a very favourable construction of 23 Hen. VIII. in support of uses really meritorious: the Judges in King James's time, [12] animated with an equal spirit of piety, were determined to keep pace with their predecessors, and perhaps to go beyond them, by a most enlarged liberal exposition and application of this Statute of 43 Eliz. I call *Porter's case* a favourable exposition of 23 Hen. VIII. c. 10, because the reason of the law, given in the preamble, respected meritorious uses equally with superstitious ones: for the reason given is, that grants to such uses were as prejudicial to the King and the lords, as in cases where lands were aliened in mortmain.

Now that loss and inconvenience were the same, whether the use was a real pious use, or a superstitious one.

The words laid hold of by the Judges, in 43 of Eliz. were the words, limited and appointed. If there was a gift in fact, a limitation and appointment made in fact, by a person who had a legal capacity to give in any way, they considered that intention improperly executed, to be a foundation for supplying any imperfection in the mode of donation; and that the Legislature intended, if estates were given in fact, defects in form were not to be attended to, and they were to let the charity take place.

How was this to be done? Before the Statute of Wills, lands were not devisable at all, and by the Statute of Wills, they could not be devised to corporations, and licences in mortmain would have been necessary, if they could have been so devised. The Judges therefore could not say the devises were good at law; and therefore they left the legal estate to follow the course of the law, but considered the devise as an equitable declaration of the trust of the estate, and as a valid limitation and appointment of the utile dominium, which was what they thought the Legislature had their eye upon, and meant by the 43 Eliz. to subject to the regulations made by that statute.

[13] A stronger case could not well arise than *Collison's case*, in Hob. 136, and Moor. 888. A devise made in 25 Hen. VIII. before this Statute of Wills, of a house and land, not devisable by any custom, nor estated in use to any, to his wife for life, and the rents then to be employed for the repair of a highway. Decree for a highway. On appeal it was referred to Mountague and Hobart, and they were of opinion, that the intended devise is a limitation or appointment to a charitable use, to be relieved by the 43 Eliz. and the Chancellor confirmed the decree upon exceptions taken by Rolt the heir at law, to whom that estate was descended. A most violent retrospective relation, to make a devise void at law, a good one in effect in equity.

*Flood's case*, Hob. 136, is the devise of a remainder to a corporation. The Judges held the devise to be void at law, but clearly within the relief of the Statute of 43 Eliz. and it was decreed, that the college should enjoy it against the ward and his heirs. And it was said (a), that the proviso, exempting colleges, was not intended to restrain gifts made to them, but only to exempt them from being reformed by commission.

Duke's Charitable Uses, 77, case 16. The same doctrine laid down in favour of a devise to St. John's College in Cambridge.

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(a) It is so mentioned in the decree.



*The King and Newman*, 1 Lev. 284. It was held by Lord Keeper Bridgman, that a devise to Trinity College was good by 43 Eliz. notwithstanding the Statute of Mortmain.

These cases have so fully settled, that devises to corporations in esse, are good appointments of the trust in equity, notwithstanding the Statutes of Mortmain, and the exception of corporations in the Statute of Wills; and this Court has so uniformly established these devises upon the strength of these decisions for near a century and a [14] half, that it is really unnecessary to speculate minutely upon colleges or the university being within the words of the 43 Eliz.; but I own the proviso in the Act is a strong legislative exposition of the extent and meaning of the word in the antecedent clause. For if they had not considered them as falling directly under the enacting clause, the proviso was vain and useless; and the proviso is by Sir T. Moore, Duke 171, taken by equity to extend to the university, which is a body politic, though colleges only are mentioned.

And, indeed, I think universities and colleges are within the proper and genuine sense and meaning of the words, "schools of learning."

The places where the public exercises are performed, are called the schools. An university is a great school, incorporated to instruct, by their professors and regular exercises, all who come to study there, and by degrees to give their students rank and credit in the republic of letters, and which are qualifications for lucrative offices and employments in life. It is a public school of divinity, phisic, law, and all arts and sciences. And colleges are schools of learning, furnishing scholars for the universal school, which is a combination of all those schools: and in any other view, than as schools of learning, they are as useless to society as monasteries: and therefore I think they are not only within the equity of the Act, but the words of it.

And I consider this devise as made for the further augmenting of the university; and for that reason the university, in its corporate capacity, is very properly made a relator in this information, being materially and essentially interested in the benefaction.

For though the university is not a corporation of colleges, but of matriculated members, and all colleges are distinct and separate corporations, yet these colleges attract and furnish the members to be [15] matriculated, and every new college enlarges the universal school, and by increasing the number of scholars, adds weight, dignity, and strength to the university.

And therefore, if an object in esse was necessary, the university is that object in esse to take and accept this benefaction instantler, subject to that controuling power, which, by the fundamental law of the land, is given to the King, in respect of the medium through which they are to receive the benefit of it.

And the further augmenting of the universities is a good and godly use.

1 Edw. VI. c. 14, expressly calls it so. Erecting grammar schools, further augmenting universities, and the better provision of the poor and needy, are there mentioned together, as good and godly uses, and recommended to the King's care and protection in the distribution of the estates given him by that Act.

But another objection is then made to this devise. That it is a devise to a non-entity, and that it depends both upon the consent of the university and the Crown, whether there ever will be such a being or not.

First, I shall consider how the law stands as to devising legal estates to persons not in esse, either in possession or remainder.

A devise to A. B. the first son of C. whether in possession or remainder, is void, if there be no such person as A. B. when the will was made; because the devise proceeds upon a supposition, which is false, and the foundation of the devise fails as to the object. But a devise in possession to a person not in esse, by a description which manifests the testator's knowledge of his not being in esse, will be [16] good, if the existence of that person does not depend upon too remote a contingency.

A devise to the eldest son, which A. B. shall have, will be good as an executory devise, because the testator does not mean a person in being, and the contingency must happen in the compass of a life: so a remainder to the first son of A. B. will be good, provided that first son exists before all the precedent estates are determined: and therefore, a remainder limited of the legal estate to a college, not existing, would have been void, just as a remainder limited to the first son of A. B. would have been void, if he had not existed when the preceding estates determined.

But executory trusts fall under a very different consideration; for when the freehold is put into trustees, and the vacuum, which the law so much abhors, is thereby avoided, a trust to arise out of a remainder for a person not existing, but who must exist within the compass of a life or lives in being, will be as good, and to be supported by a Court of Equity as much, as a trust for a person in esse: and therefore, suppose a remainder, limited to trustees and their heirs, in trust for the first son which A. B. shall have, and his heirs; the trust, being in the mind and intention of the testator for a person not then existing, but to exist, and where that existence must happen within the compass of a life or lives, would be clearly good. So in this case, the testator does not only declare his intention to give to a person not in esse, but is actually giving directions for the creation of that person; and there is no difference between the cases, but that one is an executory trust for a natural person to be created, and the other is for a political person to be created.

[17] But then it is said, it depends entirely upon the pleasure of the Crown, whether such a college shall ever exist or not; and it equally depends upon the will of God, whether A. B. shall ever have a son or not: and one event may wait a whole life, whereas the will of the King may be known as well in six months as six years, allowing time for the most mature deliberation; so that the contingency is greatly within the time allowed by the law for the expecting executory trusts to arise.

As to the consent of the university, if it be necessary, they are relators, and have thereby signified their consent to the devise in toto: and perhaps the words in the will, in and within the University of Cambridge, only mean the town of Cambridge; and in common parlance, they are often used as synonymous. In Popham, 56, 57, academia, and city or town, are determined to be the same. But I think it more probable, the testator meant, that his college should be put upon the same footing, and have the same relation to the incorporation of the university, as the rest of the colleges there.

If there is nothing in the trust to draw the condemnation of this Court upon it as illegal and void; then comes

The second question,

Whether the trust is of such a nature as that, under all the circumstances of this case, a Court of Equity ought to give any aid or assistance towards the execution of it, or at least if it is not a premature application?

The discretion of this Court, in the execution of trusts, is a very wide and extensive subject to range over, and no exact, precise boundary lines can or ought to be drawn upon it.

[18] It is difficult to limit the extent of it with precision; but it must, like legal discretion, be governed, directed, and regulated by constitutional, legal, and equitable principles, applied to the case under consideration: and therefore, unless there is some latent vice in this trust, repugnant to these principles, the Court will not refuse to execute it.

Cases of that kind might be put, and have happened; and whether this is one of those cases, or not, is now the question.

In one respect, this trust comes before the Court in a much more favourable light than any which have been mentioned, or indeed, which generally have existed.

Dispositions of this kind generally work an immediate disinherison of the heirs at law, and often proceed either from minds inflamed with anger and resentment against their own family, or overcast with gloomy and melancholy reflexions upon their approaching dissolution.

No such ingredients are to be found in this case; no anger nor resentment to his family: he has not only provided for all the male line of his family, but for some of his cousins descended from females; and he has substituted this memorial of himself and his family, after so many lines of succession, and at so remote a distance, that the inheritance, subject to the antecedent limitations in the will, was of little or no value when the will was made.

And it was not any sudden start, or the effect of any cloudily distempered moment, for he lived two-and-thirty years after he made the will, without making the least variation in this part of it: and therefore the case stands clear of all the compassion, which regard [19] for families, very properly and laudably, produces in all Courts of Justice.

The 9 Geo. II. c. 36, has been urged as furnishing a motive for this Court not to interpose, in two views:

First: Because, whatever the trust was, in its creation, it is illegal now; and therefore this Court ought not to execute it, and should regulate their discretion by what the law now is, and not by what it was when the will was made.

Secondly: That the devise of the estate being lapsed by the death of the trustees, the testator himself, after the Statute of Mortmain, could not have set the legal estate up again; and that this Court ought only to supply what the testator could have supplied, and ought not to call forth this legal estate to support and save this trust, which by his will the testator could not have done. And it was argued by Mr. Harvey, that these were personal powers to be executed only by the trustees named in the will.

To answer these objections, I do not think it necessary to give any opinion upon the operation that statute would have had on this will, in case it had been made subsequent to it.

If it is to be considered as a devise in trust for the university, ("for augmenting the university," as the 1 E. VI. expresses it) or, by a liberal construction of the proviso, for a college to exist in the university, the trust would be lawful now; but suppose it not within the proviso, and that such a trust could not now be created by will; yet if the Act, as it is admitted, do not extend to the devise at law, how can this Court say, it does extend to it in equity? for equity must follow the law, and the devise must be either good or void in toto, in both Courts.

[20] And if the Court says, they will not execute such a trust, it is exactly the same thing, as if they said, the trust was void. For no other Court can execute it.

I cannot see the least difference between saying the trust is void by the statute, and that the statute furnishes a reason precluding the Court from executing it.

It is admitting the authority of *Ashburnham's case* (a), and at the same time denying the consequences of it.

Giving the statute a retrospective relation and influence upon the trust, would be breaking in upon that uniformity of judgment, which Courts of Law and Equity so anxiously study to preserve in the construction and execution of Acts of Parliament.

The law says, it is a good devise, unimpeached by the statute: equity admits it, but says, I will not execute it—I will stand neuter, quiescent, and inactive. Pursue the consequences of such a neutrality: the trustees, if now living, must have kept the estate themselves. For if it is a valid disposition of the whole legal and equitable estate, there can be no resulting trust for the heir at law; or if there was, and this Court stands neuter, what other power in this kingdom can give that trust any effect?

I have no such idea of the jurisdiction of this Court: it is as much bound to act and decide upon a trust estate, as a Court of Law is upon a legal one.

But it has been said, the Court is not called upon to act against a trustee, but against an heir at law.

In the first place, Lady Downing is not the heir at law, but the devisee of the heir at law; and though she stands in his place, yet in the present state and situation of things, the heirs at law of the [21] family are as much disinherited by letting her keep the estate, discharged of the trust, as by compelling a performance of it: but suppose she was the heir at law, I take it to be a first and fundamental principle in equity, that the trust follows the legal estate, wheresoever it goes, except it comes into the hands of a purchaser for a valuable consideration, without notice.

And an heir, whom the law calls, "*eadem persona cum antecessore*," can never be under a less or more imperfect obligation to perform the commands of his ancestors, than a mere stranger: and especially, in a case where Sir Jacob Downing (in whose place Lady Downing now stands) took so great an interest in this very estate, so vast a fortune from the bounty of that ancestor, whose commands are now disputed. I never heard any distinction made, nor has any case been cited to prove, that a trust fit and proper to be executed against a trustee, should be suffered to fall to the ground, and remain unexecuted, against an heir at law, where there was no trustee.

2 Vent. 349. Devise by an impropiator to a curate, and all who should serve the cure after him, shews, that where the devisee was incapable of taking for want of being incorporated, the Court decreed, that the heir of the devisor should stand seised in trust for him.

(a) *Ashburnham v. Bradshaw*, ub. sup.



But to avoid citing cases on so plain a point, I will only refer to all the cases which have been determined from the 43 Eliz. to this time, upon devises to corporations. For the words "limited and appointed," do not carry the legal estate; they only operate as declarations of trusts, or gifts of the utile dominium, and bind the legal estate in the hands of the heirs at law.

And in the present case, the legal estate was not devised by the will. For by the answer it appears to have been conveyed to Sir [22] George Downing in 1721, four years after the will was made; and it was admitted on both sides, that Sir George Downing had only an equitable estate, when the will was made; and therefore the question cannot be varied by any lapse of the legal estate, because there was no legal estate ever devised, to lapse. But, if it had been devised, the lapse of the legal estate never has the least influence upon the trusts, to which it is subject.

Trust estates do not depend upon the legal estate for an existence. A Court of Equity considers devises of trusts as distinct substantive devises, standing on their own basis, independent of the legal estate, or of one another; and the legal estate is nothing but the shadow which always follows the trust estate, in the eye of a Court of Equity.

Another argument has been urged from 9 Geo. II. that the testator could not have set the legal estate up again after that statute was made, and that this Court ought to do nothing more than what the testator himself might have done.

The case of *Willet v. Sanford*, 20th December 1748 (a), was cited to shew, that the testator might, by a codicil, have supplied the legal estate, but that case does not prove that position.

[His Lordship here stated the case.]

This case does not prove that the legal estate of the premises devised by the will, was well devised by the codicil to the two new trustees, in conjunction with the three old trustees named in the will.

But it was held by the Court, that the codicil enured, not as a revocation, but as a confirmation of the will, in respect of the charity: that the trusts in this will were not affected by the codicils, [23] except in postponing one nephew to another. And the operation of the codicil upon the legal estate, as to the two new trustees, was not argued, nor any part of the determination.

And the true answer to that objection is, that it proceeds upon presuming, that the trust was affected by the lapse of the legal estate—that the trust fell with it, and that the legal estate must be set up again to re-animate the trust; whereas the trust stands exactly as it did, unaffected both by the lapse and the statute. And the Court is not setting up the legal estate to impart an activity to the trust, but following the legal estate into the hands of the heir, instead of the trustees; not supplying what the testator could not have done, but acting exactly in the same manner as it would have done in case no trustees had been named at all, or if they all had refused to act in it.

And surely the casualty of a lapse of the legal estate, if there had been one, would have been too fine a thread to have hung this cause upon. It would have been a total inversion of the principles and practice of this Court, which makes the legal estate always follow the trust, and never suffers the legal estate to lead it.

As to these powers being personal to the trustees, and by their deaths become unexecutable; they are not powers, but trusts; and there is a very essential difference between them.

Powers are never imperative: they leave the act to be done at the will of the party, to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.

This Court supplies the defective execution of powers, but never the non-execution of them: for they are meant to be optional. But [24] the person, who creates a trust, means it should at all events be executed.

The individuals, named as trustees, are only the nominal instruments to execute that intention. And if they fail, either by death, or being under disability to act, or refusing to act, the constitution has provided a trustee. The King, as *parens patriæ*, has the superintending power over all charities, abstracted from the Statute

(a) 1 Vez. 178 & 186.

of 43 Eliz. and antecedent to it, 2 P. Wms. 119; and that paternal care and protection is delegated to this Court.

Where no trustees are appointed at all, this Court assumes the office in the first instance; and in the event which hath happened, it is the same as if no trustees had been appointed at all.

There is some personality in every choice of trustees, but this personality is *res unus ætatis*. In perpetual charities, where the persons, upon whom the trust may devolve, do not exist, the personal confidence can be only in this Court; and if the trust cannot be executed through the medium which was in the primary view of the testator, it must be executed through the medium which the constitution has substituted in its place. And as a question of intention, nothing can be clearer.

A college is to be founded under the eye of five trustees. That cannot be. The death of the trustees frustrates that medium.

What then? Must the end be lost, because the means are, by the act of God, become impossible? Suppose the question was asked the testator, If trustees die or refuse to act, do you mean no college at all, and the heirs to take the estate?

No—I trust them to execute my intention! I do not put it into their power, whether my intention shall ever take place at all.

[25] And *The Attorney General and Hickman (a)*<sup>1</sup> is an authority in point, that this Court is to execute trusts as personal as can be created.

The trust has then been attacked as not meritorious, as ostentatious, repugnant to commercial principles, useless, and prejudicial to the public, by throwing so large an estate into mortmain.

I shall consider these objections separately.

A gift for the advancement of useful learning is the most meritorious charity that can be given. Most charities terminate with individuals, who are the objects of them. But donations of this kind are benefactions to the whole community. They furnish the means of bringing great parts and natural abilities out into public service, and thereby become a charity not only to the persons who are so helped forwards in their education, but to the whole society, which reaps the benefit of those parts and abilities in the several stations of life, where Providence places and employs them; and as Coke, in arguing *Porter's case*, says, “No time was ever so barbarous as to take away erudition and science.”

All people have at all times thought it most meritorious to promote and encourage them. Even Omar, who directed the Alexandrian Library to be burnt, did not wage war against useful learning; but thought, if the learning contained in those books did not agree with the Alcoran, it was noxious; and if it did, it was useless.

It has been observed, that it is an ostentatious attempt to perpetuate the testator's name.

Wishes of this kind often influence the wisest and best of men. There is nothing immoral in yielding to such a motive, if it was the sole and only motive of such a disposition. It is a passion implanted in the mind, as a laudable incentive to industry, and the reward [26] promised Abraham for his faith: “I will make thy name great among the nations.”

The Barnardistons and Peters's (a)<sup>2</sup> are to change their name, but that circumstance will not affect the validity of the devise; and why should that circumstance be more disgusting in one case than the other? To raise and establish a family in the testator's name and blood, was his first object: natural affection was the principle of that provision. To perpetuate his name by the medium of a college for the good of mankind, was his next object: social affection was the principle of that provision.

Admit that vanity had some share in both the dispositions: it loses all its malignant qualities, when it is productive of good. And in Popham, 139, ascribing charitable gifts to vain glory and ostentation, is said to tend to a public wrong, because it deters and discourages them; and perhaps the world owes some of the greatest and noblest benefactions to this motive, acting in a thousand shapes and forms. It is a spring not to be checked and stopped up; because, under the direction of good laws, it becomes an inexhaustible source of benefits to mankind: and Courts of Justice are not to examine, like casuists, the motives of such dispositions, but to execute or

(a)<sup>1</sup> Kelynge's Select Cases in Chan. 34.

(a)<sup>2</sup> The devisees in remainder prior to the estate to the trustees for the charity.



condemn them, according to their own intrinsic merit or demerit, let them proceed from what motive they will.

Another objection to this charity has been, that it is useless, unnecessary—that there are colleges enough already, and those not full.

If the college to be founded was directed to follow exactly the plan of the colleges already established, there might be more weight in this objection than the last. But the framing of the laws, rules, [27] and orders, for the government of it, and the useful learning to be taught there, is left at large to the trustees nominally, but in reality to the two archbishops and the masters of St. John's and Clare Hall; under a well-grounded hope and expectation, that such an establishment would be made, and such a system of government and study introduced, as might greatly improve an academical education.

The testator could not expect that the trustees, particularly named, should survive so many estates of inheritance as are limited before this devise was to take place, and therefore the confidence was in the archbishops and masters, who should be in being at that time. He did and might safely rely upon their ability and integrity to adapt and fashion this college to the time of its foundation; to reject all the weeds and to plant all the flowers which are to be found in every other system of education, ancient or modern, either at home or abroad.

Another objection has been made to this trust, that it is repugnant to commercial principles, and prejudicial to the public, by throwing so much land into mortmain.

First. Devises to charitable uses, unincorporated, equally lock up real property: but I agree, that, in a commercial country, the circulation of real property ought not to be too much checked; and to prevent it, the constitution has deposited with the King, as a Royal trustee for his people, the sole and exclusive right of making corporations, and licensing alienations in mortmain to them.

The King, and not this Court, is intrusted to decide upon the propriety of such corporations and alienations: he will weigh the objections of throwing so much land out of commerce, with the advantages which may result to the public from the improvements such a college may make in an university education, and determine in this, as in every other measure of his government, by that supreme law (from whence he never departs) the good of his people.

And this brings me to the objection of the application here being premature, and that the officers of the Crown will be under a bias, and their judgment anticipated by the judgment of this Court upon the nature of the trust, and that an incorporation cannot be refused after a decree is made by this Court in favour of the trust.

I think the application very properly timed, and that it would have been premature to have applied for a charter before the validity of the trust was settled in this Court. Suppose the reasons, which have been urged at the Bar, had been laid before the Crown against granting a charter; the answer would have been, "We are not to determine the legality of trusts. To grant or refuse the incorporation on that ground is to determine a question *alieni fori*. That is a question for a contentious jurisdiction to determine between the parties who are interested in it."

A Court of Equity is only competent to such a question, where the parties may have the benefit of an appeal to the Supreme Court of Civil Judicature.

Suppose the Crown had incorporated the college, and this Court afterwards said, it was a void illegal trust, and not fit to be executed: the King's charter had been a nullity, and all the trouble and expence of getting it, idly thrown away. Suppose it had been refused, upon a supposition of the trust being illegal and void; the Crown would have acted upon a false ground (if the trust was not an illegal one), and the parties have been left without any redress.

[29] And therefore it is beginning right, to take the opinion of this Court, first upon the validity of the devise, and the nature of the trust, which must either prevent any application from being made to the Crown at all, in case the opinion of the Court is against the trust; or, by a decision in favour of the trust, disengage the Crown from any perplexity upon that question, and leave it to judge of the propriety of such an incorporation from the same reasons of policy, prudence, and convenience, as would guide and direct it, if the validity of the trust had never been questioned; and as they do in all other cases, where reasons, which will not reach the legality of the trust, may decide against it politically, and be sufficient to determine against making the incorporation, or granting a licence of alienation.

As to the officers of the Crown being biassed, and their judgment anticipated by such a decree, I think their judgment will be very properly anticipated as to the legality of the trust; because it has been settled, where it ought to be settled, and can only be settled,—in this Court.

It will be so far from embarrassing them, that I think it will deliver them from an embarrassment, by removing a doubt, which might otherwise have mixed itself in the consideration of the propriety of such an incorporation.

The opinion of the Court, upon the nature of the trust, can go no further than a declaration, that, according to the rules adopted by this Court, in compelling the execution of trusts against heirs at law, they see nothing in the trust, which should induce them (proceeding in the ordinary course of administering justice) to refuse the execution of it.

[30] But the making of corporations is part of the King's prerogative, where reasons of State-policy only are to direct and govern the measure. Courts of Justice, whether legal or equitable, are bound down to rules, and precedents, and reasons, which have prevailed in similar cases.

And your Lordship, presiding in this Court, and deciding a question of meum and tuum between the university and Lady Downing, may think the reasons not sufficient to warrant a refusal of the execution of the trust, and yet give them weight in considering the propriety of making such an incorporation. And many cases may be put, where this Court must execute the trust, and yet the Crown would be very rightly advised to refuse incorporating the body which is to be the object of that trust.

Suppose a trust created for Birmingham or Sheffield, if incorporated in three years. There is no legal objection to the trust: but as trade has flourished, and is more likely to flourish, whilst unincorporated than incorporated, the Crown might be very properly advised to refuse the incorporation.

Another difficulty then arises; who is to apply to the Crown for the charter? Not Lady Downing, because it is her interest to oppose it.

It might be referred to the Master to appoint trustees for that purpose, in the same manner as if no trustees had even been appointed.

And in Duke, Char. Uses, 79 (a), an estate was directed to be sold, without naming by whom, and the commissioners appointed J. S. to sell the land, and—decreed his sale to be good; and upon appeal the decree was confirmed.

[31] Perhaps the heirs at law might not be improperly introduced upon this occasion; and if the heirs at law were to succeed the trustees in every power which they were entitled to under the will, neither the university, nor Lady Downing, nor the archbishops and masters, could have any objection to seeing the heirs at law of the donor substituted in the place of the trustees. Upon whom does the trust so naturally devolve, or who so proper to guard and protect the charity, as the blood of the person who gave it?

It is my opinion, therefore, to declare the will well proved, and in case a Royal charter, with licence to take in mortmain, shall be obtained, that the trusts of the will ought to be performed, but as the trustees are all dead, the master to appoint five new trustees, who are to apply for such charter of incorporation and licence; and reserve all further directions till after the master shall have made his report of the event of such application.

The opinion submitted upon the two first questions, if it be right, makes it a matter of great indifference to Lady Downing, what becomes of

The third question; whether, supposing the trusts illegal and void, or of such a nature as not fit to be carried into execution by a Court of Equity, this Court will apply the estate to some other charity ejusdem generis, and as near the testator's intention, as the rules of law and equity will permit.

But as this question has been argued at the Bar, I shall mention very briefly what occurs upon it.

This Court has long made a distinction between superstitious uses, and mistaken charitable uses.

[32] By mistaken, I mean such as are repugnant to that sound constitutional policy, which controuls the interest, wills, and wishes of individuals, when they clash with the interest and safety of the whole community.



Property, destined to superstitious uses, is given by Act of Parliament to the King, to dispose of as he pleases; and it falls properly under the cognizance of a Court of Revenue.

But where property is given to mistaken charitable uses, this Court distinguishes between the charity and the use; and seeing a charitable bequest in the intention of the testator, they execute the intention, varying the use, as the King, who is the curator of all charities, and the constitutional trustee for the performance of them, pleases to direct and appoint.

If it were *res integra*, much might be said for the heir at law; because in every other case, if the testator's intention in specie cannot take place, the heir at law takes the estate. And as the motive inducing the disinheritance in a charitable devise, is a passion for that particular charity which he has named, if that particular charity cannot take place, *cessante causâ, cessaret effectus*.

The right of the heir at law seems to arise as naturally in this case as in any other; but instead of favouring him as in all other cases, the testator is made to disinherit him for a charity he never thought of; perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish. But this doctrine is now so fully settled, that it cannot be departed from; and the reason upon which it is founded, seems to be this:

The donation was considered as proceeding from a general principle of piety in the testator. Charity was an expiation of sin, and [33] to be rewarded in another state; and therefore, if political reasons negatived the particular charity given, this Court thought the merits of the charity ought not to be lost to the testator, nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a presumption, that the principle, which produced one charity, would have been equally active in producing another, in case the testator had been told the particular charity he meditated could not take place. The Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious, would entitle him to the same reward.

There is a law in the Digest, which seems to have furnished a hint for varying the destination of a donation to the public.

Digest. xxxiii. tit. 2, De Usu & Usufr. Legatorum.

De Legato Civitati ad Certum Usus. 16.

Modestini, lib. ix. Responsorum.

"Legatum civitati relictum est, ut ex redditibus quotannis in eâ civitate, memorie conservandæ defuncti gratiâ, spectaculum celebretur, quod illic celebrari non licet. Quæro quid de legato existimes? Modestinus respondit: Cum testator spectaculum edi voluerit in civitate, sed tale, quod ibi celebrari non licet, iniquum esse, hanc quantitatem, quam in spectaculum defunctus destinaverit, lucro hæredum cedere: Igitur adhibitis hæredibus & primoribus civitatis, inspicendum est in quam rem converti debeat fideicommissum, ut memoria testatoris alio & licito genere celebretur."

Vide etiam Scævola's responsum in § sequenti.

It is plain they looked at the motive of the gift, the immortalizing the memory of the donor, which was the only future reward a Pagan [34] could enjoy. For this law was made 100 years before Christianity was the religion of the Empire. The particular spectacle directed was only the means by which that future reward was to be secured. Any other spectacle would as effectually answer that purpose. They looked at the end and aim of that benefaction, and shaped the means in such a manner, as without any violation of the laws, might secure the attainment of it.

The reason, which animates the law, applies as forcibly to a legacy given to a charitable use under the Christian dispensation.

I do not mean to cite all the cases.

The case of *Da Costa and De Pas* was the last great case which I have any account of: that was heard December 6, 1743, at Lincoln's-Inn Hall. It was a bequest of the interest of £1200 for establishing a *jesuba*, or assembly for reading the Jewish law. It was agreed that it was not a good legacy to the intent for which it was given; but whether it was void generally, or only to this particular intention; or whether it should devolve upon the Crown for its own use, or was to be applied to some other charity, was reserved for further argument. And upon 18 May 1754 (a),



it was determined, that, as it was a charitable bequest in the intention of the testator, though of such a nature as not proper to be established in this Court, yet it must be applied to some other charitable use, to be fixed by the Crown; and that it was not a superstitious use, given to the Crown for their own *(b)* benefit.

[35] And therefore, unless the Court is of opinion, that the trust is totally void to all intents and purposes whatsoever, Lady Downing could not be entitled to the estate. For if the Court is only of opinion, that it is an improper charitable use, not fit to be carried into execution by this Court, the consequences to Lady Downing would be materially the same. She would be as much excluded by a charity to be fixed by the Crown, as by the charity directed by the testator. And therefore, if the second question was with Lady Downing, yet unless the third question was with her too, her claim could not be supported.

The Master of the Rolls having delivered his opinion to the same effect; and the Lord Chancellor having agreed with them both:

Declared their unanimous opinion, that the trusts of the charity in question ought to be carried into execution, in case His Majesty shall be pleased to grant his Royal charter to incorporate the college, and his Royal licence for such incorporated college to take the devised premises in mortmain *(a)*.

### [36] IN CHANCERY.

The Great Seal in Commission.—Lords Commissioners, Lord Chief Justice Willes, Sir Sydney Stafford Smythe, Sir John Eardley Wilmot.

LADY MANSELL, Widow of Sir Edward Mansell, Deceased, Plaintiff; SIR E. VAUGHAN MANSELL, BART. & UX. M. LANGDON, AND OTHERS, Defendants.  
Hil. 1757.

[Distinguished, *Green v. Green*, 1845, 2 Jo. & Lat. 539; 8 Ir. Eq. R. 473.]

Ed. Vaughan, Esquire, by will dated 30th November 1683, devised his estates to Sir Edward Mansell and A. Mansell, deceased, remainder to the use of Edward Mansell, afterwards Sir Edward Mansell, Baronet, father of the plaintiff's late husband, and his heirs for ever.

Sir Edward Mansell, father of the plaintiff's husband, by will 2d September 1717, devised his estates as follows: viz.—“I give and devise all my lands, tenements, and hereditaments, to my wife Dorothy for ever; and that she shall be directed and governed by John Vaughan and Morgan Davies, Esquires, and their heirs, in the management of her concerns, whom I constitute and appoint my trustees of this my will, to act for her and my children's interest, as hereafter mentioned: viz. after my said wife's [37] decease, I give, devise, and bequeath all my said lands, &c. (subject to the legacies hereafter mentioned) to my son Edward Mansell, for and during his natural life; and that he shall be capable, with the consent of the said trustees, to

*(b)* By the decree on the original hearing of the cause, the Court declared that the bequest was not good in law, and ought not to be decreed or established by the Court; but reserved the consideration whether such £1200 ought to accrue to the residue of the personal estate, or be applied otherwise, and how. On the 18th May 1754, the cause came on to be heard upon the special reservation in the said decree, concerning the £1200; when the Court declared that the same ought not to accrue to the residue of the personal estate, but ought to be applied to some other charitable use, and that the appointment thereof belonged to the Crown; and recommended it to the Attorney General to apply to the King for a sign manual to dispose of the same. The King, by sign manual, appointed £1000 part thereof, to the governors and guardians of the Foundling Hospital, for supplying a preacher in their chapel, and to instruct the children under their care in the Christian religion, and for other incidental expences attending the said chapel. And on 6th August following, the Court directed payment of the said sum of £1000 to Taylor White, the treasurer of the hospital. Reg. lib. A. 1754, fol. 309.

*(a)* See the subsequent proceedings in this cause in 3 Vesey, junior, 714, under the name of *Attorney-General v. Bowyer*.

settle a jointure on the woman they agree to in writing he shall marry, and from and after his decease, to his first, second, and every other son, in strict settlement; remainder to my son Rawleigh Mansell for life, and to his first, second, and every other son, in strict settlement. And my further will is, that the said Rawleigh shall have, during my wife's life, what she pleases to allow him, and after her decease, £80 per annum, free of all taxes, for his own life."—He then gives various legacies, and after making his wife sole executrix, he adds, "And for want of heirs male, accordingly as before-limited and expressed, then my will is, that my said real estate, &c. shall be and enure to my four daughters and their heirs for ever, and for want of such issue, to the use and behoof of my right heirs for ever."

The testator died in March 1720, and his widow Dorothy, in September 1721.

Their son, the late Sir Edward Mansell, was married to his first wife Anne, at the date of his father's will in 1717; and she died in 1739.

The trustees, Vaughan and Davies, were at that time both dead; Vaughan dying in 1722, and Davies in 1728. In October 1740, Sir Edward Mansell married the plaintiff.

The bill stated, that the said trustees, Vaughan and Davies, being both dead, so that their consent became impossible by the act of God; and the said Sir Edward Mansell thinking it reasonable [38] to make a provision for the plaintiff, in case she should survive him, did, in consideration of, and previous to the marriage, by lease and release of the 30th and 31st October 1740, convey the estate in question to trustees, &c. to the use of himself for life, remainder to the plaintiff for life for her jointure. He died 9th May 1754.

The defendant Sir Ed. Vaughan Mansell, admitted the will and other proceedings stated in the bill, but said that the plaintiff's late husband did at and long before his father's death, lead a very debauched life, and was at that time married to two wives, one of them Louisa Smith, a woman of a very vicious course of life, from whom he was separated, and had libelled for a divorce; the other was Anne, the widow of R. Phillips: and defendant believed that the manner of life he led, and his imprudence in marriage, and apprehensions of future misconduct, were the reasons of his father's limiting the estate to him in so strict a manner, and of his annexing such strict conditions to his power of making a jointure on any future wife he should marry; that though the trustees were both dead, the eldest son and heir of Morgan Davies, the survivor, was alive, and then of the age of forty years, and was never applied to for his consent; as Sir Edward must have been fully convinced that no person who had the least regard for him, would have consented to such marriage; in regard that the plaintiff, long before her said marriage, was not only a woman of no family or fortune, but of ill fame; and also, that Sir Edward Mansell was fraudulently prevailed upon to make such settlement; inasmuch as the plaintiff, or some person on her behalf, prevailed on him before the said marriage, to execute a bond to her by the name of S. Baylis, spinster, for £6000, notwithstanding no consideration was paid.

[39] The defendant submitted therefore, that such settlement was not duly made, being without the consent of the heir of the said Morgan Davies, the survivor of the two trustees; that he, being eldest son of the said Rawleigh Mansell deceased, is tenant in tail under the will of the said Sir Edward Mansell the father, on the death of the plaintiff's husband without issue, and also heir general of the family; and that as the plaintiff's late husband intermarried with the plaintiff, without the consent of the original trustees, or the heir of the survivor, he had not any power to limit the said premises in jointure to the plaintiff, such previous consent being, as he was advised, a condition precedent to the vesting of the said power, and therefore, that the settlement is absolutely void.

Lord Commissioner Wilmot.—There are three questions:

1st. What the power devised is, whether a power to make a jointure, with consent of Vaughan and Davies personally, or with their consent, whilst they lived, and, after their deaths, with consent of their heirs? whether he intended to give the heirs the same check and controul as he gave to Vaughan and Davies?

2d. If he did, whether this intention can take place according to the rules of law?

3d. In case the consent stops at Vaughan and Davies, and does not extend to their heirs, whether the power exists after their deaths; or in case it be determined at law, whether a Court of Equity can set it up again?

The first question is merely a question of intention, which must be collected from



the situation of the testator and his family at the [40] time he made this will, and from the words of the will; for though evidence of intention, dehors the will, is not admitted; yet facts and circumstances regarding the testator and his family, have been always taken into consideration to explain and illustrate the words of a will.

Sir Edward Mansell had a wife, two sons, and four daughters: he was seised in fee of two estates; the Mansell estate, £800 a year, rightfully; the Vaughan estate, £650 a year, or thereabouts, wrongfully; but, as he thought, rightfully.

In this situation, he makes a settlement of all his estates by his will. The first object of his care was his wife; he gives the whole to her for life; he makes his son to depend absolutely upon her whilst she lived; she is to maintain Rawleigh, and the unmarried daughters: after her death, he gives £1000 a-piece to the daughters, and £80 a year to Rawleigh; subject to these provisions, he gives the estate to his eldest son for life, who was at that time married very improvidently, and was supposed to have two wives alive at the same time: his father's displeasure was incurred. John Price swears his father was very angry on account of both the said marriages: however, his anger did not operate so far as to produce any disinherison of him or of his children; they were to inherit his title, and therefore his son's children, even by his then wife, who had come into his family without his consent, were to take the estate in a course of succession; but as to the wife herself, he would not give him a power of settling any thing upon her, even with the consent of his trustees, however she might deserve it by any future behaviour. Then an event arises in his mind—the wife might die, or perhaps a nearer event might be in his eye, which was a divorce: suppose that should happen, what must he wish? If no children at all—that his [41] son should marry again, and have children for the continuance of his name and family. If he had children, he might wish he should marry again, rather than lead a dissolute profligate life, and strengthen the succession by having more children, provided he made a proper choice. He might wish he should rather not marry at all, than marry a common prostitute, a circumstance not in his power to prevent; he could not direct his choice, but if he chose improperly, he could prevent that person from having any interest in his estate; and by excluding his present wife from having any chance of a jointure, he shews that the ruling passion of his disposition was, that no improper person should ever have any thing to do with any part of his estate. The power of making a jointure would enable him to marry properly and prudently; but if he was to exercise that power as he pleased, he might exercise it improperly and imprudently; from what had happened, he had no great reason to repose any confidence in him; and therefore, to give him a power of making a jointure as he pleased, was too great a power. On the other hand, if he had no power of making a jointure at all, no lady of fortune or family would marry him. He would not trust him with making a jointure upon whom he pleased, nor absolutely tie him up from making a jointure at all. He took the middle way, a power of making a jointure with consent of trustees; it is a kind of delegation of his own authority. "If he marry a woman I like, I should be very willing to settle a jointure upon her. If after my death, he marry a woman they approve, he shall have the same power. This qualification will give all the good which such a power can give, and at the same time guard against all the abuses of it. There will be no temptation for a profligate woman to entrap my son, when there is nothing to be got by it. It will be [42] a motive for a lady of merit and fortune to make the alliance, when she sees a proper provision may be made for her. When my son finds he can make no jointure, unless the woman he proposes to marry is approved of by the trustees, it is the most likely method I can take to make him look out for a lady worthy of their approbation." Under these reflections, and in this view and prospect of the future marriage of his son, he makes his will. The trustees expressly named in the will, were at that time about sixty years of age, and the son's wife thirty. From that fact, the counsel on both sides agree in contending, that the testator did not intend to stop with the two trustees, because it was between five and six to one, if alive when such a marriage happened; but from those premises they draw very different conclusions. The counsel for the plaintiff say, this is an evidence of the testator's intention to make the consent only a temporary check in the exercise of this power, and when consent could not be had, that the power should be absolute. The counsel for the defendants insist, this is a reason for a liberal construction of the words of the will: and that as he intended a check, he must have meant an effectual check, a check which was to be co-existent

with the power on which it waited, and that can only be by extending it to the heirs of the trustees. Now suppose he had been told at that time: "It is five to one but these trustees, or one of them, die before your son's wife dies. If that should happen, what do you intend in that event? That your son should settle the whole £1500 a year upon whom he pleases; or that he should have no power of making a jointure at all? or do you intend to give the heirs of Vaughan and Davies the same controul over this power, as you have given Vaughan and Davies, and that their consent should be necessary to the exercise of this power?" I have no doubt but he [43] would have chosen the check upon the power by the heirs of Vaughan and Davies, because that is a provision which comes the nearest to his intention in giving the power at all. It does not answer it fully and in every respect, because it is placing a confidence in persons he cannot certainly know; for the persons who are their heirs apparent at the making of the will, may be dead, when this power comes to be executed; but though the individuals are not certainly known, yet the stock from whence those individuals must come, are known and named; it is a trust reposed in the heads of those two families, and it is the credit and general character of families which often occasion individuals of such families to be named as trustees, when such individuals have been very young, and before they have given any visible proof or testimony of their own honour and virtue; it was not leaving it absolutely to chance to determine, there being a well grounded hope and expectation that persons allied to sense, and honour, and virtue, should inherit those qualities: it is all the security which can be had, and all the caution which can be taken for the performance of trusts of duration. That virtues are hereditary and run in the blood, many instances evidence the truth of such an assertion: though it is not so satisfactory as checking the power with persons, whose judgment, sagacity, and discernment have been experienced by him, yet it falls in more with his intention to check it imperfectly, than not to check it at all. Whether such a trust can be reposed in persons not certainly known, will be the point to be considered under the second question. He certainly intended to give a qualified power in the first instance, during the lives of the trustees; what reason can be assigned, why he should give an absolute power, or no power at all, when they were dead? The death [44] of the trustees could not mature his judgment, or affect the motive which induced him either to give the power or to check it: to intend a check which in all probability would never take place, was as absurd, as to give a power which could in all probability never take place: they were both equally out of his intention; he never severed the power in his own mind from the qualification of it; they both together formed one complete idea in his mind; he must have intended that the power and the qualification should live and die together, or to speak more accurately, that his son should have this qualified power as long as he lived.

To shew that this was his intention, I will examine whether he could intend to give the power absolutely, if the trustees died. Whilst the trustees lived, they were not only to determine if any jointure, but what that jointure should be; for if they could give or withhold their consent at pleasure, they might certainly ascertain the quantum of the jointure; so that, according to the circumstances of the son, when his wife died, and of his having several children, few or many, they were to regulate their judgments in the execution of the confidence reposed in them. If he had many sons, and was become a very old man, they might not consent to his making any jointure at all upon any woman. If to make a jointure at all, the family, the fortune, and other circumstances, were to have regulated the quantum. But if the restraint was to fly off, and the power to become absolute on the death of the trustees, surely he would have given some directions as to the quantum of the jointure, or the fortune to be brought as an equivalent for it, or that most material circumstance, his having or not having sons by his first wife. What a vast immense space there is between not trusting his son to settle a [45] shilling upon any woman whatsoever, proper or improper, without the consent of two trustees, and leaving him at liberty to settle the whole £1500 a year upon whom he pleased; for take away the check, and he may settle the whole, and though the plaintiff should be evicted, that makes no difference; it is to be considered, as if she had the whole of the estate.

It is not possible to conceive that a man's imagination should step from one extreme to another, without any cause whatsoever, to make this alteration in his intention; there is a much less distance between giving a limited circumscribed power, and no power at all, than giving a limited power and an absolute one.



Powers to make settlements upon second wives, where there are children by the first, are not always inserted in settlements, and are often attended with great inconveniences to families; but there never was such a thing heard of, as to give a power of settling the whole family estate, without any restraint, upon a second wife, even though there should be children by the first. It is not done where a son marries with consent, much less where there was such an instance of his indiscretion: could the testator ever intend to leave his grandsons, or his second son, or his sons, who were to inherit the title, without a single shilling, during the life of a woman without the least fortune or merit whatsoever?

But suppose the question had been put: "You cannot check this power by the consent of the heirs of the trustees; it is uncertain who they may be; they may be idiots, lunatics, infants, or such a number of heirs as may never consent; the law will not endure such a disposition. You must either give him the power absolutely, or not give it him at all, after the death of the trustees. Two events may [46] happen; your son may reform, and be disposed to marry a woman of virtue, family, and fortune. This power will enable him to make such an alliance. He would probably answer, "But if he have many children by his present wife, there is no occasion for his marrying again at all: and if he has no children, and he should marry again, he may choose as improperly as he has done already; whereas he may marry prudently if he has no such power. My grandchildren and second son cannot be hurt if he has no such power; but if he has such a power, they may be injured extremely by the abuse of it." The ruling passion of his mind was to guard against a profligate woman having any thing to do with his estate. He would not so much as let the woman he had married have a chance for one inch of his estate. In the state of mind he must then have been in, the very chance of a second improvident match, and the prospect of his grandchildren, or his second son, being postponed for the life of such a woman, must have turned the scale against giving a power free from controul. Will the words of the will bear this construction? He gives the whole to his wife, and then says, she shall be directed and governed by Vaughan and Davies, and their heirs, in the management of her concerns, whom he constitutes and appoints trustees of his will, to act for her and his children's interest as hereafter mentioned; then to his son for life, and that he shall be capable, with consent of his said trustees, to make a jointure on the woman they agree he shall marry; and who were to direct and govern his wife. The trustees were Vaughan and Davies—was there any body else? Their heirs. If the heirs of Vaughan and Davies were to direct and govern his wife, they were to be trustees. What effect this nomination of trustees would [47] have as to his wife, is not the question. He thought gratitude, affection, and a deference to him, would incline her mind to comply with that injunction; and if he was providing for an event of their deaths, and substituting their heirs to direct and govern his wife, who was as old as the trustees, a fortiori he must intend that provision to take place in respect of his children, who were so much younger than the trustees and his wife.

This is the more enlarged and liberal construction of the power, and most for the benefit of the person to whom it is given; for if a power is to be executed with the consent of a particular person, and it cannot be executed after the death of that person, as will appear upon the third question, this is the most benign construction of the words of the will, and we must construe it now exactly in the same manner as if the power had been executed with the consent of the heirs at law of the trustees, and the present defendants had now been contending that the consent was confined personally to the two trustees, and, as they were dead, that it could not now be executed at all. View the case in that light, and the plaintiff's right would have been incontrovertible.

It is to be considered in the same manner as if he had said, "With consent of Vaughan and Davies, and their heirs;" but if he had said so, then,

The second question arises; viz. whether that intention can take place according to the rules of law?

It is not necessary to determine this question. For, if the testator intended they should consent, it shews he did not intend that the power should be executable after the death of the trustees without [48] consent, which is the great point of this question, and in reality decides it. But, for my own part, I do not see any rule of law which encounters this intention.

The objections are; first, that it is absurd to place a confidence or trust in persons



who are not known to the party who trusts them, because the motive of choice is the judgment and honour of the party trusted, which cannot be where the persons are unknown.

That objection goes too far, for it strikes at all authorities coupled with interests. For, suppose estate to A. and his heirs, upon trust, to convey to such woman as B. shall marry with the consent of his heirs; there the estate will draw the trust along with it, and there is as much personal confidence put in the one case as in the other: nay, there is a greater, for if he should sell the estate for a valuable consideration to a purchaser without notice, the estate is lost. It would be an objection against creating any trusts, which would last longer than the lives of the persons trusted. There is a necessity for trusting persons who cannot be personally known, in order to effectuate men's intentions in the exercise of that dominion which the law gives them over their properties. There is nothing absurd in trusting persons not known, nothing incongruous or repugnant to the rules of law. If there was, the uniting an authority with an interest could not legitimate it, because it does not remove the objection, which is, that I do not personally know whom I trust.

The case in *Moor*. 61, is directly in point, that a confidence or authority may be committed to persons who cannot be known to the party. Nothing can be more personal than the selling an estate, and disposing of the money for the good of the testator's soul; and the instances there put, of a sale by a person to be appointed by his [49] wife, by the right heirs of J. S. or by the Mayor of London, prove the same position, even in case of a naked authority.

It is then objected, that this is a kind of judicial office, a *forum domesticum*. There is no certain rule that a judicial office cannot be granted in fee: that of sheriff, which in some branches is a judicial office, may: the great appellant jurisdiction of this kingdom is hereditary; if it were improper, it would be much more so in the last resort than in the first.

Judicial offices are grantable in fee; viz. ushers and chamberlains of the Exchequer; office of warden of the Fleet, a great trust, and yet grantable in fee. Objected, that there may be no body to execute it till administration, which may be given to entire strangers, named by the Ordinary, or named by the party. Heirs are certain upon death of ancestor, and must be of the blood of the person in whom it radically and primarily vested. But it cannot be compared to a judicial office: this is a mere single act to be done; to judge of the general character and fortune of the lady: it does not require great skill and ability; one man is as good a judge as another; as to real merit and temper, and disposition, the wisest are generally the worst judges.

It is said, that a naked authority will not survive, and therefore will not descend; that *Peyton and Bury* proves the principle. That case does prove, and the law is settled, that a naked authority will not survive, though there is something very like a naked authority that will survive, viz. guardianship, 2 Peere Will. 103.—*Lord Shaftsbury's case*—the slenderest interest coupled with it which can be conceived: an action may be brought for the ward, but it is such an interest as cannot be assigned or transmitted; and as this [50] species of authority may survive, though it cannot be transmitted, an authority may be transmitted which cannot survive; but where office or authority is given to two and the survivor, then it will survive. This shews there is nothing in an authority incompatible with its surviving, but only proves, that if I say, I will trust two, the law will not say, I shall trust one: it is a joint confidence; but if it is limited to survivor, it is saying, I will trust two as long as they live, and afterwards one of them. So, if a power is given to A. the law will not say, he shall trust his heir; but if he should say, he will trust his heir, there is as much reason to give that purpose an effect, as to trust one instead of two. The case cited shews a man may trust persons he does not know; if nothing illegal, the intention ought to take place; it is not giving a surviving or descendible quality of a naked authority; but it is a special designation and description of the persons to whom the power is given upon the death of the persons expressly named. A personal estate has no descendible quality in it; it cannot be made to descend to an heir at law; but it may be given to an heir at law by a special description. Devise of personal estate to heirs of A. good: or to A. and his heirs during the life of B: so a power may be devised, with consent of the heirs of A. It might be so given in the first instance; it may be given so eventually; and though given to heirs of persons

particularly named, yet it is the same as if, after their deaths, the heirs of any other person had been named; and though in this case they are named, as if intended to take by descent, yet it must take effect according to the legal operation; by descent, where it can, by special description, where it cannot, as in the estate *per autre-vie*. It is then said, as it is clear it cannot survive, what must have become of it after the [51] death of one of the trustees? It must do as in all other cases where there can be no survivorship, and yet are words to shew it is not to determine, viz. take place in the persons substituted to act after the death of the persons named; it must be considered as a tenancy in common; or rather, in analogy to that species of estate, the same as if the testator had said, with the consent of Vaughan and Davies, while they live; when one of them dies, his heirs shall stand in his place, and concur with the surviving trustee in the check; when both dead, the heirs of both shall concur in the check. If he had said, their several and respective heirs, it would have been clear; and in common parlance, and according to the common apprehensions of mankind, when an estate is given to two men and their heirs, no man, not illumined with the legal notion of jointenancy, could ever conceive the estate was to go to the heirs of the survivor. The law depends upon particular reasons, which it is not necessary to consider in this case; and even at law, where the thing given is several in its nature, it shall operate severally, though the words are joint. A corody to two men and their heirs, is a several grant to each of them; for the persons be several, and the corody is personal, Co. L. 190 a.: so here the persons are several, and the consent is personal: it is equivalent to saying, "With consent of both while they live, but when one die, that consent shall devolve upon his heir: the heir of the dead trustee shall consent, as well as the surviving trustee: one may abuse the power; I will supply the loss of one by his heirs, and the loss of both, by the heirs of both."

It is then said, this power may devolve on infants, idiots, or lunatics, or such a number of female heirs, as will make their agreement very improbable, and equivalent to a disability.

[52] 1st. This is an objection to authorities coupled with interests, as well as to mere naked authorities; the disability is the same, but it is no reason against the creating such a power, that by an accident it cannot be exercised.

If the party expressly named becomes disabled, it introduces a suspension of the power: as the death of the party would totally take it away, a temporary disability would suspend it; and how far this Court will act in such a case, is not necessary now to determine.

But suppose the consent was confined to Vaughan and Davies, then

The third question arises, viz. whether this power can be executed, when this consent cannot be had; that is, whether the power becomes absolute, or expires at their death: and if it expires, whether the Court will set it up again?

I will consider this as a mere legal question, uninfluenced by any apparent or declared intention either way. It is said, that the power vests upon the testator's death, and that whenever there is a vesting, whatever happens to defeat it afterwards is a condition subsequent; and if that becomes impossible by the act of God, that the estate or interest vested becomes absolute. Something does vest upon the testator's death; a power to be exercised in futuro, upon a precedent condition or a contingency; the same as vests in devisee of estates upon condition, not the estate itself, but a right to have the estate, when the condition is performed. Where an estate vests and is executed, it gives an immediate right to the rents and profits, which shall not be taken away by a condition becoming impossible; but all powers are executory, and vest no estate in any body till they are executed.

[53] The power itself is a mere incorporeal right, and whilst it remains incapable of being exercised, it is to every intent and purpose the same as if it did not exist at all; and wherever a fact is to happen, before it can be exercised, that fact must be in the nature of a condition precedent; whatever must happen before it can be executed, must precede it; the time of exercising the power is the only point of time to be considered, whether the condition is precedent or subsequent. I have no idea of a condition subsequent to the execution of a power. An estate, derived under the execution of a power, may be defeasible by a condition subsequent.

But before a power starts from its state of inactivity, whilst it is incapable of being executed, it does not exist: when the event happens, and it exists, and is executed, there is an end of its existence, and no subsequent condition can unexecute the power,



and determine the existence of what does not exist. The trustees approbation is a condition precedent to the existence of this power. His appointment without their approbation, is as ineffectual as their approbation without his appointment. They must both concur to the animation of this jointure: he can no more execute this power after they are dead, than he can whilst they live and withhold their consent.

It has been said, that the execution of this power devests nothing. It postpones the remainder: it turns a remainder expectant upon one life, into a remainder expectant upon two: it not only removes the chance of the enjoyment a life back, but it suspends the power of acquiring the absolute dominion of the estate by a recovery.

It has been said, the words, "if living," must be added. If they were, they would not vary the case; at least they would vary it no more than what is expressed; they cannot consent, if they are not alive. But [54] there are more material words to be added, viz. "That after their deaths, his son should have a power of appointing a jointure, without the consent of any body;" that is, the testator has given a power to be executed in one event, and, because it cannot be executed in the manner he intended, therefore we must give him a power, from conjecture which we do not know whether he intended or no, and which we must presume he did not intend, as he has not said it. This would not be expounding a will, but making a will; it is not like *Coryton and Hilliard*, where the words were equivalent to, if so long live (a).

[55] *Uvedale and Halfpenny*, 2 P. Will. 151, was a plain apparent mistake. All these kind of affirmative powers, imply a negative; viz. if they are not executed with consent, they shall not be executed at all.

Powers of revocation are often given in marriage settlements, with consent of trustees; but it was never apprehended that when the trustees were dead, the tenant for life might revoke all the uses of the settlement. It is in the power of the giver to modify his gift as he pleases, and the donee must take it as it is given him; and if he cannot have it in that manner, he cannot have it at all.

The qualification of this power, being a consent to a marriage, is looked upon with an unfavourable eye, and rather throws a mist about this point, which another kind of qualification would not have done; for suppose it had been to make leases with consent of A. to such persons as A. shall approve, or if A. comes from Rome, or any other collateral event, it would not have endured a moment's litigation.

It has been said, powers must be literally construed, and the cases adduced are

(a) *Coryton and Hilliard*, 10th August 1745, from Sir Eardley's MS. notes.

Sir William Coryton devised all and singular his manors and lands unto his wife Sarah, Sir Edward Littleton, and others, and their heirs, determinable as hereafter declared, upon the several trusts hereinafter mentioned, viz. until his son John Coryton, Esquire, attained his age of twenty-seven years, and no longer; in trust, in the mean time, out of the rents and profits, to discharge the legacies and sums of money mentioned in his will, and after payment thereof, to lay out the remaining money at interest, upon the same trusts as his lands are settled; and after the determination of the estate limited to them in use or in trust as aforesaid, and the accomplishment of his son's age of twenty-seven years, to the use of the trustees and their heirs, that they should stand seised to the use of them and their heirs, to the use of his son John and his assigns, for the term of ninety-nine years, sans waste, and from and after the determination of that estate, to the use of the said trustees, during the life of his said son John, to preserve, &c.; and from and after the death of his said son John, then to the use of his first and other sons in tail, with other remainders over.

John Coryton the son died, having made his will, and devised all his personal estate to his wife, who claimed the ninety-nine years as a term in gross.

The question in this cause was, whether, on the construction of this will, John Coryton, the son, took an absolute estate in the term, or whether only for his life?

Lord Chancellor said,

There are two questions; first, whether these are limitations of a trust, or of a legal estate? Secondly, whether the term of ninety-nine years is now subsisting as a term in gross, or is attendant on the inheritance?

As to the first question, Lord Chancellor was of opinion it was a trust and not a use, after the arrival of John Coryton to his age of twenty-seven years.

As to the second point, he held it determinable on the death of Sir John Coryton.



very proper to support that position; but in all these cases a power has clearly existed; whereas the question here is, whether there is such a power or not. Cro. Elizab. 26, *Lee v. Vincent*, is in point—state it.—Estate cannot be sold after the death of A. In 1 Leo. 286, is a case of the same kind. Lands to be sold after an estate-tail, with the assent of A. who dies, the power is gone; and yet very improbable A. should survive the estate tail.

But the true way of considering this question is, to take it as a description and designation to take. All powers arise out of the old fee, and, when executed, operate by the Statute of Uses, and are equivalent to a limitation inserted in the deed containing the power; the party is in by the giver of the power: the same as if devised to [56] son for life, remainder to such woman as he shall marry with the consent of A. and B. She must bring herself within the description, in order to take. Suppose a power to make jointures upon any of the daughters of a particular person, and that person never has any daughters, or they all die, or upon a peeress. The case in Dyer, 189 b., *Butler and Bray*, is in point upon this part of the case, and though obscurely reported, yet the substance is plain; and in Godbolt, 77, *Bonefant v. Sir R. Greinfield*, it is cited in this manner: Lord Bray covenanted, that if his son marry with the consent of four lords, whom he especially names, A. B. C. D. that then he would stand seised to the use of his son and his wife, and of the heirs of their two bodies begotten; one of the four was attainted and executed; the others consented he should marry such a one. He married her, yet no estate passed, because the fourth did not consent, and it was a joint trust. In 1 Leon. 74, *Baldwin and Cock*, it is cited again, and said to be adjusted, that upon that marriage no use shall accrue.

It has been argued from intent, and said, that comparing ages of trustees with the wife's age, it was five to one if they survived her; and therefore that he could not intend to give a power with a restraint which would probably defeat it.

The testator was the proper judge of the propriety of such a disposition: he knew the wife's age, and the ages of the trustees: he might not have given his son any power at all: he saw the improbability of the power taking place. If he had thought proper to have given the power without any restraint, in case the trustees died, he would have said so.

Suppose it had been given with the consent of one trustee who had been younger than the son's wife, yet he might have died before her; and the testator must be supposed to have taken that event [57] into his consideration; and whether it is more or less likely that the contingency shall happen is not material: he might have given him no power; he might have given it him upon an event where it was two to one, or a hundred to one, whether that event should happen: "expressio unius est exclusio alterius;" the giving it in one event, is saying he shall not have it in any other.

It would be most absurd to say, he had given it on a contingency, and yet that he should have it, whether the contingency happened or not; the giving it on a contingency, is equivalent to saying, he shall not have it unless the contingency happens.

The other Lords Commissioners being of the same opinion;

Decree, that the plaintiff's bill, so far as it seeks relief concerning the Mansell estate, do stand dismissed out of this Court without costs, and that possession of the Mansell estate be delivered to the defendant Sir Edward Vaughan Mansell; and order, that the plaintiff do deliver to the said defendant, upon oath, all deeds and writings in her custody or power relative to the said Mansell estate.

### [58] IN CHANCERY.

The Great Seal in Commission.—Lords Commissioners, Lord Chief Justice Willes, Sir Sydney Stafford Smythe, Sir John Eardley Wilmot.

Rehearing. HENRY TOYE BRIDGEMAN, ESQUIRE, Plaintiff; GEORGE GREEN AND MARY his Wife, THOMAS GREEN, WILLIAM LOCK, AND WILLIAM LOCK, JUNIOR, Defendants; AND GEORGE GREEN, Plaintiff; HENRY TOYE BRIDGEMAN, Defendant. June 1757.

[S. C. 2 Ves. sen. 627. Applied, *Huquenin v. Baseley*, 1807, 14 Ves. 289; *Cook v. Lamotte*, 1851, 15 Beav. 250; *Lyon v. Home*, 1868, L. R. 6 Eq. 680. Referred to,

*Coulthas v. Swan*, 1871, 19 W. R. 486; *Baker v. Louder*, 1872, L. R. 16 Eq. 57; *Fane v. Fane*, 1873, L. R. 8 Ch. 397. Applied, *Moxon v. Paine*, 1873, L. R. 8 Ch. 886; *Allcard v. Skinner*, 1887, 36 Ch. D. 160; see, *In re McCallum* [1901], 1 Ch. 154; *Turnbull v. Duval* [1902], A. C. 435.]

The substance of the original bill was, that in 1746, the plaintiff hired the defendant George Green, as a butler; that the defendant having served him a short time, took advantage of the weakness of his understanding, and obtained a bond from him for £2800, conditioned for paying him an annuity, if his wages were not paid, or if the plaintiff turned him out of his service; that he received his rents, and never accounted for them; that he introduced the defendant William Lock to him, and they together got him to execute conveyances of various forms; that defendant George Green, proposed to him to mortgage his estate to Edward Bridges, Es[59]-quire, for £5000, which he did, and received the money in bank notes; but did not keep any of them, being told by William Lock, that he must indorse his name, which he did, and delivered them to George Green, William Lock, and Thomas Green; that the plaintiff had applied to them for an account, which they refused. The bill therefore prayed for an injunction, and for general relief.

The defendant George Green, by his answer admitted, that he came into the plaintiff's service in 1746, and that in six months he gave the defendant a note of hand for £300, and afterwards executed the bond as stated in the bill; that the plaintiff having no children, conceived a high opinion of him, and told him and others, that he meant to make him his heir, and give him his estate; that he proposed to raise £4000 to give to him the defendant; and that afterwards, conceiving a friendship for Mr. Lock's son, he proposed to raise another £1000 for him; admits that he received £2600 for his own use, £1000 in trust for his brother, and that Lock received another £1000 for his son. He admits the rest of the transaction, except that he denies that he used any means to gain an undue influence over him, and that he at all times appeared to be a gentleman of good understanding, and capable of managing his own affairs, and that he was not imposed upon or deceived by him.

Thomas Green, by his answer, says, that the plaintiff often expressed the great regard he had for his brother. William Lock says, by his answer, that he was employed by the plaintiff, in September 1750, to draw some deeds, which he did, and which were executed by the plaintiff; and confirms the other part of the account.

[60] These causes coming on before the Lord Chancellor Hardwicke, he declared that the sum of £5000 was obtained from the plaintiff without any consideration, and by undue influence and imposition.

On a rehearing before the Lords Commissioners:

Lord Commissioner Wilmot.—There are two questions in this cause:

1st. If this money was obtained from the plaintiff by undue influence and imposition?

2d. If Lock ought to be liable to pay any part of the costs of the cross bill, to which he is not a party?

The first is a question of fact, depending upon evidence read in the cause, and a more powerful and unerring kind of evidence arising from the whole transaction taken together, from the particular relation there is between an attorney and his client, and the duty that relation laid Lock under to Bridgeman.

It was truly said at the Bar, that if the decree proceed upon a principle of taking away that power which the law gives every man over his own property, it ought to be reversed: and most certainly it ought; for our laws, very unfortunately for the owners, leave them at liberty to dissipate their fortunes as they please, to the ruin of themselves and their families. The Roman laws drew a line between liberality and profusion; they very wisely for the public, and very kindly for the parties, considered immoderate extravagance—"inconsulta largitio"—as a distemper of the mind, and treated a "prodigus," as a madman: they said, "expedit rei-publicæ nequis sua re male utatur." They thought it safer for the public, as well as kinder to individuals, to lay by their estates, whilst they were under the tyranny of their passions, and reserve them [61] for their use, when under the direction of their reason. But our laws strike no such boundary; "stat pro ratione voluntas," is the law with us; every man may give a part, or all of his fortune to the most worthless object in the creation; and this Court never did, nor ever will rescind or annul donations merely because they are improvident, and such as a wise man would not have made, or a man of very nice



honour would not have accepted: nor will this Court measure the degrees of understanding, and say, that a weak man, provided he is out of the reach of a commission, may not give, as well as a wise man. But though this Court disclaims any such jurisdiction, yet where a gift is immoderate, bears no proportion to the circumstances of the giver; "*ubi modus non adhibetur, ubi non refertur ad facultates*," where no reason at all appears, or the reason given is falsified, and proved to be a fiction, and the giver is a weak man, of a facile easy temper, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct and behaviour of the persons in whose favour it is made: if it see that any arts or stratagems, or any undue means have been used by them to procure such a gift; if it see the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee, as may naturally give him an undue influence over him, if there be the least scintilla of fraud; in such a case, this Court will and ought to interpose; and by the exertion of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident to property, that it acts upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

[62] Take the case on great outlines: a gentleman, of £800 or £1000 a year, with no ready money, and £1000 in debt, mortgages part of his estate for £5000 gives £2600 to a man who came into his family five or six years before, as a footman, £400 to his wife, £1000 to the footman's brother, £1000 to the son of the attorney who procured the money, and was introduced by the footman, besides 100 guineas procuration, and £123, for his bill. What! give away the fifth part of all he had in the world, without any apparent motive whatsoever? no extraordinary services, no peculiar good offices, no visible spring from whence such a stream of bounty could flow. It must alarm and raise jealousies and suspicions in every man's mind who hears of it; for though, as Lock told Floyer, every gentleman may do what he will with his own, yet people never dispose of their own without some motive for doing it. I do not say the validity of a gift is to depend upon the relevancy or futility of the motive producing it; but still there is some motive which impels the will of the donor in every gift; and in the disquisition which the mind makes after the motive of an extraordinary and unusual gift, if it cannot find a good one, it is apt to suggest a criminal one, which has been done in the present case; and if it can find none, I defy any man, who watches the operation of his own mind, from concluding that some foul play has been used in obtaining it. Here, the criminal motive, it is agreed on both sides, must be laid quite out of the case, because there is not the least tittle of evidence about it; if there had, I should have thought it a very strong circumstance for the plaintiff: for this Court proceeding upon principles regarding the safety and utility of the public, would refuse or give re-[63]lief, not according to the merit or demerit of the party applying, but as was most likely, to prevent such a horrid commerce; and if men were not suffered to retain the wages of sin, it would be most likely to remove one great temptation to the inferior part of mankind, and to prevent them from submitting to such execrable prostitution; and I should not think a man a very free agent, when the party to whom he gives, has a halter about his neck; but as that motive must be quite expunged out of the consideration of this case, there is no motive at all suggested, but that of reconciling the husband and wife (which is proved to be false) and general affection taken up for a servant. Now affection alone, even the strongest, which is natural affection, works no such effects. Parents upon marriage of children, or for their advancement in the world, or for some particular reason, will give liberally to their children: masters often provide a support and maintenance for servants, during their lives; but parents very seldom extend their bounty so far as to mortgage their estates for a fifth part of what they are worth, and give it a child wantonly for no reason whatsoever, but to make him independent of them; much less will affection alone operate in the case of a servant, so as to produce such an immoderate and unusual largess from a master; and in all questions arising upon fraud and imposition in obtaining bounties from weak men, the propriety of the act done will always fortify it; the seeing a cause which might naturally give a being to such a bounty, speaks strongly in favour of it; and on the other hand, the impropriety of the act done, and the high improbability that the cause assigned should produce such an effect, will always bear a strong testimony against it, and at least force the mind to give a very favourable reception to any evidence of fraud and imposition in obtaining [64] it; and therefore in the present case, if an annuity of



£20, £30, or £40 a year, had been given Green for his life, or the sum of £500, or some such sum, had been given him, considering the man, his situation, his understanding, and his circumstances, there would have been nothing in the act itself which had impeached it; but when the gift bears no proportion to the situation of the giver, to his rank in life, and to his circumstances, and no cause is shewn which, according to the constitution of human nature, and the common and ordinary operations of mere love and esteem, might naturally beget such a bounty, it carries its own death-wound, as Lord Hobart calls it, along with it, and proclaims itself upon view, to be the offspring of fraud and imposition. But it is worse here; for by the cross bill, the esteem and regard is said to be founded upon Green's having been a means of reconciling Mr. Bridgeman and his wife; whereas he is proved in the cause to have been the means of parting them.

Having said thus much upon the outside of the transaction, as it strikes me upon the first view of it, I will now consider the several parts of it.

The decree is, that the £5000 was obtained from the plaintiff, and divided between Green and his wife, and Green's brother, and Lock the father, without any consideration, and by undue influence and imposition on the plaintiff, and therefore the real question is, was it obtained by undue influence or imposition, or not? and as to the restitution of the money, independently of the consideration of costs, it seems to me to be quite immaterial from which of them the undue influence and imposition came.

There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over the [65] plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it; and therefore supposing Lock's conduct quite unexceptionable, though I think I shall shew it to be extremely criminal, yet if Lock took this money under the undue influence and imposition of Green, he has no more right to keep it than Green's wife or brother had; and therefore, so far as the admittance of the undue influence and imposition, by not appealing from the decree, goes, it reaches the whole £5000 and makes no distinction between the money received by Lock, and the money received by Green, his wife, and brother.

The counsel for Lock have felt the weight of this decree, unappealed from, so sensibly, that they have frequently endeavoured to engage our attention to keep the cases of Lock and Green quite distinct, and to deprecate our mixing them together; but that is the very point of the cause, viz. whether the evidence does not shew a combination and a union between them two to plunder the plaintiff; and most certainly Lock is not concluded by Green's not appealing from the decree. He may say, as his counsel have done at the Bar, that it was a bounty from the plaintiff to Green, the result merely of his own benevolence to him, without any undue influence or imposition; or if there were any, yet that he stands quite detached from Green; that there was no combination between them, that [66] he has done no more than a good father ought to do, viz. received a bounty for his son, from a man who might have given him all his estate if he had pleased. Now as to the undue influence and imposition of Green, the strength of the evidence is, that the plaintiff was a weak man, and easy to be imposed upon, and that Green had a very great influence over him. It is in proof, that he brought his master's purse into the hall, and said he was master of that, and should soon be master of him. Was this an undue influence; and how did he gain this influence over him? If by false suggestions and misrepresentations, it was unduly gained; and if unduly gained, it was an undue influence: a more wicked and more detestable mode of acquiring influence cannot well be suggested. In May 1745, Mr. Bridgeman marries a lady with 7 or £8000 paid down, and £22,000 more in her own disposal: they live very fondly and affectionately together, till this footman comes into the family, which was in the end of June 1746, at £6 a year wages; he is not contented with getting 3 or £400 of his master in 1747; in April 1748, he goes with him to Kidderminster, and makes him resolve not to live with his wife any longer; charges her with infidelity and disloyalty to his bed, with a servant, one Stone: when they returned and went to Clifton, he declared his master should go away with him, and actually did take him from her; and, lest he should have sense

enough to see through the lie, or love enough to forgive it, when he had roused his jealousy, he endeavours to raise an aversion; traduces and vilifies her person, calls her nasty, ugly, stinking, old fashioned, &c.—dissuades him from having any personal intercourse with her; advised him not to live with her, unless she would unstring her purse and give him £1500, and then repents of even qualifying his [67] advice. In 1749, when Savage was sent with a letter to the plaintiff, and ordered to tell him, that if he would turn Green away, and come back with him, she would give him £20,000; this man's ascendancy was so great, that he dissuaded him from it, and said, "Damn her and her fortune together." There are many other instances of his ascendancy over him; but if he could prevail upon him to violate his duty to his wife, and to prefer his footman to her and £20,000 into the bargain, surely there is something more than a spark of undue influence in it. The relation between them was inverted, and he appears to be quite in a state of vassalage to Green. What difference is there between gaining a sum of money from a weak man, by false suggestions; and gaining the affection of the giver by false suggestions, which affection produces the gift? The gift is bottomed upon falsehood in one case as well as in the other; and in such cases as these, the influence is exerted, and the imposition must always be carried on, secretly and privately: it is almost impossible ever to adduce evidence which applies directly to the act itself.

The first instance of meddling with any part of the real estate, was about Michaelmas 1749, when Green was to be qualified to sport: that appears to have been a sham qualification; for though possession appears to have been formally given, and it had the appearance of a livery "by twig and turf, and the key," yet the rents were paid exactly as they were before; and when the estate was sold, Green was never made a party to the conveyance, nor set up any title to it; and it does not appear from the evidence, that the plaintiff did execute any conveyance at all; and according to Edward Whitehead's account of that transaction, it was conducted so awkwardly, as might very naturally make Green think it was high time to call in some [68] legal assistance for getting any part of the real estate; for Edward Whitehead swears that when, some weeks after the livery, &c. he was called into the music-room to be a witness, the parchment was signed by Green; and that some time afterwards he was fetched in again by Green, and that the plaintiff brought out the same purchase deed, and said he had sent for him to see Green's name cut out, which was then done and flung into the fire. This strange execution of the purpose aimed at, which was getting £100 a year, must have alarmed Green, and determined him not to venture upon his own or the plaintiff's judgment; but to have somebody employed, whom, as he said to Loveday, he could trust to do his business for him.

And now Lock comes upon the stage. Who is Lock? Why, an attorney, and a landlord of a public house at Farringdon, forty miles from Bridgeman. Did he know him, or had he ever experienced his ability or fidelity? No. It does not appear he ever heard of him in his life before. Who introduced him; and how came he to be employed? Green introduced him. Loveday proves, out of Green's own mouth, the reason why the attorney of the family were not employed, and why Lock was—because he could not trust Barow or Jones; that he had found an honest attorney, Mr. Lock, to do his business. What was it he could not trust to Barow and Jones? not, the preparing a conveyance;—they were much more likely to prepare it properly than an innkeeper:—he could not depend on their concurring and assisting in the completion of such a self-evident piece of imposition: he knew that they would take care of Bridgeman, who was their client, and would guard him against imposition, and not do Green's business, which was to carry it into [69] execution. It is said he did not employ Barow or any neighbouring attorney, because he wished to keep it a secret. But if that was a motive, why fall upon a man Green knew, and who had been concerned for him? why not an entire stranger? If he meant nothing but what was fair, he was the only man in the kingdom who should not have been employed: besides, if that had been the motive, who was more likely to keep it a secret? An attorney of great honour, worth, and ability, a neighbour concerned for him before: or a man he never heard of in his life, to whose honour, abilities, and taciturnity he was an entire stranger? a man engaged in a way of life where a secret is the least likely to be kept, unless his own interest engages him to keep it? Green's reason therefore for calling in Lock, appears clearly to have been a conviction that Barow and Jones would not do what Lock would. When Lock came to Bridgeman, and was



informed what he was to do, that he was to convey £160 a year to the man who fetched him, in fee: what was his duty to have done? why, to have remonstrated, or at least, with modesty and humility, to have inquired into the principles and motives of such a wild immoderate act. A man of nice honour would have said in a moment, "As I am an entire stranger to you and your circumstances, and there is something so very extraordinary and uncommon in what you propose to do, I will not be concerned in it upon any account whatsoever:" but there is not an attorney in the kingdom of common honesty, or who is desirous of appearing to have common honesty, who would not have paused upon receiving such orders; who would not have thrown an eye of doubt upon the directions, and have talked very explicitly both to the master and servant about it. He would at least have protracted the execu-[70]-tion of such an extravagant purpose; he would have given time for deliberation; if he received no satisfaction from them, he would have taken some opportunity of inquiring in the neighbourhood, into the character of this gentleman and his servant, and what the opinion of the neighbourhood was about them: but instead of proceeding in this manner, Lock finishes the affair in five days; he never asks a single question, but only what he should insert as the consideration of the conveyance; and though it is not quite clear that Lock was at Brinkmarsh on the 15th September, when the letter was dated, or that he was present when it was written, yet it is very probable he was. He says, by his answer, that he came on or about the 14th, and staid there about two days; but whether there or not, as he had received directions from the plaintiff himself, the letter could be written for no other purpose, but to furnish him with a piece of evidence to justify his own conduct (a). It shews that he thought such a transaction as this could not pass unnoticed by mankind, and that no man could believe he ever received such directions, unless he could shew them in writing; and to me, this letter is rather an instance of his cunning, in gilding the transaction and planning a defence for himself, than a proof of his innocence in it.

In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged, to the same effect as [71] the deed or will, are very material; but in cases of undue influence and imposition, they prove nothing; for the same power which produces one produces the other; and therefore, instead of removing such an imputation, it is rather an additional evidence of it.

The combination is evidenced very clearly to me from Lock's conduct upon the first interview in preparing these deeds; and if it was to be a gift, why did he disguise it and bring it forth as a purchase, *bonâ fide*, for a valuable consideration? Here is one great badge of imposition—"aliud simulatum, aliud actum."—Here he was concurring in an imposition upon mankind in general; here he was lending his aid and name by witnessing the receipt to obtrude a gift upon the world as a purchase. This shews he dealt in masks and disguises. If creditors attacked him, it was to be a purchase, *bonâ fide*, for a valuable consideration; if necessary to set it up as a gift, and the attorney is asked, "How came you, when you knew it was only a gift, to give it the air of a purchase?" then the letter is to be produced, to shew that his client had directed him to do so; and therefore, if the parties had stopt here, and the bill had been brought to set aside these conveyances, I should have thought the falsity of these conveyances a strong evidence of the imposition, and that Lock had been a party to it, and was used as an instrument by Green in completing it; but in less than a month, there is a change of intention, and £4000 is to be borrowed by Lock. What had occasioned this change of intention does not appear; it must have been suggested by somebody, that as money has no ear-mark, it is very difficult to pursue it: lands are visible and accessible; conveyances are more easily set aside, and restitution of lands is easy. Whether any advice was taken on these deeds; or upon considera-[72]-tion, Lock might entertain some doubt about the validity of the deeds; or might wish to open a new scene, in hopes of getting some

(a) Lock, by his answer, stated, that he came to Brinkmarsh on the 14th September, and that after receiving parol instructions for the conveyance, he desired the plaintiff to reduce the instructions to writing, and to mention what sum he would have inserted as the consideration. He then added (without stating when he left Brinkmarsh) that the plaintiff wrote a letter, dated the 15th September, and sent it to the defendant at Farringdon; and that the plaintiff thereby directed him to prepare the conveyance, and to insert 3500l. as the consideration.



plunder himself; whatever was the reason, Lock is employed by Bridgeman to get him £4000. The mortgage was some time depending; doubts and difficulties arise; deeds are wanted. In the course of this negotiation, Bridgeman contracts a great regard for Lock's son, and will give him £1000. Was this true? It does not appear that he ever saw the boy in his life before the £1000 was paid to the father for him. There is not the least title of evidence in the whole course of the cause, to verify that part of the answer; and therefore we must take it to be all a fiction, so that the motives suggested in support of the gifts are both false; the one is proved so, and the other is not proved at all: but if it had been true, would this Court endure, that an attorney, who is borrowing money for a client, should, pending the negotiation, receive either for himself, or any of his family, such an immoderate and extravagant bounty as this is? If it should, there is an end of the Statutes of Usury, and of all that care which the Legislature has taken to prevent men, who borrow money, from being plundered by exorbitant procuration.

This Court will not let an attorney take a security from his client, pending a suit, for a shilling; and yet, in many cases, it is impossible for a man to attain his right without some such allurement to induce an attorney to be concerned for him. If he fail in the suit, he can never be paid, and therefore it seems reasonable he should stipulate for some certain extraordinary advantage in case he succeed: but the Court says he shall have nothing but his fees. The relation between them, and the power which his situation gives him over his [73] client, makes it impossible to distinguish between free agency and undue influence and imposition; and therefore, in such a state, an attorney shall not take at all. Marriage brokerage bonds, bonds to lewd women from heirs apparent upon contingencies—this Court sees the parties in a situation so liable to be unduly influenced and imposed upon, that it will presume they were so, and admit no proof to the contrary.

The giving money to the son, and especially as it is not proved he ever saw him in his life, evidences the imposition more strongly than if given to himself. The plain reason was, to have made himself an evidence in support of the gift, and to enable him to call upon this Court for their protection of his son, as an infant. I consider it as a gift to the father; and nothing appears to have been ever done to declare the trust for the son. But if it was given to the son, we cannot execute the trust reposed in us for his benefit more faithfully, than by throwing such a poisonous weed out of his fortune: and it is very observable, that a false colour is given even for borrowing this money. Jones swears that the plaintiff told him, in Lock's presence, that he did not take up the money as wanting it then immediately, but as he was going abroad, and should want money to lodge in his banker's hands, to answer his drafts; and the plaintiff was amused with thoughts of going abroad. Jeffrys was to instruct Green in French and Latin, and did give him two or three lessons; and this delusion was kept on foot till after the notes were given, and just before the mortgage was executed: for Jeffrys was not dismissed till the 19th April 1751, and the notes were given the March before, and the mortgage executed the 21st April 1751; and even at the execution of the mortgage, Stevens swears that [74] Bridgeman said he intended going abroad, and wanted the money to lodge in his banker's hands; so that Lock, at the Spring Assizes 1751, and at the execution of the mortgage, when the plaintiff tells Mr. Jones why he borrowed the money, sits by, and as far as silence goes, abetted what he knew to be false, because he had at that time drawn the notes for the disposing of the whole £5000; and when Floyer asked Lock about it, on 4th September 1751, Lock tells him he knew nothing of it, and that he was not concerned in it. Here is disguise, artifice, false colouring, and low, dirty, shallow cunning, from one end to the other. But the taking the notes to Lock's son, is a decisive mark of imposition. Green had given up his deeds; the notes were substituted in their place, and therefore there might be some colour for taking them to Green and his brother; but what pretence for taking a note for £1000 to Lock's son? He ought not, especially whilst the mortgage was depending, to have endured the very intimation of such a bounty. But to dare to take a security for it; to draw it with his own hand, and such a security—a note for value received, (which was false) so as at the end of a month, Lock might lay him in gaol, whether he had the money or not, (and if these notes had been indorsed, there would have been no relief against them at law or in equity) was such an abuse of that trust which subsists between an attorney and his client, as without any other circumstance of fraud whatsoever in the case, would

have satisfied me in decreeing a restitution of the money paid upon notes so obtained.

There had been a scheme laid for going abroad, or at least a pretence of that kind, and carried on so far in earnest, that Jeffrys was engaged to go with them. They durst not venture to trust Bridge-[75]-man with the receipt of the £5000, and have no hand over him at all. These notes were taken to enforce an application of the money, in case they had found him disposed to have broken his chains; and I observe the money is ready the very month after the notes were given.

Attornies, by being entrusted with their clients secrets, must always have a great influence and ascendancy over them: they are the great money-borrowers now all over the nation. The wants, the pressures, and the keenness of men's passions to get money, for the gratification of their vices or their follies, would make them give any thing to expedite or accelerate a loan. Men are really not free agents under such circumstances; they are as much, or more, under the influence of their attorney in negotiating a loan, as in the prosecution or defence of a suit; and the reason of the decree in *Walmsley and Booth* (a)<sup>1</sup>, applies strongly to the present case. I have no doubt, nay I know, there are many attornies who would have died before they would have acted such a part as Lock has done in this affair. If there are any who forget that they are ministers of justice, and not only stand by and see their clients robbed by footmen, but are themselves accessory to the robbery, and divide the plunder; this decree will inform them they shall not do it with impunity. It is their duty to avert the blow which fraud and imposition aim at their clients. This Court has frequently made them answerable for gross laches and negligence in the placing out their clients money upon sham or insufficient securities; but where, instead of averting the blow, a man's own attorney directs and guides the hand that strikes it,—this Court cannot but express the greatest resentment and indignation at such a behaviour: and though, in general, costs are not given [76] against persons who are not parties to the suit; yet, as Lock was a party to the original cause, and they were both brought on together, and he had the management of both the causes, and the subject matter of both the causes, as to this point, was the same; and he was left out of the cross cause, only to make him an evidence; and he has so grossly misbehaved himself in his profession, and that misbehaviour has been the occasion of both the suits, and of the costs expended by Bridgeman, he ought in justice and equity to pay them (a)<sup>2</sup>.

I have thought upon both the points as fully as I can, and have had no doubts upon them, and consequently the less occasion to call in the authority of the noble lord who made this decree. But though I shall always examine, with the utmost freedom, the opinion of every man submitted to my judgment; yet I must own, that if my mind had stood in an equal balance, the authority of the noble lord who made the decree, would have turned the scale; and I am sure every man, who wishes well to the laws, liberties, and properties of this nation, cannot but wish that his opinions may always have the greatest weight with his successors in this place.

The other Lords Commissioners being of the same opinion:

Order, that the said decree be

Affirmed.

#### [77] HOUSE OF LORDS.

Die Martis, 9<sup>o</sup> Maij 1758. Opinion on the Writ of Habeas Corpus.

Upon the second reading of the bill, intituled, "An Act for giving a more Speedy Remedy to the Subject upon the Writ of Habeas Corpus" (a)<sup>3</sup>, it is ordered by the Lords

(a)<sup>1</sup> 2 Atk. 25.

(a)<sup>2</sup> By the original decree, both the defendants were directed to pay the costs of both suits.

(a)<sup>3</sup> Which "bill" was as follows: "Whereas the writ of habeas corpus hath, in all times, been deemed to be the most effectual security for the liberty of the subject, against every kind of wrongful imprisonment or restraint: and whereas any delay in the awarding or returning of such writ may be attended with the most fatal consequences to the person under restraint; and, by reason of such delay, the relief intended to be given may come too late for such person to be discharged from his restraint, or to receive any benefit from such writ; be it therefore enacted by the King's Most



Spiritual and Temporal, in Parliament assembled, that the Judges do attend this House, the first Thursday after the approaching recess, to deliver their opinions *seriatim*, with their reasons, upon the following questions :

1st. Whether, in cases not within the Act 31 Car. II. writs of habeas corpus *ad subjiciendum*, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?

[78] 2. Whether, in cases not within the said Act, such writs of habeas corpus, by the law as it now stands, may issue in the vacation by fiat from a Judge of the Court of King's Bench, returnable before himself?

3d. What effect will the several provisions proposed by this bill, as to the awarding, returning, and proceeding upon returns to such writs of habeas corpus, have in practice; and how will the same operate to the benefit or prejudice of the subject?

[79] 4th. Whether, at the common law, and before the Statute of Habeas Corpus in the 31st of King Charles II. any, and which, of the Judges could regularly issue a writ of habeas corpus *ad subjiciendum*, in time of vacation, in all or in what cases particularly?

5th. Whether the Judges, at the common law and before the said statute, were bound to issue such writ of habeas corpus *ad subjiciendum*, in time of vacation, upon demand of any person under restraint; or might they refuse to award such writ, if they thought proper?

[80] 6th. Whether the Judges, at the common law and before the said statute, were bound to make such writs, so issued in time of vacation, returnable immediate; and could they enforce obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, and by what means?

Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the several provisions which, by an Act made in the thirty-first year of King Charles the Second, intituled, 'An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas,' are made for the awarding of writs of habeas corpus, in cases of commitment or detainer for any criminal or supposed criminal matter, shall, in like manner, extend to all cases where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his or her liberty, under any colour or pretence whatsoever; and that upon oath being made by such person so confined or restrained, or by any other on his or her behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, is not by virtue of any commitment or detainer for any criminal or supposed criminal matter; an habeas corpus directed to the person or persons so confining or restraining the party as aforesaid, shall be awarded and granted in the same manner as is directed, and under the same penalties as are provided, by the said Act, in the case of persons committed or detained for any criminal or supposed criminal matter; and that the person or persons before whom the party so confined or restrained shall be brought by virtue of any habeas corpus granted in the vacation time under the authority of this Act, may and shall, within three days after the return made, proceed to examine into the facts contained in such return, and into the cause of such confinement or restraint; and thereupon either discharge, or bail, or remand the parties so brought, as the case shall require, and as to justice shall appertain.

"And be it further enacted by the authority aforesaid, that whensoever any writ of habeas corpus, granted either in term or vacation time, on the behalf of any party so confined or restrained without a commitment for any criminal or supposed criminal matter, shall be served upon the person so confining or restraining such party, or shall be left at the place where such party shall be so confined or restrained, the person so confining or restraining such party shall make return of such writ, and bring or cause to be brought the body or bodies, according to the command thereof, within the respective times limited, and under the provisions prescribed by the said Act to sheriffs and other officers, in case of commitment or detainer for criminal or supposed criminal matters; and every such person neglecting or refusing so to make return of such writ, or to bring or cause to be brought the body or bodies, according to the command



7th. Whether, if a Judge, before the said statute, should have refused to grant the said writ, upon the demand of any person under any restraint, the subject had any remedy at law, by action or otherwise, against the Judge for such refusal?

8th. Whether, in case a writ of habeas corpus ad subjiciendum at the common law be directed to any person returnable immediate, such person may not stand out an alias & pluries habeas corpus, before due obedience thereto can be regularly enforced by the course of the common law?

9th. Whether the said statute of the 31st of King Charles II. and the several provisions therein made, for the immediate awarding and returning the writ of habeas corpus, extend to the case of any man compelled against his will in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters?

10th. Whether in all cases whatsoever, the Judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the Judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty, by the most unwarrantable means, and in direct violation of law and justice?

[81] ANSWER of Mr. Justice Wilmot (*a*) to the questions proposed to the Judges by the House of Lords, on the second reading of the bill, intituled, "An Act for giving a more Speedy Remedy to the Subject, upon the Writ of Habeas Corpus."

1st. Question. "Whether in cases, not within the Act 31 Car. II. writs of habeas corpus ad subjiciendum, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?"

thereof, within the times respectively limited, and under the provisions prescribed by the said Act to sheriffs and other officers, shall be guilty of a contempt of the Court under the seal of which the said writ of habeas corpus shall issue; and shall also for the first offence, forfeit to the party grieved the sum of three hundred pounds, and for the second offence, the sum of five hundred pounds.

"And be it further enacted by the authority aforesaid, that the several penalties inflicted by this Act shall be recovered by the party grieved, his or her executors or administrators, against the offender, his or her executors or administrators, in like manner as the penalties inflicted by the said Act are to be recovered.

"And, to the intent that no person may pretend ignorance of the import of any such writ, be it enacted, that all writs of habeas corpus, awarded or to be returned under the authority of this Act, shall be marked by the Court, or person respectively awarding the same, in this manner:

"By an Act passed in the thirty-first year of the reign of King George the Second.' And shall also be signed by order of the Court, or by the person respectively awarding the same.

"And be it further enacted by the authority aforesaid, that if any action, plaint, suit, or information, shall be commenced or prosecuted against any person or persons for any offence against this Act, the same shall be commenced within twelve calendar months after the time of the offence committed, unless the party grieved be then under confinement or restraint; and if he or she shall be then under confinement or restraint, then within the space of twelve calendar months after the decease of the party so confined or restrained, or his or her delivery from such confinement or restraint, which shall first happen; and such person or persons so sued in any Court whatsoever, shall and may plead the general issue, not guilty, or that he or she owes nothing; and upon any issue joined, may give the special matter in evidence: and if the plaintiff or prosecutor shall become nonsuit, or forbear further prosecution, or suffer a discontinuance; or if a verdict pass against him or her, the defendant shall recover his or her costs; for which he or she shall have the like remedy as in any case where costs by the law are given to defendants."

(*a*) The following was found among Sir Eardley Wilmot's Papers, endorsed by him, "State of the case on the Press Act. April 1758."

"A little before Hilary term twelvemonth, some applications having been made to

[82] Answer. I am of opinion, that in cases not within the Act of the 31 Car. II. writs of habeas corpus ad subjiciendum, by the law as it now stands, ought not to issue of course, but upon probable cause verified by affidavit.

A writ which issues upon a probable cause, verified by affidavit, is as much a writ of right, as a writ which issues of course.

[83] There are many other writs, besides the writ of habeas corpus, which fall exactly under the same circumstances: writs of mandamus, prohibition, 1 Syd. 65.

Mr. Justice Foster by persons in the Savoy, raised under the annual Act then in force, viz. 29 Geo. II. c. 4, for the speedy and effectually recruiting of His Majesty's Land Forces and Marines, he issued writs of habeas corpus, upon which the men were brought up, and let go by acquiescence or consent, without any return ever being made: but conceiving it to be a matter of doubt and consequence how to proceed in such cases, he desired the assistance of all the other Judges of the Court of King's Bench, to consider the said Act and what ought to be done.

"All the Judges of the Court accordingly met, and the great object of their deliberation was how they might relieve with expedition and effect, in case the great power given by the Act was abused, without defeating the end of the Act and the view of the Legislature where the power was not abused.

"They considered the matter together and separately; they talked with some of the most eminent counsel, and it has since been sifted to the bottom. The more it is examined, the more it will be found that what the Court did, was not only the best, but the sole remedy that could be devised to relieve the subject under immediate oppression from an abuse of the great power given by that Act, until the Parliament should expressly declare their pleasure in the new bill for the next year, which, from the ordinary course of business, was expected to pass in about six weeks or two months. To shew this, it may be proper,

"1st. To consider the nature of the Act.

"2d. How men, wronged by the commissioners in the first instance, might afterwards be speedily and effectually relieved.

"1st.—The Act is founded in the violation of private liberty; and the cause alledged for such violation, is the want of a speedy and effectual recruit.

"There cannot be a speedy and effectual recruit, unless the law receives a speedy and immediate execution; therefore the Parliament entrusted commissioners, named by the Act, to execute the powers therein mentioned.

"The power given to the commissioners, is to change the condition of men, under certain descriptions, into the condition of soldiers, against their will.

"The Act requires several circumstances to be observed before the condition of the recruit is to be completely changed: but when those circumstances are observed, the Act declares him a soldier to all intents and purposes whatsoever.

"The custody or imprisonment in any secure place, whether private house or prison authorized by the Act, is temporary, casual, and a mere consequence of the man's condition being changed into that of a soldier. It is only a detention, to secure him till he can join the corps; and gives him no other right to controvert his being a soldier, than he would be entitled to when he has joined the corps.

"It seems from the words and meaning of the Act, that where all the circumstances have been observed, the persons under whose care or authority the recruit happens to be delivered, are authorized to treat him as a soldier, to all intents and purposes, without being obliged to prove him within the description.

"1st. From the words:—

"Every clause is studiously penned, to avoid the possibility of a supposition that the recruit's being within the description was necessary to be proved by every person to whom he was delivered, and that the change of his condition was for ever to depend upon proving that he was within such description.

"The parish officers are directed 'to bring before the commissioners all such persons as they can find, who are or shall appear to them to be within the description of the Act.'

"And the commissioners are strictly to examine all such persons as shall be so brought before them; and if, upon examination, they shall find that such persons shall come within the descriptions therein mentioned; and the commissioners, and the officer who shall be appointed to receive the recruits, shall judge them to be



Sir R. Raymond, 4. *Supplicavit, ne exeat regnum*, the writ of *homine replegiando*; —are all writs of right; but a proper case must be laid before the Court by affidavit, before the parties, praying such writs, may be entitled to them. They are the birth-right of the people, subject to such provisions as [84] the law has established for granting them. Those provisions are not a check upon justice, but a wise and provident direction of it.

The very learned and able men who framed the 31 Car. II. could not avoid taking

such as shall be thereby intended to be entertained as soldiers in His Majesty's service, then the commissioners are to cause such persons to be delivered over to the person appointed to receive them.

"The clause enabling the parish officers, after the second meeting of the commissioners, to take up and detain, without any warrant, such persons as they should find, or should appear to them to be within the description of the Act, directs the lifting and delivering of them over at the next meeting, if judged within the description of the Act.

"The clause relating to the age, size, religion, and bodily condition of the recruits, refers to what shall appear in the opinion of the commissioners and officer appointed to receive them.

"The clause relating to the voters, is conceived in such terms as shews the validity of the lifting was not to depend upon the right to vote; but upon the recruits making it appear to the satisfaction of the commissioners then present, that he had a right to vote.

"After reading the Articles of War, the Act says, 'He shall be deemed a soldier to all intents and purposes, and shall be subject to the discipline of war, and in case of desertion, shall be proceeded against as a deserter.'

"The Acts directs many entries to be made; but directs no entry of the examination or grounds upon which the commissioners find him to be within the description of the Act.

"2dly. From the intention of the Act.

"The cause of the Act was a speedy and effectual recruit; but after all the trouble and expence the public has been at, they would scarce have the benefit of a single man against his will, if the persons to whom he is delivered, were obliged to prove him within the description: they are strangers to the proof upon which the commissioners proceeded; and if they knew it, they could not avail themselves of the same kind of proof, which the Act authorizes the commissioners to receive; for they are warranted by the Act to proceed upon the examination of the persons themselves, and to judge from what they do or do not say; but a person cannot be examined against himself in any legal proceeding.

"No officer could inquire into the qualifications of recruits brought from all parts of the kingdom. In what condition must they be, if they could not justify treating or punishing the recruit as a soldier, without proving he was within the description?

"Upon the perusal of the Pressing Acts which passed in Queen Anne's reign, many observations occur:

"The 5th of Queen Anne gives a power of review to the commissioners, at any time, which was not in the former Acts.

"The 7th of Queen Anne omits the power of review; and the proviso as to voters is varied, and describes such persons as shall make it appear that they have a vote.

"The 10th of Queen Anne is the same as the 7th; but restores the clause of review, limiting it to six weeks.

"The clause of review was omitted in the 29th George II. and in all the Acts made in this King's reign, before the 29th George II.

"The execution of the special powers given by this Act, for the purposes therein mentioned, is like no other case whatsoever. It is not like a conviction: it is not in writing: it is not by way of punishment for an offence. There is no other evidence required than what the man says, or does not say, upon his examination. If it was to be compared to an order, then the evidence need not be set forth; and there never was an instance, upon any of those Acts, of an application for a *certiorari*.

This being the nature and intent of the Act;



these writs of habeas corpus for private custody, into their consideration. Three or four years before that Act passed, [85] there had been two very great cases, extremely agitated in Westminster Hall, upon writs of habeas corpus for private custody, viz. the cases of *Lord Leigh*, 2 Lev. 128, and *Sir Robert Viner, Lord Mayor of London*, 3 Keb. 434, 447, 470, 504. 2 Lev. 128. Freem. 389. But they wisely drew the

“2d.—The second question is, what relief a man, who complained that he was wrongfully pressed by the commissioners, could have by writ of habeas corpus?

“When he was at liberty, with the regiment to which he was delivered, he could have no habeas corpus. If he happens to be secured in a private house, or public prison, or other safe place, the accidental custody gives a pretext to apply for a habeas corpus to be set at large from that restraint.

“The officer or keeper must in his return, either aver, not only that all the circumstances required by the Act were observed, but that the man was within the description; or else, that all the circumstances were observed, and rely upon them as a sufficient cause and justification, without averring the man to be within the description.

“The first form of return could only be made upon the credit of what the commissioners had done, and a presumption that they had done right.

“It is impossible for the officer or gaoler to proceed upon any other ground; and in execution of the trust reposed in him, he ought to give credit to their judgment, and proceed upon that foundation.

“In this case, the only remedy of the recruit would be an action for a false return; and no jury would give more than trifling damages against an officer acting ‘bonâ fide,’ and making a return in support of the trust which was reposed in him, the truth of which he could no otherwise come to the knowledge of.

“Suppose the return made in the other form, the observations before mentioned tend to shew that it would be sufficient. In that case, no man who admitted all the circumstances in the Act to have been observed, could be entitled to relief by habeas corpus; because upon his own shewing there appeared sufficient cause.

“In this form the King’s Counsel had prepared and settled the draft of a return: suppose that form not sufficient; the other must have been followed of course, as the only one possible to be made by the officer or gaoler.

“But to go farther; suppose the man set at large by virtue of the habeas corpus, from the custody of his temporary keeper for want of cause, or sufficient cause, shewn by the officer or gaoler, or upon any other reason; he would be in no better condition than if he had never been secured at all, and would be liable to be taken up, prosecuted, and shot for desertion.

“The end of the habeas corpus is only to set him loose from the custody, not to determine whether he is a soldier. The merits of that question could not be determined in proceeding upon a writ of habeas corpus against the gaoler or temporary keeper. The gaoler’s acquiescence to let men go, by making no defence to a writ of habeas corpus, could no more release them from being soldiers, than his voluntarily giving them leave to go.

“In this light, a discharge by habeas corpus, for want of defence by the keeper, might be a cruel snare to poor and ignorant men: no effectual relief can be given, but in some way which may, as between proper parties, decide the question whether the man’s condition was changed into that of a soldier. If such a way cannot be devised, a recruit so raised by the commissioners, must be absolutely without remedy.

“In other cases, if a man be treated as a soldier, who is not duly lifted or subject to military discipline, he has his action; nay, the officer who so treats him, may, according to the nature of the case, be criminally liable. But where a man is raised under the Act by the commissioners, though wrongfully, yet, the circumstances of the Act being observed, it is a sufficient justification for treating him as a soldier. The officer is a stranger to the grounds upon which the commissioners proceeded.

“Diligent inquiry has been made into the practice under the former annual Acts of the like kind, and no cases have been discovered of more than two or three instances, from the 2d of Queen Anne to the year 1746, of applications for writs of habeas corpus, by men pressed under the authority given by any of the Acts during that period.

“Only one return has been found, *The Queen and Chamberlayne*; and there, upon the face of the return, the Court sent the man back without any other inquiry.

line between civil constitutional li-[86]-berty, as opposed to the power of the Crown, and liberty as opposed to the violence and power of private persons. They thought this power of judging might be abused in favour of the Crown, but they saw no danger of an abuse of it as between one subject and another; and therefore they

"In the year 1746, in the case of *King and White*, the Lieutenant of the Tower made a return in the same form.

"It was impossible to say the return was not sufficient. The Court could not admit affidavits to contradict the return; for though in the case of a wife, where the cause is totally immaterial; or of a lunatic, where no legal custody under a commission is returned, affidavits may have been let in for collateral purposes; yet the truth of a return, setting forth the execution of a special authority, jurisdiction, or power, cannot be contradicted by affidavits. It is contrary to all the principles and authorities of law; and in the year 1746 there never had existed an instance.

"Had the Court then made a precedent to contradict the truth of the facts contained in a return by affidavits, it could only have been justified by the end; but it would have been dangerous, as a deviation from a general rule of law, and applicable to other cases.

"The Court took another way: upon reading affidavits, they made a rule upon the commissioners to shew cause; and for want of cause being shewn, discharged the man. After a sufficient return to the habeas corpus, the use of the writ was at an end. No relief could be given by it. The relief was given in consequence of the rule, and by virtue of the rule only.

"We were glad to follow and improve the plan of this precedent, by directing notice likewise to be given to the officers of the Crown, that Mr. Attorney General might be heard in behalf of His Majesty. The King, in behalf of the public, is alone concerned in the question, whether the recruit's condition be changed into that of a soldier.

"If that question were determined in any method where the King was really, not nominally, a party, and by his officers substantially heard or consenting; we thought the man might be discharged from the condition of a soldier, and set at liberty.

"An intimation was given to the practisers, and also in Court, of the Judges conference.

"In the first case, the then Attorney General being ill, Mr. Solicitor General came into Court and declared on behalf of the Crown, that there was no objection to discharging such men as should appear to the Court to have been unjustly pressed.

"No person ever applied afterwards for a habeas corpus, who, upon being asked which he meant, did not change his application into a motion for the rule.

"No counsel desired to argue the question, whether they ought not to have a habeas corpus instead of the rule; if they had, they would certainly have been heard; had it been insisted upon, for the more solemn determination of the question, a habeas corpus would have been granted; but it would have been cruel to the particular person not to have given notice of the result of the consultation among the Judges, or to have put a poor man to the delay and expence of litigating a point, contrary to the opinion the Court had once conceived, when he had another and easy remedy.

"The consent given on the part of the Crown was never retracted; the most eminent counsel who practise in the Court of King's Bench, have publicly averred, that the Court in fact never refused a writ of habeas corpus to any pressed man in custody; and no man, who pretended to know any thing of the matter, has from his own knowledge said the contrary. The Legislature, by the bill now in force, made alterations tending to explain the law in the same way; for they have directed that the commissioners should levy such able bodied men, who could not, upon examination, prove themselves not to be within the description of the Act.

"They have given a power of review to the commissioners themselves within ten days; and if the recruit is discharged, the levy money is directed to be returned; and they have likewise prescribed a particular form of entries to be made in columns; but no entry is required of the proof or examination upon which the recruit is raised.

"By this Act the Legislature gave more than a silent sanction to what the Court has done, and strengthened the reasons for pursuing it. There is now depending a case upon the rule, in which no habeas corpus could possibly have issued."



applied the remedy to the evil they had [87] seen and experienced, and left the law as they found it in respect of private persons.

There is no such thing in the law, as writs of grace and favour issuing from the Judges: they are all writs of right; but they are not all writs of course.

[88] Writs of course, are those writs which lie between party and party, for the commencement of civil suits: and if they are sued without a good foundation, the common law punishes the plaintiff for suing out the writ vexatiously, by amercing him "pro falso clamore." And by the statute law, he is to pay the costs of the suit.

But the writ of habeas corpus is not the commencement of a civil suit, where the party proceeds at the peril of costs, if his complaint is a groundless one: it is a remedial mandatory writ, by which the King's Supreme Court of Justice, and the Judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places. 2 Cro. 543. Palmer, 54. And, as all these remedial mandatory writs were, originally, rather the suits of the King than of the subject, the King's Courts of Justice would not suffer them to issue upon a mere suggestion; but upon some proof of a wrong and injury done to a subject.

Writs of habeas corpus, upon imprisonment for criminal matters, were never writs of course: they always issued upon a motion, grafted on a copy of the commitment; and cases may be put in which they ought not to be granted. 1 Lev. 1. Comber. 74. Habeas corpus was denied to one committed to Bridewell for lewdness. 3 Bul. 27. 2 Mod. 306. If malefactors, under sentence of death in all the gaols in the kingdom, could have these writs of course, the sentence of the law might be suspended, and perhaps totally eluded by them.

[89] The 31 Car. II. makes no alteration in the practice of the Courts in granting them: they are still moved for, in term time, upon the same foundation as they were before: and when a single Judge in vacation grants them under the 31 Car. II. in criminal cases, a copy of the commitment, or an affidavit of the refusal of it, must be laid before him. He must judge, even in that case, whether treason or felony is specially expressed in the warrant of commitment: and there have been a great number of cases where a doubt has arisen on the frame and wording of the warrant; so that even upon the Act, the probable cause of bailing is really disclosed to the Judge, unless the copy of the commitment is refused, and then the law will presume every thing against it; and in cases out of the Act, which take in all kinds of confinement and restraint, not for criminal, or supposed criminal, matter, and to which this question relates, it has been the uniform uninterrupted practice, both of the Court of King's Bench, and of the Judges of that Court, that the foundation, upon which the writ is prayed, should be laid before the Court or Judge who awards it.

The reasons of guarding the writ in this manner, I take to be these: there are many kinds of private restraint that are lawful. There was a much greater number formerly. The Reformation opened the doors of religious prisons; and the abolition of military tenures unfettered an unhappy class of men, called villeins, who lived in a state of captivity under their masters.

There are many kinds of restraint that exist at this day; some in the nature of punishments. In domestic government, which takes in the case of husbands, fathers, guardians, and masters, the law [90] authorizes restraints, in order to enforce a performance of those natural, moral, and civil duties, which wives, children, wards, and apprentices, owe to their superiors, in their several relative capacities. These domestic governments could not subsist without such authorities; and therefore all States have endeavoured most anxiously, some in a greater degree, and others in a less degree, to preserve the greatest reverence for them.

The wisdom of our ancestors would not suffer this kind of authorities to be broken in upon wantonly, upon mere suggestion, and without seeing some reason for an interposition; because they saw it would have encouraged disobedience and rebellion in private families; and, at all events, must have abated that awe and respect which act so materially in the support of those authorities. They may be abused: if they are, the law says, let it be shewn, and the party shall have relief; but if he cannot shew they are abused, he is entitled to none. The legal presumption is certainly in



favour of these authorities ; the law will not presume they are unduly or irregularly executed.

But if these writs were to have issued without any case made, they must have issued indiscriminately, in the cases of lawful restraints, as well as unlawful ones ; which would have been levelling all distinction between them, and have been subjecting the authority of fathers, husbands, guardians, and masters, to be canvassed and questioned in the same manner, and upon the same suggestions, as the extravagant outrages of persons acting without any authority at all.

It would have been proceeding upon an inversion of the legal presumption, and would thereby have destroyed all that order, discipline, and subordination in private families, which lead men into a habit of obedience, and dispose them early to obey the laws of their country.

When a Judge is called upon for a habeas corpus, in order to bail a man for a bailable offence, the injustice of the imprisonment is obvious and self-evident : for imprisonment before trial, being only to secure his being amenable to justice ; if that security can be obtained by bail, in bailable offences, it is unjust that he should be kept in prison. The authority which committed him ought to have bailed him.

The authorities I have mentioned are equally legal, and therefore within the spirit and reason of the Habeas Corpus Act itself. The injustice of the imprisonment ought to appear in the first instance, before the party has a right to demand the remedy.

The law laid this check, to prevent that scene of disorder and confusion which must arise, if wives, children, wards, and apprentices, or any other person in their name, and on their behalf, were to be at liberty, without any foundation or cause shewn, to force a production of them in Westminster Hall, or before a Judge, wherever he should happen to be, whenever they pleased, and as often as they pleased, at a risk of having them rescued out of their hands, "in transitu," and without a possibility of a satisfaction from any body.

There are many other lawful restraints besides those arising under the authorities I have mentioned :—All persons who are in custody upon civil process, or under special authorities, created by Act of Parliament, proceeding "civiliter," and not "criminaliter," against the persons who are the objects of them :—Persons who are bailed, paupers in hospitals or workhouses, madmen under commissions [92] of lunacy, or confined by parish officers, under the Vagrant Act of 17 Geo. II. are all under a lawful confinement.

If all these persons were to have had these writs of habeas corpus of course, without shewing any cause or foundation for granting them, it would have been suffering this great remedial mandatory writ to have been used as an instrument of vexation and oppression ; it would have become a weapon in the hands of madmen, and of dissolute, profligate and licentious people, to harass and disturb persons acting under the powers which the law had given them.—One most frightful instance occurs : the case of a crew performing quarantine.—If this writ were to issue of course, it might bring back pestilence and death along with it.

The check upon the writ, by requiring a probable cause to be shewn before it issues, is only saying, "shew you want redress, and you shall have it : " and if a person cannot disclose such a case himself, as to shew he is aggrieved when he tells his own story, and is not opposed or contradicted by any body ; it is decisive against his being in such a condition as to want relief.

Besides the practice, which is a decisive evidence of the law, it appears from a case (a), Hilary, 8th King William, called *Griffiths's case*, that the Court would not grant this writ, until a probable cause was laid before the Court that the party was entitled to it.

When this writ was first applied to relieve against private restraints, does not appear ; but whenever it was, the manner of issuing it seems to have been adopted from that of the writ of *homine replegiando*, which was the true common law remedy for the assertion of liberty against a private person : and that writ never issued of course, but was applied for by petition to the Great Seal, and an affidavit [93] made, disclosing the foundation on which it was prayed. State Trials, 3 vol. 632. 2 Lill. Pr. Reg. 23. 2 Freeman, 27, *Jennings's case*, upon affidavit made, that Jennings had got a young heiress into his custody without the consent of the guardian, upon the

(a) From a manuscript of Lord Raymond, in possession of Mr. Filmer.

motion of the Attorney-General, a *homine replegiando* was granted. And as the law checked that writ of *homine replegiando*; the habeas corpus, which seems by practice to have been substituted in its place, took the check along with it.

Careful as the law is to prevent this writ from being abused, it cannot always prevent it: for if a man does not disclose the whole case, it may issue sometimes where it would not have issued, if the case had been fairly stated.

I will mention one case, which happened last term, and which shews the reason of the law, in expecting to see a full state of the case before the writ issues.

A gentleman applied to a Judge of the Court of King's Bench in vacation time, for a habeas corpus to his wife's mother, to bring up his wife, upon an affidavit of detention of her from him. As it was near term, the writ was returnable first day of term.

The fact was, that they had entered into articles of separation, which had determined his right to the custody of his wife; the mother brought the wife into Court, and returned the articles of separation. The return was of great length, and the mother was put to a very great expence in the making it, and if she had brought her daughter from the remotest part of the Kingdom, she could have had no satisfaction at all.

If the affidavit had disclosed the articles of separation, as it ought to have done, the Court, or Judge, would have said, "You have no [94] right to the relief you pray, and therefore must not put the parties to costs and vexation, in a case which is remediless of your own shewing."

2d Question. Whether in cases, not within the said Act, such writs of habeas corpus, by the law as it now stands, may issue in the vacation by fiat from a Judge of the Court of King's Bench, returnable before himself?

Answer. I am of opinion that in cases, not within the Act of the 31st Car. II. writs of habeas corpus *ad subjiciendum*, by the law as it now stands, may issue in the vacation by fiat from a Judge of the Court of King's Bench, returnable before himself.

From the best inquiry I can make, writs of habeas corpus, in criminal cases, have been awarded by the Chief Justice of the King's Bench, and the Judges of that Court, long before the 31st Car. II.

The files of the fiats for writs made out in the Crown Office before the reign of Car. II. are not to be found there, except for four or five terms in Queen Elizabeth's time, one or two in James I. and for six or seven terms in Car. I.

No information is to be had from the records; but there are traces from cases in print, and from fiats since the Restoration, and before the 31st Car. II. that there had been a kind of unsettled practice for the Chief Justice, and Judges of the Court of King's Bench, granting them in vacation; and as the Judges of that Court are justices of peace all over the kingdom, they have a power of bailing, as incident to that authority; and I don't see how that power of bailing could well be exercised, without removing the person to be bailed before them by habeas corpus.

*Catesby's case* in vacation, is in Hilary, 43 Eliz. in the 7th vol. of the State Trials, 175.

[95] I have a list of fiats for habeas corpus, since the Restoration, and before the 31 Car. II. Thirty of them appear to have been granted and made returnable before the Judges in vacation. Since the 31 Car. II. these writs have issued, in criminal cases, under that Act, when granted at the instance of a subject.

As to writs of habeas corpus in cases of private custody, I cannot ascertain the commencement of their being first issued by the Court.

By the common law, the liberty of a man's person against private persons, acting without any legal authority, was protected in this manner:

1st. First, the law gave every man a right to repel force by force, and to defend his liberty in the same manner as he might his life.

2d. As every unlawful imprisonment was a breach of the peace, it must be proceeded against as such, by justices of peace; and the delivery of the party perhaps enforced by a rigorous execution of that authority. It might also be punished by indictment. Satisfaction might likewise be recovered for the injury, by an action of false imprisonment.

The writ of *homine replegiando*, as mentioned before, was the only specific remedy provided by the common law, for the protection and defence of his liberty, against any private invasion of it.



Though there is an "obiter" saying by Justice Wild, in Carter, 222, of a case where the Court sent a habeas corpus to Dr. Prujean, beyond sea, for Sir Robert Carr's brother, yet it is so loosely stated, I lay no stress upon it.

[96] The first case is the case of *Sir Philip Howard*, mentioned in *Lord Leigh's case*, and therefore must have been before that time. *Lord Leigh's case* was in the 27 Car. II. where habeas corpus was granted to bring up his wife. And the case of *Viner and Emmerton* was in the 27th year of Car. II. where a habeas corpus was granted to Viner to bring up his daughter-in-law, viz. his wife's daughter by a first husband. From that time to this, the Court has constantly granted them.

When the practice of the Chief Justice, and the Judges of the Court of King's Bench, granting these writs in vacation, in cases of private custody, first began, does not appear; but in all probability, it was either coeval with what the Court did, or very soon followed it; because the principle which supports the one, concludes as forcibly to the supporting the other: and the principle is this; if the writ is applicable to one species of unlawful imprisonment, it is in reason equally applicable to another. They are cases "ejusdem generis;" and therefore let the usage of issuing this writ have begun sooner or later, it was in the first instance a warrantable extension of a legal remedy in one case, to another case of the same nature; and I consider the usage in this case as the voice and testimony of the Judges, for near eighty years together, to the legality of the very first application of it.

The principle upon which the usage was founded, lay in the law; and the usage is nothing but a drawing that principle out into action, and a legal application of it to attain the ends of justice. It is upon this foundation only, that an infinite variety of forms, rules, regulations, and modes of practice in all Courts of Justice must stand, and can only be supported.

[97] In many instances, an usage for some time is considered as an evidence of an antecedent immemorial usage, and therefore may be called the common law. 2 Co. 16 b., *Lane's case*. "The customs and courses of the King's Courts are as a law. The course of a Court makes a law."

But when the commencement of an usage can be fixed and ascertained, it cannot be supported by a presumption, and the legality of the usage must then depend upon some other principle; and that principle is this, "ubi eadem est ratio, ibi idem est jus;" a writ applicable to one kind of imprisonment, is in reason equally applicable to another.

It would be endless to enumerate instances where the King's Supreme Courts of Justice in Westminster Hall have, for the ease and benefit of the suitors of the Court, reformed, amended, and new moulded and modified their practice, as from experience and observation they found it would best advance, improve, and accelerate the administration of justice; and all acts done by Judges at their chambers, and by officers of the Court, either in term or out of term, are under a delegated authority from the Court. They are controulable by the Court, and obedience to them must be enforced by the Court. And the acts done in Court and out of Court, taken together, form that system of practice by which the benefit of the law is dealt out to the people.

I will mention an instance where a writ has been extended by usage to a purpose much beyond the original intention of it, viz. "ne exeat regnum;" which is a State writ to restrain people from going abroad; first used to hinder the clergy from going to Rome; then extended to laymen, machinating and concerting measures [98] against the State; now applied to prevent a subterfuge from the justice of the nation, though in matters of private concernment, in order to get bail for an equitable demand, upon affidavit of intention to go abroad.

The legality of that application was settled in Car. II.'s time, upon an usage first begun in the time of James I. 1 Ch. Ca. 115. *Read against Read*, 2 Ch. Ca. 245. If usage, where the commencement of it was known, could legitimate a process which is to take away a man's liberty, surely usage, founded upon a legal principle, will legitimate a process which is applied to protect it.

I will mention a case in the Year Book 13 Hen. VII. fol. 17, where the mode of proceeding, in one kind of action, was translated to another, in favour of liberty. Action of trespass.—Plaintiff sets forth that he was a freeman, and that the defendant claimed him to be a villein, so that he durst not go about his business, and that the defendant had taken some of his goods; and he prayed that the defendant might



give security to deliver them, and not take any more of them, or his body, pending the writ. This was the practice in a "homine replegiando;" and in a "homine replegiando," the plaintiff was to give security to deliver his body in case the action was determined against him.

It was resolved they should find security to one another, as if it had been a "homine replegiando;" and the Court said, "it was good discretion to favour liberty as much as might be by reason." They applied the provisions applicable to one writ, to another writ, because it fell under the same reason, and was to favour liberty.

It has been lately said, that the practice of issuing these writs by the Judges in vacation, was taken up under an apprehension of their being within the 31 Car. II. and that they have been marked in the [99] Crown Office by that statute. How such an apprehension or practice could have prevailed, is to me inexplicable! No man could ever have such an apprehension who had ever read the Act: it is confined in words, and by the nature almost of every provision in it, to criminal, or supposed criminal, matter.

As to marking them by the statute, as there were fifty writs in criminal cases, for one writ in the case of private custody, the mistake might easily be made; if observed, could do no harm: it might quicken the returns; or be an inaccuracy in the office: I lay no stress upon it; because we see some few writs of habeas corpus, issued by the Court, marked by the statute, and yet the Act gives the Court of King's Bench no power of awarding these writs, but leaves that power exactly as it found it; and therefore it might as well be inferred, that the Court thought their power was by the statute, when their writ was marked by the statute, as that a single Judge thought his power was by the statute, because the writ was marked so.

I will never offer such an indignity to the very great and eminent men who have presided in that Court, and to the succession of Judges who have sat in it for near eighty years, as to say, that they founded this practice upon a mistake which could not have infected the meanest capacity.

I must say they never read the Act if they thought so. And *Griffiths cases*, already cited, shews that these kinds of habeas corpus were understood not to be within the Act.

Lord Chief Justice Hale does say, in second volume of *Pleas of the Crown*, 145, that this writ is not regularly to issue but in the term time, when the Court may judge of the return, or bail or discharge the prisoner; and in page 147, he says, it seems, "regularly," [100] this writ should issue out of the Court of Chancery in vacation time, and out of the King's Bench in term time.

That word "regularly," alludes to some unsettled practice of the Judges issuing that writ in vacation.

This was a noble, but a posthumous, work, not fitted by him for the press, nor corrected; and, I have heard, a collection of notes made by him before the Restoration.

If it was, then the precedents and practice since the Restoration, were not taken into his consideration; and yet the practice after the Restoration, and even his own practice, varied the law extremely from what he asserted it to be in his book: for he says, that this writ issues for matter only of crime; and that assertion is confuted by his own practice, because he was Chief Justice when the writs were awarded in *Lady Lough's case*, and *Viner's case*, in the 27 Car. II. which were not for matters of crime, but for private custodies; and *Viner's case* seems to have been as much agitated as any case could be, and there never was the least objection to the Court's right of awarding the writ. That circumstance is decisive against his authority upon the nature of this writ; or rather a declaration that he changed his opinion, and thought it might issue for other matters.

In 2 Ins. 53, and 4 Ins. 81, 182, Lord Coke says, "It ought to issue out of the Court of King's Bench in term time, and out of Chancery either in term time or vacation." All writs, in supposition of law, do issue in the term; and he might mean no more, than that Judges could not grant them by their own proper authority, as separate and detached from the Court, as they issue warrants.

First, this was no judicial determination; a mere "prolatum," which, as to the Court of Chancery, is very doubtful. For no writ [101] of habeas corpus can be found to have ever issued out of the Court of Chancery, except some returnable in the

House of Lords. The 16 Car. I. takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the writ had issued out of that Court in vacation. And the 31 Car. II. seems to proceed upon a supposition, that it could not issue out of the Court of Chancery, because the 10th section expressly empowers the Court of Chancery to grant it, which would have been unnecessary, if it could have granted the writ before; and it only shews, what I really take to be the truth of the case, that there was no settled fixed practice, then established, of their issuing in vacation; but if they could not, nor ever did issue out of the Court of Chancery, it is the strongest reason that can be urged in support of the practice of issuing these writs by the Judges of the Court of King's Bench, in vacation, before the statute, because there could not otherwise have been a perfect and complete remedy at all times for the subject against imprisonment, for a bailable offence at the common law, and before the Statute of 31 Car. II.

That Act proceeds upon a supposition of a practice of that kind then prevailing. To what purpose is the writ to be marked by the statute, if the Judges, in vacation, could issue no writ of habeas corpus ad subjiciendum, but under this statute? That direction was to distinguish this writ, when issued at the suit of a subject to be bailed, from every other writ of this nature, which the Judges in vacation might issue: not meant to give a power which they did not exercise before, but to reduce an unsettled, informal, vague practice, into a formal regular system, as to the bailing for bailable offences, and to correct the abuse of any power which they had in fact exercised.

[102] But upon Lord Coke's own principles, suppose no such practice when he wrote, yet a subsequent practice, founded upon legal principles, and an experience of its utility, has made the law; "*per varios actus legem experientia fecit.*" Lord Coke's averment has not the weight it would have had, if made after 31 Car. II.; according to his own principles, the practice would have made it law; and as it appears by the flats between the Restoration and the 31 Car. II. that three Chief Justices, Foster, Hyde, Keyling, and four Judges of the Court, Morton, Twisden, Mallet, and Wyld, granted these writs in vacation, and the practice is warranted by legal principles, and it is admitted they were always grantable "*pro Rege,*" (which establishes the vacation right) the opinion both of Lord Hale and Lord Coke may be true; and, upon Lord Coke's own principle, if he had written twenty years after the Restoration, instead of thirty years before it, he must have been of the opinion I now give.

As to the 4th (a) and 5th questions upon your Lordships paper, viz.

4th question. Whether, at the common law, and before the Statute of Habeas Corpus in the 31 King Car. II. any, and which, of the Judges could regularly issue a writ of habeas corpus ad subjiciendum, in time of vacation, in all or in what cases particularly?

5th question. Whether the Judges at the common law, and before the said statute, were bound to issue such writs of habeas corpus ad subjiciendum, in time of vacation, upon the demand of any person under restraint, or might they refuse to award such writ if they thought proper?

[103] Answer. I think the Chief Justice of the Court of King's Bench, and the other Judges of that Court, did in fact issue them in vacation, before 31 Car. II. in criminal cases, and might do so on principles of law; possibly it might be done at first for the King only, and afterwards for the subject; but I do not think there was any settled course of practice observed in granting them before the statute, and that such unsettled manner of practice produced the statute in the cases of bailable offences: and, in cases out of the Act, usage has now fixed a regular course or manner of granting them; but I desire to be understood, that the present usage of granting them must be supported upon such principles of law, as would have supported the granting them when such usage first began. And I think they were not bound to grant them upon the demand of any person under restraint, at the common law, and before the statute, any more than they are bound to grant them now upon demand. There must have been some case made, before they could be bound to grant them at any time.

6th question. Whether the Judges, at the common law, and before the said statute, were bound to make such writs, so issued in time of vacation, returnable

(a) At the request of the Judges, the 3d question was waived by their Lordships.



"immediaté;" and could they enforce obedience to such writ so issued in time of vacation, if the party served therewith, should neglect or refuse to obey the same, and by what means?

Answer. I am of opinion, that the Judges at the common law, and before the said statute, were not bound to make writs of habeas corpus ad subjiciendum, issued in vacation time, returnable "immediaté;" because I find by the files of fiats for these writs before the statute, that they were sometimes made returnable "immediaté," [104] and sometimes in term time; and I think the Judges cannot enforce obedience to any writs of habeas corpus, issued in time of vacation, (whether they issue in cases within the 31 Car. II. or in cases out of that Act) if the party served therewith, should neglect or refuse to obey the same, by any means but by attachment for a contempt, which can only issue out of Court in term time.

7th question. Whether, if a Judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, had the subject any remedy at law, by action or otherwise, against the Judge for such refusal?

Answer. I think that the subject had no remedy at law, by action or otherwise, against the Judge for such refusal. The denying a writ stands upon the same ground as any other breach of duty.

8th question. Whether, in case a writ of habeas corpus ad subjiciendum, at the common law, be directed to any person returnable "immediaté," such person may not stand out an alias and pluries habeas corpus, before due obedience thereto can be regularly enforced by the course of the common law?

Answer. I am of opinion, that in case a writ of habeas corpus ad subjiciendum, at the common law, be directed to any person returnable "immediaté," the Court, upon the affidavit of the service of the writ, will grant a rule for an attachment.

By the course of the common law, he might have stood out an alias and pluries; but by practice the course is now altered, and in many cases the Court has enforced obedience to a writ for private restraints, in the first instance, by attachment, for the furtherance of justice. The method of proceeding by alias and pluries, is gone [105] into disuse, in almost all cases, and the process by attachment substituted in its stead; and that practice stands upon this legal principle;—that disobeying the King's writ is a contempt, and equally a contempt to disobey the first writ as the last.

9th question. Whether the said Statute of the 31 Car. II. and the several provisions therein made for the immediate awarding and returning the writ of habeas corpus, extend to the case of any man compelled, against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal, matters?

Answer. I think they do not extend to the case of a man so compelled; because the person who compels a man against his will, in time of peace, either into the land or sea service, without any colour of legal authority, is the criminal, and not the man impressed. And I think that Act doth not extend to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal, matters. \* \* \* \* \*

10th question. Whether, in all cases whatsoever, the Judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the Judges, by the clearest and most undoubted proof, that such return is false in fact, that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?

[106] Answer. I am of opinion, that no cases whatsoever, the Judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them, if it shall most manifestly appear to the Judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice. But by the clearest and most undoubted proof, I mean the verdict of a jury, or judgment on demurrer, or otherwise in an action for a false return: and in case the facts averred in the return to a writ of habeas corpus, are sufficient in point of law to justify the restraint, I am of opinion, that the Court or Judge, before whom such writ is returnable, cannot try the facts averred in such return, by affidavits, in any proceeding grafted upon the return to such writ of habeas corpus.



The clearest and most undoubted proof in the law, is the verdict of a jury; and if the facts, set forth in a return, are disproved by a verdict, I think the Judges are not bound by those facts in any case whatsoever, from discharging the person brought up before them; but as I presume the question means, "proof by affidavit," in order to examine the truth or falsity of a return; I shall consider the question in that view.

To get at the bottom of it, the nature of this writ must first be considered: it is a demand by the King's Supreme Court of Justice to produce a person under confinement, and to signify the reason of his confinement.

In imprisonment for criminal offences, the Court can act upon it only in one of these three manners:

[107] 1st. If it appears clearly that the fact, for which the party is committed, is no crime; or that it is a crime, but he is committed for it by a person who has no jurisdiction, the Court discharges.

2d. If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction; or it appears to be a crime, but a bailable one, the Court bails him.

3d. If an offence not bailable, and committed by a competent jurisdiction, the Court remands or commits.

The nature and quality of the fact with which the party is charged, and the jurisdiction which has taken cognizance of it, are to be considered on the return; but the existence of the fact, that is, whether such a fact was committed, or whether there is such a warrant of commitment as the gaoler has returned, is a matter which belongs "ad aliud examen." The Court says, "Tell the reason why you confine him." The Court will determine whether it is a good or bad reason; but not whether it is a true or a false one. The Judges are not competent to this inquiry; it is not their province, but the province of a jury, to determine it: "ad questionem juris, non facti, judices respondent." The writ is not framed or adapted to litigating facts: it is a summary short way of taking the opinion of the Court upon a matter of law, where the facts are disclosed and admitted; it puts the case exactly in the same situation as if an action of false imprisonment had been brought, and the defendant had set forth a series of facts to justify the imprisonment, and the plaintiff had demurred to the plea. A return is the same as the justification demurred to; but, in both cases, if the facts are controverted, they must go to a jury; and when the return to a habeas corpus is made and filed, there is an end of the whole proceeding, and the [108] parties have "no day" in Court; and therefore it is impossible that a proceeding, by way of trial, should be grafted upon it.

All the arguments upon the habeas corpus, in the seventh volume of the State Trials, 123, 156, take it for granted that it is impossible to go out of the return; and Mr. Calthorp, who was recorder of London, a very ingenious man, and argued for the subject, lays it down, "that it ought to be precise and direct, so as to be able to judge of the cause, whether sufficient or not. For there may not any doubt be taken to the return, be it true or false; but the Court is to accept the same as true; and if it be false, the party must take his remedy by action upon the case."

Mr. Selden likewise in his argument in the same book, page 156, says, "The keeper of the prison returns by what warrant he detains the prisoner, and with his return fixed to his writ, brings the prisoner to the Bar at the time appointed: when the return is thus made, the Court judgeth of the sufficiency or insufficiency of it, only out of the body of it, without having respect to any other thing whatsoever, that is, they suppose the return to be true, whatever it be; if it be false, the prisoner may have his action on the case against the gaoler that brought him." And it is for this reason the law requires such exact critical certainty in returns, because the party can have no answer to it upon the return. Nothing can be pleaded to it. It must be taken to be true, until twelve men, upon their oaths, have said that it is false.

To enter into a disquisition of this sort upon affidavits, would be confounding the offices of judge and jury, and introducing a mode of trial where no issue is or can be joined. The parties, in such a summary way of trial, must lose the benefit of a "viva voce" examination, where the looks, the manner, and deportment of the witness, are extremely material to confirm or discredit his testimony: it is found by the experience of ages, that nothing does so effectually explore the truth as a cross-examination, which strikes so suddenly that fiction can never endure it.

Another decisive reason against this mode of trial, is, that there is no compulsory

method of forcing men to swear affidavits; so that if a person were obliged to prove the truth of his return by affidavit, he is totally destitute of any means of obliging men to make affidavits to prove them.

Another reason is, that the parties are entitled to no costs upon the return to a habeas corpus; and if the Court pronounces a wrong judgment upon the facts, there is no method of controverting it. But in an action for a false return, witnesses may be compelled to appear, and must be examined "viva voce." Costs will follow the event of the trial. If the verdict is false, or contrary to evidence, the law has established a legal method of controverting it.

Writs of mandamus stood exactly upon the same foundation. They are both the King's mandatory writs, issued at the instance and for the relief of the subject. The answer to them shall be taken to be true, till it has undergone that examination which the wisdom of our ancestors has established for the decision of facts. And the law gave such credit to returns of these writs, that they would not even suffer the facts to be denied and brought to trial before a jury in that course of proceeding. "You have asked a question; you shall take the answer as it is given you: if it is insufficient in point of law, the Judges will give instantaneous relief; if it is false in [110] fact, you have received an injury; vindicate yourself against that injury by an action, and when you have proved the fact to be false, you will be entitled to a complete relief."

This rule was adhered to so strictly, that even in the case of annual offices in corporations, where the offices would expire before the truth or falsity of a return to a mandamus could be tried in an action for a false return, the law would not suffer the return to be traversed.

In 9th Queen Anne, an Act of Parliament was obtained, to permit the traversing returns to mandamus's for such offices as are within that Act; and all offices, not within that Act, stand as they did at the common law; and the facts, though ever so false, cannot be disproved but in an action for a false return, or in some cases by an information.

This is a strong Parliamentary declaration of what the law is, upon returns to writs of mandamus, which are always considered as standing upon the same foundation as returns to writs of habeas corpus.

I have looked through the books as carefully as I can, and so far from finding an instance of their being controverted by affidavit, where a person has been in custody of an officer under a legal authority, there is not an instance where the party is let in upon the record of the return to traverse any of the facts contained in it; but if that might have been done, yet it does not contradict my assertion, because a traverse carries it to its proper manner of trial, a trial by jury.

There are two cases, *King and Gardiner*, Cro. Eliz. 821. Trem. 354. *Swallow and The City of London*, 1 Syd. 287, where facts, consistent with the return, have been let in to be averred: I will [111] cite them, because they shew that even facts, confessing the truth of the return, and avoiding it, must go to the jury.

A bailiff going to arrest a justice of the peace, he carried with him a hand gun: the 33 Hen. VIII. prohibits all persons from carrying such weapons. The justice sends out his servant and apprehends him for carrying this hand-gun; the justice convicts him upon the statute for the penalty, and sends him to gaol till he paid the penalty. Gardiner brings a habeas corpus, and removes himself into Court. The return was the warrant of execution, where the fact of his being a sheriff's officer did not appear; but the matter being disclosed to the Court, it was thought to be no offence, and that a minister of justice might carry a hand-gun. How was it to be come at? This was a fact which did not contradict the return, but confessed and avoided it; and yet the Court would not interpose by affidavit: they ordered a plea to be put in, comprising the whole matter, and upon the King's coroner and attorney confessing the plea, the man was discharged. But if it had been controverted, the plea put it into such a method, as would bring the fact to that form of trial, which the law has established as the best for investigating truth.

In the other case, *Swallow* was committed by the Court of Aldermen to Newgate, for refusing to accept the office of alderman, to which he had been elected by the ward where he lived; he was brought up by habeas corpus; after the return filed, it was moved for him to have leave to plead to the return, that he was an officer of the Mint, and by charter exempt from all offices—not a hint at an affidavit, and they put him to a writ of privilege, besides the plea; and as facts confessed and avoided the



return, it was ad-[112]-mitted : but still it brought the point to trial by jury ; and it was agreed in that case, that matter, contrary to the return, could not be pleaded, but the party is put to his action for the false return.

It appears by Sir G. Treby's report, February 1688, that the House of Commons came to twenty-eight resolutions, to be carried into the Bill of Rights. Many of them were afterwards dropped, and amongst the rest, the twenty-fifth, which was, "that the subject should have liberty to traverse returns to writs of habeas corpus and mandamus."

This doctrine is echoed through all the books for three or four hundred years together. Y. B. 9 Hen. VI. fol. 44. Babington, who was then Chief Justice ; "If the cause appear to us sufficient in itself, notwithstanding it be false, it is enough for us upon the return, which the whole Court agreed. And if he had returned that he was his villein, this shall not make an issue here, whether he be his villein or not : wherefore, if you cannot prove but that the cause is sufficient in itself, he shall be sent back again." 11 Coke 99, *Bagges's case*. 12 Coke 129, *Hawkeridges case* : "that upon an insufficient return, the party must be bailed or discharged ; otherwise, if return shall be sufficient, when it is false." Godbolt, 129. If the return is false, the party cannot be delivered. 8 Co. 127 b.

I find no authority which warrants a difference between returns, when filed to writs of habeas corpus in cases of private custody, and of public custody, where the facts justifying the imprisonment have been set forth ; that is, where there has been a full, complete, sufficient return.

For as to returns of process, which are to bring parties into Court, in order to have the right tried and examined, when the Court is [113] proceeding not "legem dicere," but only "sistere in iudicio," the Court often proceeds in a summary way upon such returns for the expedition of justice ; the Court will not see their process disobeyed and eluded by tricks and falsities ; and the case of *Emerton and Viner*, which was in Hilary term, 26 and 27 Car. II. and Easter and Trinity terms, 27 Car. II. seems to have proceeded upon this principle. It is reported in 3 Keb. 434, 447, 470, and 504. 2 Lev. 128. Freeman, 389, 401, 522.

I will state the case particularly, as it appears upon the record. In Hilary term, 26 and 27 Car. II. a habeas corpus issued to Sir Robert Viner, Lord Mayor of London, for the body of Bridget, the only daughter and heir of Sir Thomas Hyde. (Note, Sir Robert Viner had married Lady Hyde, the mother of Bridget, who was then dead.) In the same Hilary term, an "alias" habeas corpus issued under the penalty of £40 ; and afterwards in the same term, a "pluries" habeas corpus issued under the penalty of £500.

Sir Robert Viner to the "pluries" returned, that Bridget, the only daughter and heir of Sir Thomas Hyde, Knight, mentioned in the writ, at the time of the receipt of the aforesaid writ, or ever afterwards to that time, was not in his custody, as by the said writ is supposed ; and for that reason he could not have the said Bridget before the King at the day and place mentioned in the writ, as by the said writ he was commanded.

A rule was then made that the return should be filed, and counsel be heard thereupon the next day. Upon that next day, the day after was given to Sir Robert Viner's counsel to speak to the return, and upon that next day, which was Saturday, this rule was made. "Upon the undertaking of Mr. Jefferys, as counsel for Sir Robert [114] Viner, upon the writ of habeas corpus for the body of Bridget Hyde, that the said Robert Viner should bring the said Bridget into Court on Wednesday next, it is ordered, that no process in the mean time should be made out thereupon against the said Sir Robert Viner."

Upon the Wednesday, the following entry was made : "Bridget the only daughter and heir of Sir Thomas Hyde, Knight, being brought here into Court, in the custody of Sir Robert Viner, Knight, desired to remain in the custody of the said Sir Robert Viner." Upon the Friday afterwards, which was either the last day of the term, or very near the last day of the term, the following rule appears to have been made : "It is ordered, that Sir Robert Viner, before the end of next week, shall bind himself before the justices of this Court, or one of them, in a recognizance of £40,000 upon condition that the said Sir Robert Viner, before the end of the next week, between the entering into that recognizance, and one month next after Easter then next ensuing, should not, directly or indirectly, cause or procure, or knowingly consent,



that the said Bridget, then being in the house of the said Sir Robert Viner, should be married or contracted in marriage with or to any person whatsoever, or should be solicited in order to marry with any person whatsoever, or should be delivered into the hands or custody of any person whatsoever, out of the custody of the said Sir Robert Viner; and if the said Sir Robert Viner shall not enter into such recognizance before the end of the next week, then let a writ of attachment issue against him for a contempt: and it is further ordered, that the said Sir Robert Viner shall permit Lady Acheson, the godmother, and the uncles and aunts of the said Bridget, and the sons and daughters of the [115] said uncles and aunts (except John Emerton, one of her cousins) to have access to her, in order only to visit her, every Monday, Wednesday, and Friday, in every week, between the time of entering into the said recognizance and one month next after Easter, between the hours of four and seven in the afternoon: and it is further ordered "by the consent of counsel on both sides, "that the several affidavits now delivered here into Court, of and concerning the said Bridget, should be filed here in Court upon record." No affidavits are mentioned or taken notice of in any of the subsequent rules.

These are all the rules which appear to have been made in Hilary term; but Emerton brought an ejectment in that Hilary term, upon the demise of himself and Bridget his wife, for a messuage and some lands in North Mymms, in the county of Hertford, in order to establish his marriage, and that ejectment appears by the record to have been tried upon Tuesday next after five weeks from the Feast of Easter; and after this trial at Bar, by which Mr. Emerton established his marriage with Bridget Hyde, and upon the very same day of the trial, a habeas corpus issued to Sir Robert Viner, tested 11th May, to bring up the body of Bridget, the wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, returnable on Friday next after the morrow of the Ascension; then an "alias" issued, tested 14th of May, and then a "pluries" issued, tested 15th May; and to all these writs of habeas corpus Sir Robert Viner made the same return, which was, "that Bridget, the wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, in the said writ mentioned, at the time of the receipt of the aforesaid writ, or of any [116] other writ of the King to him directed, or ever afterward to this time, was not, nor yet is, in his custody, as by the said writ is supposed, and for that reason he could not have the said Bridget at the day and place mentioned in the said writ, as by the said writ he was commanded." And upon the same day that these writs were returned, it was ordered, that the returns should be filed; and it does not appear that there were any other proceedings on those returns in that term.

But in the beginning of Trinity term, there appears to have been a rule made in the following words: "It is ordered, that unless Sir Robert Viner shall immediately permit William Emerton and Owen Davies to see Bridget, the wife of John Emerton, the son of the said William Emerton, or shall give notice to the said William Emerton and Owen Davies, where the said Bridget now is, that the said Robert Viner should attend the Court to-morrow;" and the next day, which was Saturday, a rule was made, "that the said Sir Robert Viner do attend the Court on Tuesday next without any further notice." But upon the Monday a rule was made, whereby "it was ordered, that the said Sir Robert Viner should attend the Court on Wednesday next peremptorily."

Upon the Thursday afterwards, "it was ordered, that Sir Robert Viner should attend the Court the next day, and that Mr. Francis Woodward, one of the officers of the Court, should give him notice of the order." Upon that next day, which was Friday, a rule was made, "that Sir Robert Viner should attend the Court upon the day after, to inform the Court where Bridget Emerton, wife of John Emerton, then was; otherwise a tipstaff should take him up and bring him into Court; and it was ordered, that Mr. Barrington should attend the [117] Court the same day." Upon the Wednesday afterward a rule was made, "that the marshal should take up Sir Robert Viner upon the 30th day of October then next ensuing (the day after Lord Mayor's Day, when he would have been out of office) or as soon afterwards as he could take him, and bring him into Court." Early in Michaelmas term, to wit on Wednesday after one month of St. Michael, a rule was made, "that the marshal should take up Sir Robert Viner on the 13th November then next ensuing, or so soon afterward as he could take him; and that Mr. Emerton and his wife, and the other relations of

the said Bridget, should, in the mean time, have free access to her at all convenient times."

By these proceedings it appears, that the Court was proceeding against him for a contempt in disobeying the writ; and as Sir Robert Viner had returned, that the said Bridget was not in his possession at the receipt of any writ, which was disproved by the record of their own Court, (for the rules I have stated shew she was in his possession) the fact, averred by the return upon the record, was falsified by evidence of equal dignity, viz. the records of the Court, grafted upon Sir Robert Viner's own acts and admissions.

In the next place, it does not appear by any acts of the Court, that any affidavits were read; for though the last rule of Court in Hilary term mentions, that the several affidavits delivered into Court concerning the said Bridget Emerton, should be filed; yet it does not appear from the records that they were ever read; and it is observable, that they were filed by consent of both parties; and if any affidavits were read, it could only be the affidavits mentioned in that rule; because no notice is taken of any affidavit in the subsequent rules, and consequently none could have been read to contradict the [118] return to the second habeas corpus, because they were made two months before the second habeas corpus issued.

But suppose there had been no such proceedings upon the record, and affidavits had been read to shew that Bridget was in the custody of Sir Robert Viner, it would not encounter the doctrine I lay down; for it was not a return, averring facts justifying the cause of imprisonment, but only an excuse for not obeying the writ; and if it be false, the Court proceeds for a contempt in a summary way in this case as they would in all others. In *Godbolt*, 219, *Smith*, one of the officers of the Court of Admiralty, was committed by the Court of Common Pleas to the prison of the Fleet, because he had made return of a writ, contrary to what he had said in the same Court the day before. And to bring it home to my point, I would suppose there had been no verdict, evidencing the marriage of Bridget with Emerton, and that Sir Robert Viner had returned, that Bridget was not the wife of Emerton, but his own wife: in case there had been no legal disability, would the Court, upon affidavits, have tried the fact of that marriage?—If it were a case of that nature, it had been in point—I apprehend clearly they could not, without usurping a power which the law has not given them.

And it is further observable in that case, that there never was any rule made upon Sir Robert Viner to produce her. The compulsory rule was, that unless he should permit William Emerton and Owen Davies to see her, or give them notice where she was, he should attend the Court.

The next compulsory rule is, "that he should attend to inform the Court where she was, or otherwise that a tipstaff should take him up and bring him into Court;" and the two subsequent rules, for the [119] marshal to take him up, and to bring him into Court, were in consequence of his non-attendance.

If they had considered the return as duly falsified by affidavit, and had proceeded upon that principle, they would have issued an attachment for the contempt in the first instance, as they had ordered in Hilary term upon the insufficiency of the first writ. And as Sir Robert Viner was indictable for making a false return, the affidavits might be properly read, as a foundation for the apprehending him; and the rather, because the marriage was established, and the Court saw he was guilty of a great offence in secreting and withholding a wife from her husband.

Affidavits may be read to collateral purposes; as in order to bail, or adjust the sum for which bail is to be given; and in the cases of madmen, when they have been brought up without any formal return at all, or only a return, "that I have the body ready according to the command of the writ." 22 Ass. pl. 56, battery and false imprisonment: defendant says plaintiff was in a rage, and did great mischief, whereupon the defendant and his other relations took him and bound him, and put him into a house, and chastised and beat him with a stick or rod.

As there was no return of a fact justifying the cause of imprisonment, the Judges were at liberty to look into it, and read affidavits, to direct them what to do upon it. For as the facts do not appear upon every return, the Court, or Judge, can be enabled only from affidavits to know whether they should interpose or not;—if satisfied the party was mad; though under no legal custody—they would not interpose. If doubtful,—they would direct an application for a commission, or put it into some way of



inquiry ; if quite satisfied it was a scene of oppression,—they would set the party at liberty.

[120] So in cases of wives, children, and wards—all the Court, or Judge, does, is to see that the party is under no illegal restraint. The law so laid down, 1 Str. 445. 2 Str. 982, *The King and Smith*.

In the case of *The King and Smith*, habeas corpus was brought by the father against an aunt, for a child near fourteen ; the return was only “ready in Court.” She made an affidavit that the uncle had devised an estate to trustees, upon trust to pay her a yearly sum for the child’s maintenance, and directed the money should be paid only to her ; that the child had lived with her from its birth ; that it was the uncle’s desire it might so continue, the father being a very extravagant person.

The noble Lord (a), who then presided in the Court, said, “The detention being undefended, we must set the child at liberty : we can take no notice of the justification in the affidavit ; we can determine nothing about the possession of the child : all the Court can do is to see that persons are not unlawfully confined.”

In all these cases, the parties have opportunities of asserting their title at law, and may have the benefit of a writ of error. If we should take upon us the summary determination of this question, it would debar the parties of their writ of error, and such other privilege as the law has given.

The remedies, which the law has provided in different cases, should not be confounded. If there are any cases where facts have been entered into by affidavit, upon habeas corpus, yet unless there have been returns to such writs filed, and those returns have set forth a sufficient cause of the imprisonment, and affidavits have been read to contradict that cause in point of fact, such cases will not encounter the position I am now advancing.

[121] A difference is made between the case of an officer and a mere private person—a difference in favour of interposing upon the return of an officer, rather than of a private person, because an officer is a minister of justice, and more under the controul of the Court than a mere stranger. If said to be a wrong-doer—that is begging the question ; for it depends upon the truth or falsity of the return, whether he is a wrong-doer.

If a lawful cause of restraint is not returned, the party will be discharged for the insufficiency of it ; but the facts, evidencing the legality, must not be presumed to be false, in order to warrant an examination whether they be false or not.

But suppose there was a distinction between custody by a public officer, and a private person acting without any authority whatsoever ; yet, in regard to pressed men, they are in the custody of public officers, acting under an authority given by Act of Parliament ; they are under a necessity of receiving them ; they take them as persons within the description of the Act ; and if they return them to be so, they have a right to have that fact tried by a jury as well as any other person. But it is not the privilege of an officer, but of an Englishman, to have a fact, justifying his conduct, and which he has averred upon record, tried by a jury.

It is said, that it is a very hard case, and that a man may be sent to the West Indies before the falsity of the return is proved in an action.—If there be any particular hardship, the Act which produces the case, must provide for it.

Judges will construe the law as liberally as possible in favour of liberty, but they cannot make laws ; they are only to expound [122] them : particular cases must yield to the law, and not the law to particular cases.

There is no difference between facts in a return, and any other facts averred upon record.

Suppose an action brought upon a bond for any given sum of money, and the party is arrested upon it, and he pleads that he never executed the bond ; suppose he could shew by affidavits ever so clearly, that he did not execute the bond, or, by a copy of the register, that he was not born when it is dated. The Court could not interpose ; why ? Because the law says, the fact must be tried by a jury : the Judges have no more cognizance or power to try it than if they were not Judges.

If they were to do it where there was the clearest and most undoubted proof, they must do it in every case : for the degree of proof cannot alter or vary the mode of trial, and translate the examination of the fact from the jury to the Judge.



If a man is arrested and in custody, in a civil action, upon an affidavit made by the plaintiff of the debt, the Court will not, even for the purpose of discharging him out of custody, enter into any examination of the reality of the debt, though there is the most clear and undoubted proof laid before the Court of the falsity of the demand: it must be tried by a jury. The Court cannot look at it. We must administer justice, not as we wish the law to be, but as it is.

Laws are framed upon principles of general utility, and adapted to such cases as most frequently happen. Judges cannot set up natural reason against the reason of the law—cannot dispense with the law, [123] for the sake of a particular case, arising upon an act which will expire with the session, and perhaps may never be enacted again; and in a case, where the hardship may be prevented by making a rule upon all the parties concerned in supporting the right to the recruit, that he shall not be carried away till the merits are tried in an action; or by letting him out, on security to return, if the merits are against him: and if the case was ever so remediless, I think we are not warranted to impeach, by affidavits, the truth of the return of an officer, acting under an Act of Parliament, which the law says ought to be impeached by a verdict.

But the case is not a remediless one: by the common law, the writ of “*homine replegiando*” will clearly relieve him. That writ, which is obtained out of the Court of Chancery upon an affidavit, goes to the sheriff, and commands him to replevy the man. If he cannot replevy him, he returns it, and a process goes out instantly to seize the body of the person who is supposed to have him in custody, and he is imprisoned himself till he produces the body. Fitzherbert, Nat. Bre. 67 b. (edition 1616), 5 Hen. 7, 3.

If a person is seized by virtue of the first writ, and the party, who has him in custody, claims any right to the detention of him, still he is to be delivered, upon giving security for his appearance, and to try the right in a Court of Justice; and if the point is determined against him, to deliver himself up to the person in whose custody he was: so that, by this writ, the party may be instantly set at liberty, without violating any rule of law whatsoever; and where a person is in actual custody, the sheriff will be sure to find him and deliver him; and it is a more sure and certain remedy in that case, than where a man is imprisoned by a mere private person, and may be shifted about so secretly, that the sheriff cannot find him.

[124] There is another method by which a man impressed may get at his liberty, laying the gaoler and the return quite out of the case: and that is, by appealing to that summary jurisdiction, which the Court of King’s Bench exercises over all inferior jurisdictions, powers, and authorities whatsoever.

The authority given to the commissioners, being a particular, special authority, if it is abused, they are answerable to the Court for it; and the Court will relieve the party oppressed by it in a summary way, by affidavits. But in that case, the complaint is founded on affidavits, and therefore must be answered by affidavits; and the fact is tried, between the persons who did the wrong, and the person who sustained it.

The Crown, being interested in the recruit, is likewise heard “*pro interesse*.” The gaoler is no party to that complaint or inquiry; and as to him, the fact, which he has averred upon record, stands unimpeached; and if it is false, he must and can only be answerable for it in an action: and by this mode of proceeding, the party acquires such a discharge as will completely work a manumission of him from his condition of a soldier.

For if a gaoler should let a man go, or return only that he had his body ready, without shewing any cause of his imprisonment, or should make an insufficient return, or a false return; no man can say that an act of the gaoler can affect the right which the public have in the recruit. That must and can only be determined between the commissioners and the Crown on the one side, and the party imprisoned on the other.

The distinction, between a proceeding by habeas corpus and upon motion, I take to be this: In a proceeding by motion, the Court goes upon affidavits; and it may take its rise collaterally, [125] various ways, out of disputes which come before the Court upon record. For instance, the return to a habeas corpus cannot be tried and set aside by affidavits; but the Court may take the matter up “*diverso intuitu*,” in

order to grant an information against a man who has seized another by outrage and violence, and detains him without any colour of authority ; or perhaps to proceed against such person by way of information for a false return, which Hale says is an indictable offence ; or in order to commit him for an outrageous breach of the peace.

Suppose habeas corpus for a maid taken away, according to the Statute of Philip and Mary, or of 3 Henry VII. ; by the one, a great misdemeanor,—by the other a felony ; and the party returns that he is married, that she is his wife. The fact, or validity of the marriage, cannot be controverted upon the return ; but upon affidavits the Court might commit him for a misdemeanor in one case, and for a felony in the other. And in cases where the Court has a discretion as to bailing, the Court might put such terms upon him as would force the immediate relief of the person imprisoned and agreeable to these principles, is *The King and White*, Trin. 1745, where the Court would not discharge the impressed man, T. Reynolds, upon the affidavits contradicting the return ; but being brought up on a Monday, and the writ and return, which was full and sufficient, being filed, the Court ordered him to be brought up again on Wednesday ; and upon reading the several affidavits of Reynolds and others on his behalf, made a rule upon the commissioners and the Master, to shew cause the next day, why he should not be discharged out of the custody of the said Richard White. The rule was as follows :

[126] Monday, 1st July 1745. “The defendant being brought here into Court, in custody of Richard White, Esquire, Major of the Tower of London, by virtue of His Majesty’s writ of habeas corpus, it is ordered, by consent of counsel on both sides, that the name Thomas White, mentioned in the said writ, be made Richard White : and it is further ordered, that the said writ and returns thereto be filed, and that the said Richard White bring into this Court the body of the said defendant Thomas Reynolds on Wednesday next : and upon reading the several affidavits of Thomas Kell and others, George Stewart and others, Thomas Reynolds and John Mangaar, it is further ordered, that Thomas Bedwell, Francis Bedwell, Charles Scriven, John West, and John Robinson (commissioners under the Act) do to-morrow shew cause why the said defendant should not be discharged out of the custody of the said Richard White, upon notice of this rule to be given to them respectively in the mean time.”

There is a decisive mark upon this rule, which shews the Court industriously avoided twisting the complaint against the commissioners with the return ; because they ordered the rule on the commissioners to come on at a different day : whereas, if the affidavits had been levelled and pointed at the return, the Court would have directed them to have come on together ; and it is extremely material, that Major White is not so much as a party to that part of the rule which is upon the commissioners ; the Court considered the return with regard to him as sacred, and not to be litigated by affidavits against him.

If the Court had meant to have impeached the truth of the return by affidavits, as between Reynolds the man impressed, and White [127] the gaoler, they would have certainly given White an opportunity of supporting the truth of his return by affidavits.

Wednesday. Sir John Strange for Major White, said, the question was of great consequence to the liberty of the subject on the one hand, and to the service of the public on the other, and that there had not been time for him to be sufficiently prepared : he proposed therefore, without prejudice to the question, to admit him to bail. The rule upon the commissioners was discharged ; and it appears that the defendant’s recognizance was afterwards discharged.

I have searched for writs of habeas corpus and returns to them, in Queen Anne’s time. There are many ; eight of the persons are remanded, seven are discharged ; as to some, it does not appear what was done. And in every case where the party was remanded, the return appears to be good upon the face of it ; where discharged, insufficient upon the face of it.

I directed a search to be made for affidavits, or for any rules that might have been made upon the discharge or remanding of the parties. The affidavits were stolen many years ago out of the office ; and there are no rules to be found in the rule-book except one, in *Bolton’s case*, which I will mention by and by, and submit to your Lordships, as the most decisive instance which can be produced, that the return was sacred, and could not be touched but by consent.

As no more light could be got from that inquiry, I then examined the returns



where the parties were remanded and where they were discharged; and if I could have found two returns in the same words, one where the person was remanded, and another where he was discharged, [128] it would have afforded a very strong reason to have believed that some extrinsic collateral evidence had been received, which had produced a remand in the one case, and a discharge in the other; but as all the returns where the parties were remanded are sufficient, and all the discharges are in cases where the returns are insufficient, it demonstrates most clearly to my satisfaction, that the Court proceeded only upon the sufficiency or insufficiency of the return, on the face of it.

There is one return of an enlisted soldier, Alexander James, committed by the captain to the Savoy, plainly insufficient. The captain is not stated to have had any authority to commit, and no offence is stated for which the soldier was committed; he is not so much as said to be a captain of the regiment in which he was enlisted.

The case of *Bolton* is in Hil. 3d of Queen Anne. A rule (a)<sup>1</sup> was made by consent to refer it to arbitrators, to determine whether he was such a person as was within the description of the Act. If the Court could have discharged upon reading affidavits, why put it into any other mode of enquiry? They saw it could be done only by action [129] for a false return; but upon consent, they might have directed an issue to try, or fixed upon referees, who are a jury of the party's own choosing, to try whether he was within the Act or not: it is nothing more than if the parties, upon a return to a mandamus, should agree to refer the fact to referees, instead of going to trial by a jury: it is so far from proving, that the Court could try the question by affidavits, it proves that they could not; and that inference is strengthened by seeing no traces of such an examination. There is no mention of it in any books of that time; and it is not to be conceived that it should by accident have happened, that all the men, remanded upon good returns, had no evidence, and that all the persons discharged, had.

I am clearly of opinion that Judges are not bound down by any fact set forth on a return, if disproved by a verdict; but that the Court can look at no other proof, as to any facts averred on a return, admitting and justifying the imprisonment.

The other Judges delivered their opinions "seriatim" on the same questions, the 25th, 26th, and 30th May 1758; and on the 2d June,

It was ordered, that the bill, intituled, "An Act for giving a more Speedy Remedy to the Subject upon the Writ of Habeas Corpus," be

Rejected (a)<sup>2</sup>.

[130] ALLEN EVANS, ESQUIRE, *against* SIR THOMAS HARRISON, KNIGHT, Chamberlain of London. In Error. 5th July 1762.

Commission of Errors. In the Court of Saint Martin-le-Grand.—Sir Thomas Parker, Knight, Sir Michael Foster, Knight, The Honourable Henry Bathurst, and Sir John Eardley Wilmot, Knight, Judges appointed by a special commission of errors, to inspect the judgment of the Sheriff's Court, and the affirmance thereof in the

(a)<sup>1</sup> Die Merc. &c. S. Hill. Anno 3 Annæ Regiæ. Nicolaus Bolton ductus fuit iterum hic in Curia supra Breve de Habeas Corpus ad subjiendum, &c. sub custodia Jer. Mahone generosi; Et ordinatum est, "ex assensu ambarum partium," quod referetur Arbitrio & finali determinatione Wilhelmi Harvey, armigeri, Carew Harvey alias Mildmay, armigeri, & Thomæ Dawtry, armigeri, tribus Justiciariis Pacis Com. Essex conjunct. cum Johanne Green, Servient. ad Legem, Johanne Wroth, arm. & Wilhelmo Stane, arm. tribus aliis Justiciariis Pacis Comitatus predicti. Utrum predict. Nich. Bolton, sit talis persona, qualis per Actum Parlamenti, intitulat. "An Act for Raising Recruits for the Land Service," &c. secundum formam Acti predicti. intens. est retineri, Anglice, "to be entertained" in servitio Domine Regiæ; quodque dictus Jeremias Mahone ducat predictum Nich. Bolton, personaliter coram Justic. predict. ad tempus et locum appunctuat. pro assemblatione Justic. illorum: et si appareat Justic. predict. vel majori parti eorum supra examinationem quod predict. N. Bolton, sit talis persona ut prefertur, tunc predict. N. Bolton remittatur custodiæ predict. J. Mahone, aliter exoneretur e custodia per Justiciarios predictos.

(a)<sup>2</sup> Lords Journals, 29th vol. p. 353.



Court of Hustings, at the Guildhall of the City of London ; and if there should be any error therein, to correct the same.

Sir John Eardley Wilmot.—This cause comes before this Court, by a writ of error brought by the defendant in the original action, to reverse a judgment in the Court of Hustings, affirming a judgment given in the Sheriff's Court against him, for the sum of six hundred pounds, supposed to [131] have been forfeited by him, for the breach of a bye-law made by the City of London.

And the declaration states, that the City of London is and immemorially hath been an ancient city and county of itself, and that the county of Middlesex immemorially hath been and is an ancient county.

That the citizens of the said city are, and immemorially have been, a body corporate under different names ; but now are, and at the time of making the bye-law afterwards mentioned, were incorporated by the name of the Mayor and Commonalty and Citizens of the City of London.

That the sheriffalties of the City of London and county of Middlesex are and immemorially have been ancient offices, and that within the City of London, there now are and immemorially have been two Sheriffs of the City of London, annually elected, chosen, and appointed, which said two sheriffs jointly are and constitute, and for three hundred years and more before the making the bye-law afterwards mentioned, were and constituted one Sheriff of the county of Middlesex, and have as well exercised the office of Sheriffs of the City of London, as the office of Sheriff of the county of Middlesex.

That by a bye-law made in the common council of the city, the 7th April, 21 George II. it was ordained, that the right of electing to the office of sheriffalty should be vested in the liverymen of the several companies of the city, to be assembled at the common hall of the city, held in Guildhall, and that the general day of election should be the 24th day of June ; and if any person or persons elected should refuse to conform to the bye-law, or die, or be removed, or there should be cause upon any other occasion to proceed [132] to a new election, then it should be lawful for the liverymen to proceed to such new election, at such day and time as should be appointed by the Court of the Lord Mayor and Aldermen. And it was ordained, that every person elected, either upon the general election day, or between the general election day, and the 22d day of September following, when there should be no actual vacancy in the office, should take the same upon him on the Vigil of Saint Michael the Archangel next following his election, and hold the same for one whole year from thence next ensuing.

And it was thereby further ordained, that from thenceforth it should be lawful for the lord mayor, between the 14th day of April and the 14th day of June in every year, to nominate in the Court of the Lord Mayor and Aldermen, one or more fit and able person or persons, not exceeding nine, being free of the city, to be put in nomination for the office of sheriffalty, to the liverymen to be assembled for the election ; and the person or persons, so nominated by the lord mayor, should be put in nomination to the liverymen until they should be elected or discharged from such nomination ; and if any person so nominated by the lord mayor should, within six days after notice thereof, pay to the chamberlain of the city £400 and twenty marks, for the maintenance of the ministers of the several prisons within the city, then such person should be discharged from such nomination, and from serving the office of sheriffalty, unless he should afterwards take upon him the office of an alderman ; and no freeman of the city, nominated or elected to the said offices, was to be discharged from such election or nomination for insufficiency of wealth, unless he should take his corporal oath before the Court of the Lord Mayor and Aldermen, that he was not [133] of the value of fifteen thousand pounds, and unless six other freemen, to be approved of by the Court, should, upon their oaths, attest their belief of the truth of what he swore.

And it was thereby further ordained, that every person elected to the said offices, either upon the general election day, or between that day and the fourteenth of September, when there should be no actual vacancy in the office, should personally appear before the Court of the Lord Mayor and Aldermen, at the first Court after notice of his election, and should then and there become bound to the chamberlain of the city, by his bond in the sum of £1000, conditioned for his appearing on the Vigil

of St. Michael the Archangel, then next following, between twelve and three, at Guildhall, where the Court of Hustings is holden, and then and there taking the oath of office, usually taken by the Sheriffs of the City and county of Middlesex, upon pain that every person that should not appear and become bound as hereinbefore is mentioned, should (if an alderman or commoner previously nominated by the lord mayor) forfeit and pay, to the uses mentioned in the bye-law, six hundred pounds, or if not an alderman or commoner so nominated by the lord mayor, four hundred pounds; and every person who had paid any sum of money to the chamberlain for the use of the city, to be exempted from the said offices, should be for ever exempted, unless he should afterwards become an alderman, and no person who had served the said office once, was to be chosen a second time.

And it was further ordained, that the penalties to be forfeited by virtue of this bye-law, should be recovered by action of debt, in the name of the chamberlain, in one of the King's Courts of Record in the city.

[134] The declaration then states, that on the 30th April 1751, Francis Cockayne, Esquire, then lord mayor, did, in the Court of Lord Mayor and Aldermen, duly nominate Allen Evans, being a commoner, and free of the city, and "a fit and able person," to be put in nomination for the office of sheriffalty, to the liverymen, to be thereafter assembled for the election; of which nomination the said Allen Evans the same day and year had due notice given him, but did not, within six days after such notice given him, nor at any other time, pay the chamberlain four hundred pounds.

That on the 24th of June 1754, and at every assembly of the liverymen, assembled for the election of sheriffs after the nomination of Allen Evans, the said Allen Evans was duly put in nomination to be elected one of the sheriffs, but was not elected; and at an assembly of the liverymen, held the 24th June 1754, for the election of sheriffs, George Streetfield and Alexander Sheafe were duly elected, but neglecting to appear and give such bond as was directed by the bye-law, the Court of the Lord Mayor and Aldermen did order, that the liverymen should be summoned to assemble on the 23d July 1754, to proceed to a new election of sheriffs.

That at an assembly held the said 23d July, Allen Evans, being "a fit and able person," and free of the city, and not then discharged from the nomination made of him by the lord mayor, nor otherwise exempted, was duly put in nomination to the said liverymen, and the then sheriffs did then and there declare as the truth was, that the election of the liverymen was then fallen on the said Allen Evans and John Torriano, Esquires; after which and upon the same day and year, at Guildhall, and in the place where the [135] Court of Hustings was usually holden, and in the presence of the deputy of the lord mayor (then indisposed) and six of the aldermen, the said Allen Evans and John Torriano were declared duly elected sheriffs of the city, and Sheriff of the county of Middlesex, for the year then next ensuing, to commence from the Vigil of St. Michael the Archangel, and proclamation was then and there publicly made thereof, and the said Allen Evans and John Torriano were called upon to come forth and give their consent to the said office, but they did not give their consent thereto.

The declaration then states, that the said Allen Evans had notice given him of his election the 24th of July 1754, and that on the 30th of July 1754, the next Court of the Lord Mayor and Aldermen of the city, after the election of the said Allen Evans, and the notice given him of such election, was held at Guildhall, where the said Allen Evans appeared and absolutely refused to take upon himself the said office, without offering any reasonable excuse for his refusal: and the said Allen Evans did then and there refuse to become bound to the chamberlain of the city by any bond, with such condition as is required by the said bye-law, and the said Allen Evans refused to execute such bond, and take upon him the said office, not having taken his oath in the Court of the Lord Mayor and Aldermen, that he was not of the value of fifteen thousand pounds, and by reason thereof forfeited the sum of six hundred pounds, which the declaration charges, he has not paid, and for which the action is brought.

To this declaration the defendant, Allen Evans, has pleaded an Act of Parliament, made in 1661, intituled, "An Act for the Well Governing and Regulating of Corporations," by which, after many [136] temporary provisions not necessary to state, it was enacted, "that no person or persons should be placed, elected, or chosen in or to any of the offices or places mentioned in the Act (comprising the said office of sheriff)



that should not have, within one year next before such election or choice, taken the Sacrament of the Lord's Supper, according to the rites of the Church of England; and that every such person or persons so placed, elected, or chosen, should likewise take the three oaths, and subscribe the declaration mentioned in the said Act, at the same time when the oath for the due execution of the said places and offices respectively should be administered; and in default thereof, every such placing, election, and choice, was and is by the said Act enacted and declared to be void."

And the defendant further pleaded another Act of Parliament, made in the first year of Will. and Mary, intituled, "An Act for Exempting their Majesties Protestant Subjects Dissenting from the Church of England, from the Penalties of Certain Laws;" setting forth, "that for as much as some ease to scrupulous consciences in the exercise of religion might be an effectual means to unite their said Majesties Protestant subjects in interest and affection," it is enacted, "that several penal laws (particularly mentioned in the Act) should not extend to any person or persons dissenting from the Church of England, that should take the oaths and subscribe the declaration mentioned in the said Act, before the justices of the peace at the General Sessions of the Peace to be held for the county or place where such person should live." The taking which said oaths, and subscribing the declaration, were to be registered in the Court of Quarter Sessions. And it was thereby further enacted, "that every person or persons, who should take the said oaths, and subscribe the [137] said declaration, should not be liable to the penalties in two other Acts mentioned in the said plea; and all places of religious worship were to be open, and the laws, provided for frequenting divine service on a Sunday, were to be enforced against all persons, except such persons as should come to some place of religious worship limited by that Act; and all places of religious worship were to be certified to the bishop, or Quarter Sessions, or to the justices at the General or Quarter Sessions, and to be registered in the Bishop's Court, or to be recorded at the Quarter Sessions.

The plea then avers, that the two sheriffs, on the 24th of September 1661, were, and from thence hitherto have been and still are, persons bearing an office, place, trust, and employment relating to and concerning the government of the City of London; and that the defendant at the time of the supposed election, was, and for the space of fifty years and more then last past had been, and ever since hath been, and still is, a Protestant subject of this realm, dissenting from the Church of England, and a person of a scrupulous conscience in the exercise of religion; and during all that time hath frequented and still doth frequent divine service on the Lord's Day, commonly called Sunday, and for that purpose during all that time hath come to, and still doth come to some congregation or assembly of religious worship amongst Protestant Dissenters, from time to time during all that time, allowed and permitted by the said Act.

The plea then states, that Allen Evans took the oath and subscribed the declaration according to the directions of the said Act, on the 21st May 1751, in the sessions held for the county of Middlesex, where he then lived; and that his taking the said oaths and subscribing the said declaration, are duly registered and recorded in [138] the said Court of Sessions, and that he had not, one year before his election, taken the Sacrament of the Lord's Supper, according to rites of the Church of England, nor has he ever taken, nor could he at any time in conscience, take the same, nor was he in any ways bound by law to take the same at any time since the 21st day of May 1751, of which premises the Court of the Lord Mayor and Aldermen held the 16th day of July 1754, and the liverymen assembled the 23d of July 1754, and the Court of the Lord Mayor and Aldermen, held the 30th of July 1754, had notice; and by reason thereof, and by force of the Act of Parliament "for the well governing and regulating of corporations," the liverymen, assembled on the 23d of July 1754, were prohibited from electing, and had no power to elect him to be one of the sheriffs of the city, and he then was disabled from and utterly incapable of being elected one of the said sheriffs, and the supposed election of him was and is void.

To this plea the plaintiff hath replied, that by an Act of Parliament made in the 5th year of King George the 1st, intituled, "An Act for Quieting and Establishing, Corporations," it was enacted, "that all and every of the then member and members of any corporation within this Kingdom, and all and every person and persons then in actual possession of any office," that were required by the therein recited Act, made in the 13th year of King Charles the 2d, intituled, "An Act for Well Governing and Regulating of Corporations" (in the said plea of the said Allen Evans above-mentioned)



to take the Sacrament of the Lord's Supper, according to the rites of the Church of England, within one year next before his election or choice into such office should be and were thereby confirmed in their several and respective offices and places, notwithstanding their [139] omission to take the Sacrament of the Lord's Supper as aforesaid, and should be indemnified, freed, and discharged of and from all incapacities, disabilities, forfeitures, and penalties, arising from such omission, and that none of their acts, nor the acts not then avoided, of any who had been members of any corporation, or in actual possession of such offices, should be questioned or avoided for or by reason of such omission; but that all Acts should be and were thereby declared and enacted to be as good and effectual as if all and every such person and persons had taken the Sacrament of the Lord's Supper in manner as aforesaid; nor should any person or persons who should be thereafter placed, elected, or chosen in or to any the offices aforesaid, be removed by the corporation, or otherwise prosecuted for or by reason of such omission, nor should any incapacity, disability, forfeiture, or penalty, be incurred by reason of the same, unless such person should be so removed, or such prosecution be commenced within six months after such person's being placed or elected into his respective office as aforesaid.

To this replication the defendant has demurred, and the plaintiff has joined in demurrer.

Judgment was given for the plaintiff in the Sheriff's Court, and a writ of error being brought in the Court of Hustings, the judgment was there affirmed; and it now comes before this Court by a writ of error, and the plaintiff in the original action having pleaded "in nullo est erratum," the cause has been now argued three times, and stands for the judgment of this Court.

There are two general questions:

The 1st is, whether the declaration is not insufficient, because it does not state that the city has any right, either by charter or pre-[140]-scription, to elect the sheriffs; that the bye-law being made to regulate this franchise, it ought to appear upon the declaration that they are entitled to the franchise, which can only be by charter or prescription; but as this cause has been long depending, and the great question in it has been much agitated, and it is high time that it should be settled, we have been very desirous to determine this cause upon its real merits; and, as we are all of the same opinion upon the merits, and are desirous that our judgment should be considered as founded upon the merits only, unmixed with any other ingredient whatsoever, we shall not give any opinion upon this objection to the frame of the declaration; so far I will say, that I think there is great weight in the objection, and I am persuaded the city will not be advised to adopt this declaration as a precedent.

The 2d, which is the great question in this case, is, whether the plaintiff in the original action, under all the circumstances disclosed by the pleadings, is entitled to recover the penalty of £600, imposed upon the defendant, for refusing to comply with that part of the bye-law, stated in the declaration, which directs that every person elected to the office of sheriff, shall appear before the Court of the Lord Mayor and Aldermen, at the first Court after notice of his election, and become bound for his appearing and taking the oath of office upon the Vigil of St. Michael then next following: and I am of opinion, that the plaintiff is not entitled to recover, and that the judgments, which have been given in this case, ought to be reversed.

This case has been very ably and learnedly argued at the Bar, and several positions laid down, which are clear and indisputable.

1st.—It is clear that, of common right, there is a power inherent in all corporations to call upon their members for the performance of all corporate duties.

[141] 2d.—That the execution of offices is one of those duties.

3d.—That the power of making bye-laws is incident to every corporation.

4th.—That a bye-law, imposing a reasonable fine for the refusal of a corporate office, is a good bye-law.

The counsel have differed a little in their notion of the nature and quality of this fine: the counsel on one side call it a punishment, and those on the other side a satisfaction by way of damages. I think it rather participates of punishment than of satisfaction. In respect of the corporator, it is certainly a punishment, for the violation of a law which he hath contracted to obey: for the right which every corporation has to command their members, and the correspondent obligation which their members are under to obey, arise from the contract which they virtually make with the corporation upon their admission into it.

The corporation stands with regard to penalties, for the breach of bye-laws, in the same situation as the King does with respect to penalties for the infraction of Acts of Parliament, "*creditor pœnæ*," as he is called in 1 Raym. 213.

There is another position which I take to be equally clear with any of the former ; and that is, that the right which every corporation has of calling upon their members to execute corporate offices, may be abridged either by themselves, or by the general law of the land ; and that brings this point to its true criterion, whether that right hath not been abridged in the present case, and what will be the legal consequence of such an abridgment.

The unhappy situation which the Royal Family and the nation had been in for many years before the Restoration, made the Legis-[142]-lature very anxious to guard against relapses : and as a very large portion of government is delegated to corporations, they thought it would be necessary, not only to rectify the irregular and arbitrary acts which had been done in garbling corporations, by removing some officers and placing others, but also to provide a proper succession of officers in corporations for the future.

The manner of purifying corporations, as they then stood, was by vesting an arbitrary power in commissioners to turn out whom they pleased for a limited time, to the 25th March 1663 ; and the only test required of persons who then were in office, or who might come into office within that limited time, was taking the oaths and subscribing the declaration ; and they did not require any sacramental qualification, because whilst the extraordinary power given to the commissioners subsisted, there was no occasion for any other check or controul : but when that commission determined, and they were to provide for the succession to offices in perpetuity, then they did not rest upon the oaths and declaration, but measured the fitness of the man by his antecedent religious habit, and laid down the rule by which that religious habit was to be examined and determined ; and that was his having received the sacrament according to the rites of the Church of England, within one year before his election. They did not propose the sacrament as a test to be given at or after the election ; they durst not trust to that security, because they thought the charms of power, in possession, might induce people to give this outward and visible mark of conversion, without being really converted : they were afraid a sudden conversion, under such a temptation, might not be a sincere one ; and therefore they guarded their favourite point by a very different provision, by requir-[143]-ing that the party should have received the sacrament, according to the rites of the Church, within one year before his election : not by letting him into the office, and turning him out again, because he would not receive the sacrament ; but by shutting the door against him and never letting him in at all, if he had not received the sacrament before his election.

And the intention of the Legislature is expressed in the strongest terms which the English language can afford, to effectuate such an intention. The words are these, 13 Car. II. st. 2, c. 1, s. 12, "Provided also, and be it enacted by the authority aforesaid, that from and after the expiration of the said commissions, no person or persons shall for ever hereafter be placed, elected, or chosen in or to any the offices or places aforesaid, that shall not have, within one year next before such election or choice, taken the Sacrament of the Lord's Supper, according to the rites of the Church of England ; and that every such person and persons so placed, elected, or chosen, shall likewise take the aforesaid three oaths, and subscribe the said declaration, at the same time, when the oath, for the due execution of the said places and offices respectively, shall be administered ; and in default hereof, every such placing, election, and choice, is hereby enacted and declared to be void."

To whom is this clause addressed ? Not to the party, but to the electors : the prohibition is laid most clearly upon the persons who had a right to elect. It is the voice of the society, commanding them not to elect persons who fall under that description ; and an election made contrary to the prohibition, is a transgression of the [144] law ; and in this case it was a wilful transgression of the law, because it is expressly averred by the plea, that the lord mayor and aldermen, and the electors, previous to the election, had notice that Mr. Evans was one of the persons who fell under the description negatived by the law ; and if it was a wilful transgression of the law, it is a moral wrong which can never lay the foundation of an action to be sustained by a Court of Justice. Courts of Justice are instituted to enforce the will of the society : the laws manifest that will, and it is the duty of Courts of Justice, by



actions or indictments, adapted to the nature of the case, to carry those laws into execution; but they are not to sustain actions for refusing to do what the society had forbidden; it would be acting in direct opposition to the very design of their institution; it would be lending their assistance to contravene the will of the society, instead of enforcing obedience to it.

The rule of the common law, in respect of acts done contrary to the prohibition of the law, is this, "*quod contra legem fit, pro infecto habetur*;" and the rule of the Roman law, adopted by all the laws in Europe, is, "*ea quæ lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur; licet legislator tantum fieri prohibuerit, nec specialiter dixerit, inutile esse debere quod factum est*;" and in this case, the law hath not only prohibited the election of persons, who have not received the sacrament within the year, but expressly declared the election to be void.

It is a mere idol and shadow of an election; and, as to all legal effects, exactly the same as if the election had fallen upon an entire stranger to the corporation. It is impossible to be under an obliga-[145]-tion to obey, if the party demanding obedience hath no right to command it. The injunction not to elect, extinguishes the obligation to accept.

This is a legal consequence, necessarily springing out of a legal principle; and though the word "void" hath upon this occasion, and upon many others, undergone very severe trials, and sometimes hath been construed to mean "voidable," and sometimes "partially and relatively void," as to particular persons, and for particular purposes; yet it must be construed in its greatest latitude and fullest extent, in respect of those persons who have done the act which the law has forbidden.

An attempt was made to shew, that the Legislature intended a difference between the case of officers, then in possession and refusing to take the oaths and subscribe the declaration, and persons who should afterwards be elected, not having received the sacrament within a year before the election: that, in the first case, the offices are declared to be "void to all intents and purposes, as if the said respective persons so refusing were naturally dead;" but that in the latter case, it is only said, every such placing, election, and choice, is thereby enacted and declared to be "void." The omission of the words, "to all intents and purposes, as if the persons were dead," is urged as an evidence of taking a much wider compass in the one case than in the other.

But I can find out no different intention, from this difference of expression, as to the point now under consideration: they intended in one case to turn persons out of power, who would not take the oaths and subscribe the declaration; and in the other, to keep persons out of power, who were not of the Established Church. Their intention was the same, as to the point then under consideration; [146] and the difference of expression is owing to a difference between the cases of turning a man out of an office which he had, and keeping a man out of an office which he never had at all. The words are accommodated and adapted to the subject matter; where the office was full, it declares the office shall be void to all intents and purposes, as if such person was dead: it was a civil corporate death they were inflicting upon officers then existing; but in the other case, they were guarding against any such existence.

And it is very observable, that the Act doth not make the office void, but the election void; which proves decisively they did not apprehend the office would be filled by such an election; if they had, they would have applied the annulling words to the office, as they have done in the case of officers then in possession, and not to the election; and though it was proper, where the office was full, to say, it should be "void, as if the person refusing the oaths was dead;" yet it would have been very absurd to have applied the same expressions to persons whom they had enjoined the corporation not to create, and most inaccurate to have illustrated their meaning by a resemblance to the election of a dead man. If they had thought any explanatory resemblance necessary, it would rather have been, as if such person had not been a member of the corporation, or as if such election had never been made; but it would have been useless tautology to have added any thing; for when it says the election shall be void, it is in effect saying that it shall be considered by the law as if there had been no election at all.

It was said, that the law against gaming makes notes "void to all intents and purposes," and the Acts against usury only makes them "void;" and that a gaming



note in the hands of an inno-[147]-cent indorsee, would be void against the drawer, but it would not be so in the case of a note given upon a usurious contract; and it was determined in the case of a gaming note, that it would be void in the hands of an indorsee; but if that case is right, which was then thought a hard one, I think the law must be the same upon a usurious note; and no case was cited, either before or since the case upon the gaming note, to establish such a distinction; and I am sure I can find out none in the intention of the Legislature, between "void," and, "void to all intents and purposes." It is only an amplification of expression, and spreading out the same idea a little more diffusively; but they both equally mean—that the act done shall be considered as if it was not done. But it was then very ingeniously urged, that the law will not endure such a construction of the word "void," and that this election cannot be void to all intents and purposes whatsoever; because a warrant by a sheriff, so chosen, would not subject the plaintiff to an action for false imprisonment, and that a bail bond taken by such a sheriff, might be assigned, and the bail might be sued, if the principal did not appear according to the bail bond; and I admit the law to be so; but it would be exactly the same if the corporation had elected an entire stranger to the corporation, or an usurper had been in possession of the office without any election at all; for a rule of law interposes in this case, viz. that the authority of a magistrate or officer is not to be looked into by individuals subject to the jurisdiction, nor any inquiry made whether his authority be lawful: possession alone, for public convenience, is sufficient to substantiate all such acts as are essentially necessary for the administration of justice, and which magis-[148]-trates and officers "de jure" must and ought to perform: but for my own part, I lay very little stress upon the annulling part of this clause; I think it is involved in the prohibition: the principle upon which I go is, that the election is an infraction of the law; and right cannot spring out of wrong.

To analyse the case more particularly—suppose an Act of Parliament were now to prohibit the election of unmarried men into corporation offices; what would be the legal consequence of such a prohibition? It would repeal all the bye-laws in England, as to the persons included in such prohibition, and place them as effectually out of the reach of the bye-law, as if the bye-law itself had excepted them. It would extinguish their eligible capacity, and in respect of corporation offices, would entirely separate them from the corporation: it would work a release of the original contract, as to such persons; for the contract being to execute all offices to which the party is duly elected, a due and valid election is a condition precedent to the existence of the right in the corporation to command, and of the obligation in the members to obey. And the present bye-law has some prohibitory provisions in it: it forbids the election of any person who has either commuted for the office, or executed it; and if the city were to elect, contrary to that prohibition, would the bye-law support them in an action for refusing to act under such an election? It would be making the bye-law contradict itself, and defeat one provision by another. And therefore, if the clause in this Act of Parliament had been engrafted into the bye-law, it must have had the same effect as the clause in the bye-law, prohibiting the election of those who had executed the office, [149] or commuted for it; and it would have had such an effect, inserted in the bye-law; "a fortiori," it must have the same effect in an Act of Parliament, which controuls all bye-laws whatsoever.

The motive of the prohibition, or the quality which the law requires or rejects in the party to be elected, will not influence the legal consequences which follow the contravention of the law: whether it be, not receiving the sacrament, or not being married, the will of the Legislature is the same; and indeed a Non-conformist is not within the terms of the bye-law upon which this action is brought; for the Legislature have said a Non-conformist is not a fit person to be trusted. The bye-law confines the nomination to fit persons, therefore a Non-conformist is not an object of the bye-law; and if it had expressly named "Non-conformists," I should have thought it void; because it would have directly encountered the law of the land, which says, Non-conformists shall not be elected. It would have laid men under contradictory and inconsistent obligations. If they obeyed the bye-law, and accepted the office, they would have been usurpers upon the Crown, and open to a penalty of £500, for breaking the law of the land: if they obeyed the law of the land, and refused to accept the office, they must have been liable to the penalty of £400, for disobeying the bye-law.

It has been said, that this Act of Parliament was not made to ease Dissenters, but to punish them ; that exemption from burdensome offices will be an ease to them, and that they ought not to enjoy their freedom at a less expence than the members of the Established Church ; that, "*qui sentit commodum sentire debet et onus :*" that it will be giving the Act an effect which the Legislature did not [150] intend it should have, and that all Acts of Parliament must be construed in such a manner as not to encounter the intention of the Legislature ; that it would be most agreeable to that intention to construe the election absolutely void as to the person holding the office, and for his benefit, but good as to the corporation, who call upon him for the commutation.

And there certainly are many cases, as I have mentioned before, where the same act is good to a certain degree, or for some certain purpose, or to some persons, and "void" as to all others ; but there never was a case where that word was construed in such a manner as to make the act good for the benefit of the person who had broke the law, and void as to the person who had refused to concur in breaking it.

As to the intention of the Act of Parliament ; it was most certainly to secure and appropriate all the power, which corporation offices give, to persons who, at least outwardly, professed the religion of the State. That was the sole end, object, and aim of this clause in the Act of Parliament : it was a bill of exclusion from power : it did not look after or provide for the consequences of that exclusion.

Whether those consequences would prove beneficial or detrimental to them, or whether upon the balance of the account, they would prove gainers or losers by the exclusion, was not the point the Legislature had in view ; their point only was, that persons, who were not of the religion of the State, should not be entrusted with offices under the State ; "*Nolumus res sic administrari.*" The consequence arising from this law, was the exclusion of Non-conformists from power, which is punishment ; but punishment was not the end of [151] the law, but a consequence of it ; and in the exposition of a law, great care must be taken not to mistake the consequence of a law for the end of it.

To attain the end of a law, it is the duty of Judges to make an enlarged and liberal exposition of it, and to hold all cases that are within the reason, to be within the reach of it ; and therefore to appropriate all corporation offices to the members of the Established Church, and exclude Non-conformists, Judges ought to expound the law with the same spirit which influenced the Legislature in making it.

But it is not to be considered or construed as a vindictive law, for any purpose whatsoever, which is not necessary to the attainment of its own end ; and if this law were to be construed in such a manner as, besides the loss of power, which is the necessary consequence of the law, it should also expose them to a penalty for having lost it, it would be confounding the end of the law with the consequence, and making it operate as a vindictive law for transgression ; whereas it was intended as a law to direct by whom the powers of government should be administered in corporations, and as a palladium to the constitution in Church and State.

Whether this case did occur to the Legislature, or how they would have thought it ought to be determined, is a matter of mere conjecture.

The Act itself plays no light upon it : it does not fall within the line of view which the eye of the Legislature was then upon : different men may, very plausibly, make different conjectures as to the will of the Legislature upon this question ; but arbitrary conjecture ought never to be the basis of judicial determinations. It would be re-[152]-moving the great boundary between judicial and legislative authority. If the case did occur to the Legislature, and they had intended to make any difference between lucrative and burdensome offices, they would most certainly have inserted a provision in the law for that purpose ; but by making no distinction between them, they must have intended that the rules of law should act equally upon both, and the construction must now be the same as to both : and suppose the question put to the Legislature upon a lucrative office, for instance, the office of chamberlain or town clerk, in this manner ; "A bye-law subjects a citizen, who refuses to execute this office, to a penalty of £400. Do you then intend, by disabling a Non-conformist from being eligible to this office, to leave him open to a penalty for not accepting it ?" What must the answer have been ? "We intend to keep Non-conformists out of power ; and for that purpose we command the corporation not to elect them. They can never be open to a penalty for not accepting an office to which they are never to be elected."



Suppose it was then said, "But the corporation may perhaps elect them; and if they do, they cannot say they are not qualified, because it is an offence, not to be qualified." If that argument had any weight with them, must not the answer have been, "We do not intend to exclude them from power and profit, and at the same time leave them liable to punishment for being excluded."

But suppose the question put upon a burdensome office, and the same argument made use of as has been urged in this case, "*qui sentit commodum, sentire debet et onus*;" and it had been said, that they ought not to enjoy their freedom at £400 less expence than the members of the Established Church.

[153] Is not the answer a very obvious one? The exemption from both makes them both equal. If they were exempted from burdensome offices only, and not from lucrative ones, there would be an inequality; but if they are excluded from both, the rule of "*qui sentit commodum, sentire debet et onus*," applies directly the other way: for if the members of the Established Church are to have all the lucrative offices, they ought also to take all the burdensome ones; and though a Non-conformist in that case pays less for the enjoyment of his freedom by such an exclusion, the members of the Established Church get so much more, and all the power of government into the bargain; and upon the balance of the whole account, the inequality produced by the exclusion, is in favour of the Established Church: for besides the home-felt joy which every good man feels from serving his King and his country, even in the popular estimate of valuable acquisitions, power is to many the most valuable acquisition; to all it is of some value; and riches themselves are often coveted only as the means of acquiring power, and of distinguishing their possessors in the government. And as to conformity to get a lucrative office, and non-conformity to avoid a burdensome one, I do not see how such a case can exist: for if they are qualified to accept a lucrative office, they are equally qualified to be charged with a burdensome one. But if the prospect of a profit to come produces conformity, as it often does, it only shews the nature of the scruple in the individual conforming—an unreal mockery in him; it does not prove that the scruples of all other Dissenters are equally fictitious and imaginary; and it is as unjust to measure the whole class of Dissenters by the conduct of some of their members, as it would be for them to judge of the religion of the Established Church by the lives [154] and practices of some who profess it: and though it has been said, they can have no scruple of conscience in paying the £400, whatever scruple they may have about receiving the sacrament; it is not a scruple of conscience which produces this refusal to pay the £400, but an apprehension that they ought not to be fined for not accepting an office to which they are not elected.

But if this law was to be considered as a law made to punish Non-conformists, in the proper sense and meaning of the word "punishment," which is the evil of suffering for antecedent transgression; it must then be construed strictly, and if any doubt arise upon the extent of it, the turn of the scale must be in favour of the delinquent; whereas the construction now contended for, is to add an additional punishment to what the old penal laws inflicted, and to the loss of power, which is the necessary consequence of this law: for however the point may be involved in words and expressions, it is in reality making this law operate in such a manner, as to subject Non-conformists to an additional penalty of £400 for not having received the sacrament.

Another argument has been urged, that it is against a maxim of law, that a man should disable himself, and especially when that disability arises from the omission of a duty which the law enjoins; that it is not a defence, but an aggravation of his offence: that according to the sound construction of the Toleration Act, Dissenters were not intended to be exempted by it from any secular duties, but only to be delivered from the penalties which several laws had subjected them to for not complying with some religious duties; and the instances of persons, who are out of their senses, not being suffered to avoid their own acts, by pleading their own disability, are [155] mentioned in support of that rule. And if a natural disability, which is the act of God, is no defence, "*a fortiori*," it is said, a disability arising from an offence ought not to prevail.

1st. I deny the rule in the latitude and extent it is laid down; for all pleas of infancy and coverture are pleas by which parties disable themselves. And even in the cases of insanity, if insanity appears upon a general issue pleaded, the law will excuse them. And so it is laid down by Holt, in *Skinner*, 576. Fitzherbert was of



a different opinion as to the rule itself; and it does seem to be very unaccountable, that a man should be at liberty to avoid his own act, by the duress of man, and not by the duress of Heaven: and the reason given for it in the books, that a man cannot know what he did when he was mad, is to me quite unintelligible; for what inconsistency is there in saying, he does not know he ever did such an act; but if he did, he was mad when he did it?

The best and the truest reason seems to be, that the law has directed a particular mode of inquiry for the manifestation of insanity, and avoiding the acts of persons under that unhappy visitation. The King, as the general curator of all such persons, is to take them under his immediate protection, and after an office, finding the insanity, to avoid such of their acts as he thinks proper. But in all cases of punishment, properly so called, insanity is always a defence; and if a lunatic were to be elected into a corporation office, he might certainly be defended against an action for not accepting the office by his insanity; for it would be only shewing that he is not the object of the bye-law; and in 5 Mod. 421, it is expressly laid down, that madmen cannot be chosen into corporation offices, but are tacitly excepted out of all bye-laws made to oblige an acceptance [156] of them. So in this case, when the party shews that he has not received the sacrament, he shews that he is not a fit person to be elected, and consequently not an object of the bye-law. The only difference between the cases is, that he shews a natural incapacity in the one case, and a legal incapacity in the other: and even in the case of lunatics, avoiding their own acts, Lord King, Equity Cases Abridged, 279, was of opinion, that the rule was to be understood, of acts done by them to the prejudice of themselves. A case was put upon a purchase by a Papist, which is void: and yet, if he were in possession of the estate, it is asked, could he plead this disability if called upon to execute an office in respect of the tenure? And he certainly could not, because the service follows the possession, and is a lien upon the estate. It is a condition which follows the land, let it be in whose hands it will, and the law looked on the person in possession; and whether he is in by title or without title, the estate must perform the service by the person who then has it.

But then, it is said, the circumstance which renders the party incapable of being elected, is an offence; it is the omission of a duty enjoined both by the temporal and ecclesiastical law, and a person shall not avail himself of a transgression of the law, to release himself from the performance of his own contract.

The fallacy of this argument lies in not fixing what this contract is: the nature and extent of the contract must be settled with precision, before we can apply any rule of pleading, laid down by the law, for avoiding it.

Now, what is the contract?—It is a contract to execute all offices to which the corporation duly elects him; and therefore, when he pleads a fact, which shews that he is not elected, it is not [157] a plea to avoid his contract, but it is a plea of a fact, shewing that he has not broken it.

In the case of insanity, the plea would avoid the contract, from the incapacity of the party to make it. This plea admits the validity of the contract, but denies the infringement of it. It is disclosing a fact which shews that he is not elected: it is an objection to the plaintiff's right of action. And the first thing to be considered in all actions, is the plaintiff's title. If there is any radical defect in his title, it is the province of the Judge to dismiss it out of Court, even though no objection was made to it by the defendant; and there are many cases founded upon that principle. If it appears the plaintiff has broken the law, he shall never have the benefit of the law in the very instance in which he has broken it; and though the defendant may have broken the law too, yet that will not repel the objection to plaintiff's right of action.

But supposing a person shall not disqualify himself by an offence, yet, since the Toleration Act, where is the offence in persons who bring themselves within the description of that Act? for that Act hath taken away both "*reatum et poenam*."

But it is then said, that the Toleration Act was not made to release Dissenters from any secular duties, but to exempt them only from penalties. And the 7th sect. in the Toleration Act has been much relied upon, to shew, that a discharge from temporal offices was then under their consideration; and that it can be carried no further than to the offices there specified, and that it is not an absolute exemption even from them, but only enables the parties to find a deputy; for if that deputy is not approved, they are still liable; and it has been very ingeniously urged, that

this is an evidence the Act did not intend to [158] meddle with any temporal offices but what are mentioned in that section, and with those, only for the purposes particularly mentioned in it.

1. Now in the first place, that clause does not relate to any offices which require a sacramental qualification; and therefore it does not prove that those offices were then under their consideration.

2. In the next place, that clause is most apparently adapted to the case of persons who did not care to take any oaths at all, viz. to the case of Quakers. It was a ray of indulgence to them, guarding at the same time against that indulgence being prejudicial or injurious to other people.

But the true use and influence of the Toleration Act upon this question is, that by extinguishing the offence, it extinguishes the reason upon which Lord Chief Justice Holt founded his opinion in the case of *The King and Larwood*. It is a necessary consequence, resulting from the repeal of those laws which created the offence.

It does not, "ex professo," interfere with sacramental offices, or perhaps intentionally; but when it abolishes the offence, it removes the objection, and puts the persons, who bring themselves within the description of the Act, into the same situation as if those laws had never existed; and if they do not exist, it is no greater offence in them not to have received the sacrament, than not to be worth £15,000. The election was illegal and void, but the parties were estopped from shewing the defect, because that defect was an offence in the person who shewed it; but when it ceases to be an offence, the estoppel vanishes, and the argument upon this objection stands thus: the not receiving the sacrament was an offence, and when it was an offence, a person could not excuse himself from paying [159] the penalty of the bye-law, by alledging that he had been guilty of it; but the not receiving the sacrament by persons within the description of the Toleration Act, is now no transgression of the law; and if it is no transgression of the law, it is no offence; and if it is no offence, it is no more than shewing any other fact which renders the party elected not eligible. And this distinction varies the case of Dissenters, bringing themselves under the description in the Toleration Act, from the case of atheists, infidels, and persons who are of no religion at all. And if the law had said, that no unmarried man should be elected into this office, there is not the least colour to say that an unmarried man, elected, might not have repelled this action, by a disclosure of the want of that qualification.

As to the amendment made by the Lords to the occasional conformity bill, and the conference upon it in 1702; both the bill and the conference proceeded from a factious party spirit in both Houses, when questions were started and tossed about from one side to the other, without considering the relevancy of them, but only how far they would annoy and perplex one another: and if it had been the result of the coolest and most mature deliberation, it only manifests the apprehensions of the Houses at that time, which were probably occasioned by the case of *The King and Larwood*: but Parliamentary doubts, debates, or conferences, ought to have no weight in directing judicial determinations.

As to the 5th Geo. I. it is made use of only to shew, that an election of a person who has not received the sacrament, cannot now be considered to be absolutely void to all intents and purposes whatsoever, because a possession for six months will substantiate it. But that Act only affects cases where there has been six months possession-[160]-sion, and is rather a Statute of Limitations, founded upon public convenience, to guard against the violent operation of the annulling words in the Corporation Act.

But before the six months are expired, and even afterwards, where there has been no possession of the office under such an election, the operation of the former law is not at all varied by it.

I shall be very short upon the cases which have been cited, because I have in some part or other of what I have said, endeavoured to meet all the reasons that are to be found in any of them.

The case of *Box and Wollaston*, is cited as an authority for the defendant in error; but that case could not have been determined for the plaintiff, upon the point which it is now produced to prove; because if it had, it must have been cited and relied upon by Lord Chief Justice Holt, and Sir Giles Eyre, as a case directly in point to support their opinion. The Court therefore certainly expressed their sentiments in favour of the plaintiff upon the merits, but determined against him upon some



imperfection in the form of the replication. But if it had been determined upon the merits, still it proceeds upon the principle of not disqualifying by an offence ; and therefore does not apply to the present case, where the fact alledged is now no offence.

*The King and Larwood* is certainly no authority in the present case, because from all the reports of it, it is clear the Toleration Act was laid quite out of that case by Lord Chief Justice Holt ; and it was the opinion only of two Judges, Mr. Justice Samuel Eyre being of a different opinion. And in 4 Mod. 274, Lord Keeper, Lord Sommers, is said to have been of the same opinion with Mr. Justice Samuel Eyre ; and it is observable from the same book, that [161] the fine set upon the defendant Larwood, in that case, was five marks and no more, which shews that the two Judges who were of opinion against him, thought it a tender case, and were very gentle in the punishment.

But giving that case all the authority which the unanimous opinion of a Court deserves, yet as it stands upon a reason which vanishes, like a phantom, before the Toleration Act, it can have no effect upon the present question, except it be in favour of our opinion—for that case does in effect prove, that if it had not been an offence, advantage might have been taken of the disability. And I observe, that it is admitted in that case by the Judges who were of opinion against Larwood, that if one is disabled by judgment to bear an office, he shall be excused, “quia judicium redditur in invitum.” If a judgment against an individual will excuse, why shall not an Act of Parliament, which is the supreme judgment of the whole Legislature, have the same effect ?

The case of *The Mayor of Guildford and Clarke*, 2 Vent. 247, is an authority against *The King and Larwood*. And though the Court in that case thought the exceptions to the declaration incurable, and the book says, that so judgment was given for the defendant ; yet they were unanimously of opinion, that the plea in that case was a good bar.

As to the case of *Sir John Read*, 2 Mod. 299, he was capable of the office at the time he was appointed to it, and had been actually in the possession of it for three months ; whereas the defendant in this case was not eligible into the office at all, and never was in the possession of it.

[162] Sir John Read was alledged a disability, which he had not only power to remove, but it was his duty to remove ; but when a Non-conformist is elected into a corporation office, he cannot remove the disability, because it is a disability which precedes the election ; and his receiving the sacrament afterwards will not remove it, and since the Toleration Act, it is not his duty to remove it if he could.

The case of *The Mayor of Exeter and Starr*, 3 Lev. 116, doth not relate to the sacramental qualification. Starr refused to take the oaths and subscribe the declaration according to the Corporation Act ; and they held that a refusal of the oaths was a refusal of the office, and so within the power given to them by their charter to fine for refusing to accept of offices ; but there was no incapacity to be elected suggested, and therefore that case differs as widely from this case, as being legally elected and illegally elected, differ from one another.

If it be thought just and reasonable that this class of men should pay £400 a piece, for not executing offices which they are forbidden to accept, the law must be altered by the Legislature ; for as the law now stands, I am clearly of opinion they are not obliged to pay it, and that the judgment in this case ought to be

Reversed (a).

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(a) The Judges, commissioners of error, were unanimous in reversing the judgment of the Sheriffs Court, and the affirmance thereof by the Court of Hustings.

A writ of error in Parliament was brought in 1766, for the reversal of this judgment of the commissioners of errors ; and, on the 4th of February 1767, after hearing the opinion of the Judges “seriatim,” on a question of law proposed to them, the above judgment of reversal was

Affirmed.

V. Journals of the House of Lords, vol. 31, p. 475.



## [163] APPEAL.

Before the Most Reverend Father in God Thomas, by divine providence Archbishop of Canterbury, Primate and Metropolitan, &c., Visitor in Ordinary and Interpreter of the Statutes of the College of All Souls departed this life in the faith, in the University of Oxford: the Honourable Sir John Eardley Wilmot, Knight, one of the Justices of the Court of King's Bench: and, the Worshipful George Hay, Doctor of Laws, Vicar General of his said Grace:—sitting as his assessors in Doctors Commons, London; present Edward Rushworth, the actuary assumed.

WOOLLEY LEIGH SPENCER, *against* THE WARDEN AND FELLOWS OF ALL SOULS COLLEGE, OXFORD. 20th February 1762.

This cause was assigned to be heard this day at the petition of the proctors on both sides: Greene prayed that his grace would pronounce for the appeal made and interposed in this behalf, and that the pretended election of William Vyse and James Poole, in this cause appealed from, was and is null and invalid in law, and that it may be so pronounced, and that the warden and fellows of the said college may be monished and compelled to admit the said Woolley Leigh Spencer, a true and actual fellow of the said [164] college, as a founder's kinsman, and of the blood, kindred, or lineage of the founder, Archbishop Chicheley, into one of the fellowships vacant at the time of the said pretended election, within a competent time, to be fixed and assigned by his grace, and to certify the same within some short time after such admission, and that the said warden and fellows may be condemned in the costs of this suit, and compelled to the due payment thereof. Stevens prayed that his grace would be pleased to pronounce against the force and validity of the appeal interposed in this behalf, and would dismiss his clients from the said appeal, and would condemn the said Woolley Leigh Spencer in costs.

There were two other appeals, of *Carne* against *The Same*. *Wynne* against *The Same*.

The appellants had proposed themselves as candidates at an election for two vacant fellowships of All Souls College. Wynne was in the eleventh, Carne was in the thirteenth, and Spencer in the fourteenth degree from the founder; and the college had rejected their claims, admitting their pedigrees and their qualifications, but insisting that consanguinity was worn out at such remote degrees from the founder, and that they were not entitled to any preference. The appellants founded their claim upon the following clauses in the statutes:

"Insuper cum, secundum Apostolum, teneamur bonum facere ad omnes, maxime ad domesticos Fidei, Ordinamus & volumus quod in omni Electione Scholarium predicatorum, futuris temporibus in dictum Collegium facienda, principaliter et ante omnes alios, illi [165] qui sunt vel erunt de Consanguinitate nostra & genere, si qui tales sint, ubicunque fuerint oriundi, dum tamen sint reperti habiles & idonei, secundum Conditiones superius & inferius recitatas, sine aliquo Probationis tempore, in veros dicti Collgeii Socios ab initio eligantur & etiam admittantur: Quibus deficientibus, tunc illi qui sunt vel erunt de locis vel Parochiis in quibus Possessiones et res spirituales sive temporales dicti Collegii consistant, &c.

"Quod omnes electos seu assumptos (his qui de nostro Sanguine duntaxat exceptis) per unum annum in eodem Collegio stare volumus, antequam in veros Socios ejusdem collegii admittantur."

The question was argued by Mr. Blackstone and Dr. Smallbrook, for the college, and by Dr. Wynne and Mr. Wynne, for the appellants.

When the audience was withdrawn (which Dr. Hay reported to be the practice upon appeals to visitors) the archbishop having asked Mr. Justice Wilmot his opinion, he said,

That he thought it was a question of intention; and that if that intention was not repugnant to reason, morality, or the municipal laws of the kingdom, it must be implicitly obeyed.

That a founder was a legislator in respect of the society which he had created. The statutes were a code of laws, by which the society was to be governed, and the succession regulated; and that his grace was substituted by the founder, in the place of his heirs, to be the guardian of the founder's intention, and in this domestic forum, to enforce obedience to it: that the founder's intention was to be collected from his

words, and that he had himself laid down the rule for expounding them, "*secundum verum literalem et grammaticalem sensum*," and that the words "*de consanguinitate genere* [166] & *sanguine*," were as general, comprehensive, and indefinite as could be found in the Latin language, to take in all persons whatsoever, who were of the same blood with the founder, to the remotest generation.

That it was a rule adopted by all laws, "*quoties in verbis nulla est ambiguitas, expositio contra verba expressa non est fienda*." That the counsel for the college had not controverted the extent of these words in their common and popular signification; but had contended, that at the time of the foundation of this college, consanguinity was limited and bounded by all laws, and particularly by the canon law (which was then in the highest esteem) to some certain degree. That the civil law, as then understood, limited consanguinity, according to some writers, to the seventh, and according to others, to the tenth degree in all collateral successions: that the canon law bounded it in many instances, and, in respect of marriages and "*recusatio judicis*," had stopt it at the seventh; and the common law of this kingdom, in challenges to jurors and sheriffs, at the ninth; and that the Court of Chancery had confined a devise "to all relations," to include only those who could take as next of kin under the Statute of Distributions. That, by the feudal law, consanguinity originally only took place in the descending line lineally "*ad infinitum*;" and though by our law now, it was as indefinite collaterally as lineally, yet the law required a person, claiming by descent, to prove himself heir, either to the first purchaser, or to the person last seised, who was presumed to be of the blood of the first purchaser. That general words may be restrained, and particular words enlarged by the subject-matter, and must be expounded always according to the meaning of the person who uses them; and that the founder must [167] mean to have used them in a limited bounded sense, which they always had in a legal signification. That the tenth was the remotest degree admitted by any law, and that Mr. Wynne, who was the nearest, being in the eleventh degree, they must all be excluded.

That he thought there was no reason to infer such an intention from this argument, but rather the reverse; because it was not to be conceived that so wise and learned a prelate as the founder (called by Lindwood, his secretary, the "*lumen legis*") should not have fixed the limit to his consanguinity, if he had intended it, when the insertion of three words, "*infra decimum gradum*," or any other degree he had chosen, would have ascertained it; and as different degrees, and different manners of computing them, had been adopted by different laws, and even different degrees to different purposes by the same law, he could never mean to leave it open to construction, which of those degrees he referred to: and as to the boundaries mentioned to have been set by the laws in the instances mentioned, that he apprehended the text of the civil law, cited by Dr. Wynne, shewed, that even in collateral successions, "*ab intestato*," there was no limit, but that parties "*etiam in longissimo gradu*," were entitled to succeed: and though some of the old commentators, as Azo and others, had bounded the relationship to the seventh or tenth degree, yet all the writers, since the founder's time, had been of a different opinion; and that the reason given by Azo, &c. for bounding it in the collateral line, (*viz.* because it ought to be between persons who might live to see one another) applied equally to the lineal descending line; whereas it was admitted by all writers, at all times, that lineal consanguinity extended "*ad infinitum*."

[168] That as to the canon law, in respect of marriages, the prohibition, though formerly extended to the seventh degree from lucrative motives, yet, at the time of the founder, was contracted to the fourth; and it did not follow, that because persons were prohibited to marry within particular degrees for particular reasons, that they were not related at all out of those degrees: that if the fourth degree were to be the limit, the great grandsons of the founder's nephew, whom he might have lived to have seen, would have been excluded. In the instances given of the "*recusatio judicis*," and challenges to jurors and sheriffs, the laws did not say that consanguinity ceased beyond those degrees which limited the objection, but that those distances removed any suspicion of partiality: that the laws, in bounding consanguinity in particular cases and for particular purposes, proceeded upon a supposition that consanguinity was infinite; because there would have been no occasion for drawing any line, if it had ceased of itself.

That the Court of Chancery had adopted the plan of the Statute of Distributions,



in the construction of devises "to all relations," for the sake of certainty, and considering the testator as meaning his next relations, and to have said no more than what the statute had expressed; but that the next of kin in the remotest degree, would be entitled to a distribution under that statute, and it had been so held in *Mrs. Windsor's case*, cited by Dr. Wynne; and therefore a devise "to all relations" would take in the next degree, if it were ever so remote. In the feudal law, the interest of the vassal was originally very little: at first perhaps, at pleasure: then for life: to sons, to grandsons, to all in the lineal descending line; and at last to all [169] collateral heirs whatsoever: that in the time of the founder, and for many centuries before, the common law set no bounds to consanguinity, but gave a right of succession to heirs at any distance.

That the counsel for the college could not tell which degree to fix upon; but only that the founder must mean some of the degrees, and desired his Grace to fix it: but if there was no evidence of the founder's intention in that respect, it must be mere arbitrary conjecture, and not found construction, to fix the consanguinity to any: and though the counsel had mentioned the tenth, yet they knew, and admitted, that degree would as effectually exclude all the founder's kinsmen now existing, as a much nearer degree.

That he thought there was nothing to determine his Grace's judgment as to any boundary at all; or if the founder must be supposed to have used the words with any legal reference, that in a disposition and establishment of his real estate under letters patent from the Crown, he might with much greater propriety be supposed to use the words in the sense of the common law, than of any other law whatsoever: that if the college were dissolved, the common law would now give the estate of the founder to his heirs at law at any distance; or if the founder had not appointed a visitor, the visitatorial power would now be in the heir of the founder at any distance: and it would be a strange exposition of those words, to deny the preference to persons as not being of the blood of the founder, when in the first instance they might take the whole estate, and in the other case, might have sat as the supreme judges upon this question, because they were of the blood of the founder.

That the principal clause in the statutes, upon which the question arises, "in omni electione scholarium predictorum futuris tempo-[170]-ribus in dictum collegium facienda," &c. shews, that the preference to his relations was to accompany the election in all times to come. The perpetuity of the one, was as much the object of his contemplation, as of the other: they were to be commensurate and coextensive; and there is as much reason to limit the duration of the college, as the duration of the preference he was giving to his relations in the original constitution of it. And it would be "maledicta expositio, corrumpens textum," to sever, in construction, ideas which the founder had united in his own mind; and the oaths to be taken by the warden and fellows, and the Statute "de Veste," all concur in evidencing the same intention.

Part of the oath to be taken by the warden is, "Ego, A. B. juro quod omnia Statuta & Ordinationes hujus Collegii, ac omnia & singula in eisdem contenta, quatenus personam meam concernunt vel concernere poterunt, secundum planum literalem & grammaticalem sensum & intellectum eorundem inviolabiliter tenebo & etiam observabo, ac, quantum in me fuerit, teneri faciam ab aliis, & etiam observari, &c."

"Item, quod consanguineos dicti Fundatoris in veros Socios Collegii, juxta formam Ordinationis & Statuti superius editi, sine difficultate quacunque admittam, & procurabo admitti juxta posse meo."

The like oath, as to the admission of founder's kinsmen, is directed to be taken by every fellow, at the time of his admission.

The Statute "de Communi Annua Veste" is, "Statuimus quod Custos & Socii universi dicti Collegii infra Regnum Anglice existentes, tam nostri Consanguinei quam alii qui pro tempore fuerint, [171] "erga Festum Nativitatis Domini, annis singulis in perpetuum, Vestes de unâ & eâdem lectâ habeant, &c."

That the clause directing that, upon a failure of his relations, a preference should be given to those who were born in the places where his estates lay, and in default of such, to persons born within the province of Canterbury, does not prove that he had a failure of relations in his eye by an extension of kindred beyond any particular degrees; but rather shews that a perpetuity of preference was then in his mind:



relations might not offer themselves as candidates, or might not be qualified, or his whole family might be extinct, or the connection incapable of being proved. In the two first events, the provision was only a temporary one; in the last, it was the substitution of a preference, which "must" last for ever, to a preference which "might" last for ever; but it would be inverting the plain avowed meaning of the founder, to suffer locality to take place of his blood at the remotest distance that the mind can conceive; and though nice speculative calculations have been made to shew the quantity of the founder's blood in the fifteenth degree, and that all affection which is supposed to be the foundation of the bounty, must be worn out long ago, and all relation of kindred extinguished, (as Lord Clarendon expresses it upon the pedigree of Lord Say and Sele, from William of Wickham) the bounty is not confined to any particular proportion of the founder's blood. It is sufficient there is any, to give it the preference to a stranger.

That this question might have existed in the founder's time: all persons descended from the twelfth lineal ancestor of the founder would have been in the same degree with Mr. Wynne. Suppose a person in that degree, duly qualified in other respects, and a person [172] born at a place where one of the founder's estates lay, had offered themselves as candidates; and the founder had been asked, to which he meant by his statutes to give the preference: must not his answer have been, "to my own blood most certainly?" Would he have thought of computing what quantity of blood there was in a human body, and how much of that blood ran in the veins of the candidates, and then have determined the question according to the event of that inquiry? or would he not have said, "the least proportion of my blood shall turn the scale against locality, which I substitute only upon the non-appearance of any persons of my own blood at the election;" and it is a mistake to suppose affection, in the proper sense of that word, to be the foundation of this kind of provisions, where there can be no lineal descendants; it is rather, reverence for ancestors, who are the common stocks from whence the collaterals must all branch, than affection for individuals, never existing to the founder.

That the advancement of learning, for the good of the public, may be the only motive of the endowment of colleges; and perhaps in many, was the only motive. A desire in the founder to perpetuate his name, and to erect the most durable monument which could be built to preserve the memory of his virtues, might very laudably co-operate with his public spirit: and when provisions are made for the founder's own family in the foundation, it is plain that the same principle, which produces strict family settlements, had some influence on his mind, in his benefaction to the public. That principle always affects perpetuity; and he considered the founder as actuated by that principle in the giving the preference to his blood. It is in the nature of a family settlement, modified so as to be subservient to the great [173] and principal object of his munificence, the good of the public; wishing at the same time, that the public might receive that good through his own relations, as long as he had any.

That it was said, he could not have made a settlement, which would not have left it in the power of the family to have alienated; and therefore, as a family provision, it ought not to subsist "ad infinitum:" but that was a mistake, for in the time of the founder, and for near two centuries before, an estate might have been settled in such manner as would have taken in all the claimants as heirs male of the body of the founder's father, or any of his ancestors. Fines and recoveries were the invention of a subsequent age. As the law then stood, a perpetuity might have been created from any stock the founder had fixed upon; a very strong argument to shew he intended a perpetuity of preference, when he was substituting this preference as some equivalent for his estate, which, in the opinion of those times, might have been perpetuated in his family.

That it is admitted, the blood never wears out in the lineal descending line: the collateral line is as the lineal to the founder, who could have no legitimate children; and at a time, when land given to a man and his heirs, would by the feudal law have gone only to his lineal descendants; yet, if an estate was given in that manner to a churchman, it went to his collateral heirs, because he could have no other.

That much stress has been laid upon a difference between proximity and propinquity: that when the inquiry was (as in successions) who was the next heir or next of kin, remoteness was no objection; but when the inquiry was, whether of kin at

all, there it must be bounded. That in case there was a class of persons in the eleventh, and another [174] in the twelfth degree, and the dispute was, who was next of kin, it might be fixed to the eleventh, because it would not be universal ; whereas, if the dispute was about propinquity, that is, who were of kin, it must take in all to the one thousandth degree, unless it was bounded.

That it appeared unintelligible how the eleventh degree is in any case whatever to be considered as the next of kin, when contrasted with a more remote degree, and at the same time, when uncontrasted with a remoter degree, to be considered as no kin at all.

That it had been said, that there is an absolute necessity of bounding consanguinity, because it would lead to an entire universality : that it must multiply into millions, and would monopolize the whole bounty of the founder, and also other additional bounties given by subsequent benefactors, without any preference to the kinsmen of the founder : that all benefactions of this kind are given for the advancement of learning, and as prizes for eminent and superior abilities : that founder's kinsmen may be as eminent as mere strangers, but that it had been held that it was not necessary they should be equal in abilities to strangers ; that a founder's kinsman had upon an appeal been determined to be qualified, if he could construe a Latin verb out of the accident ; and that the general intention of the founder was encountered by tying up the college to postpone great merit and abilities in their elections.

That the college has no reason to object to the extension of the consanguinity "ad infinitum," as leading to a universality ; because, when that is the case, the college may prefer any of the candidates they please, and which seems to be the object of their wishes ; and, in its progress towards universality, the circle of consanguinity will widen [175] very fast, and consequently the more extensive their choice must be ; for not being bound down to take the nearest relations, they might always elect the worthiest ; and when the blood was opposed by strangers, the preference ought not to be given unless there was such a degree of learning and merit as deserved encouragement in "*arbitrio boni viri*." An exact parity of learning or natural parts, would be too strict a measure ; but there certainly ought not to be a great disproportion ; and if the whole bounty was monopolized by persons so qualified, it would be most agreeable to the founder's intention ; for he meant the advancement of learning through the medium of his own family in the first place, and thereby united two very laudable purposes, the good of his own family, if they deserved it, and the good of the public : and if subsequent benefactors ingraft upon the original foundation, it is an evidence they intended their benefactions should follow the plan of the original foundation ; and if they did not intend it, they should have provided against it in their establishments ; and if the college accepts the bounty upon different terms, they must comply with them.

That there was no danger of monopoly to the founder's family, from the great difficulties of proving pedigrees and the many qualifications required in the candidates ; and as to limiting any particular number of fellowships to the founder's family, that his Grace had no such authority : that he was not to controul the founder's laws, but to execute them ; and if Bishop Hooper's decree for limiting the fellowships in William of Wickham's foundation was truly stated, he thought it an illegal one.

Upon the whole, Mr. Justice Wilmot was of opinion, that it was most clearly the intention of the founder to give a preference [176] to his blood, "*ad infinitum* ;" and that no boundary line could ever be drawn to the consanguinity, but by the hand of time, which sooner or later levels all distinction of families, and obliterates every other memorial of human greatness.

But he submitted his opinion to his Grace's much superior wisdom and judgment.

His Grace the Archbishop pronounced for the appeal, and that the pretended election of William Vyse and James Poole was void ; but gave no costs : and decreed the statutes of the college to be delivered out of Court.



## [177] HOUSE OF LORDS.

JOHN EARL OF BUCKINGHAMSHIRE, AND MARY ANN, COUNTESS OF BUCKINGHAMSHIRE, his Wife, late Mary Ann Drury, Spinster; JOCOSA CATHARINA DRURY, Spinster, an Infant, by her Next Friend, Appellants; DAME MARTHA DRURY, Widow, Respondent. 1762.

[S. C. 3 Bro. P. C. 492; sub nom. *Drury v. Drury*, 2 Eden, 39, 60; see *Carruthers v. Carruthers*, 1794, 4 Bro. C. C. 510; *Field v. Moore*, 1855, 7 De G., M. & G. 714; *Seaton v. Seaton*, 1888, 13 App. Cas. 67; *Clements v. London and North Western Railway* [1894], 2 Q. B. 492.]

By indenture tripartite, dated 5th October 1737, previous to a marriage between the respondent, (the mother of the appellants, the Countess of Buckinghamshire, and Jocosa Catharina Drury,) and Sir Thomas Drury, Baronet, deceased, who was the father of the said appellants, and made between the said Sir Thomas Drury, of the first part; the respondent, then Martha Tyrrell, spinster, one of the daughters of Sir John Tyrrell, Baronet, deceased, of the second part; and Joseph Townsend and Thomas Matthews, Esquires, of the third part: after reciting the intended marriage, it was declared and agreed, that the said Sir Thomas Drury should be entitled to and receive all the personal estate and effects, which the respondent was possessed of or entitled to, for his own use and benefit; and that all the lands, tenements, and hereditaments, then late of the said Sir John Tyrrell, which should descend to or devolve upon the respondent, during the intended coverture, should be settled and assured in manner therein after mentioned; and also that the respondent, in case she should survive the [178] said Sir Thomas Drury, should have and enjoy a clear annuity of £600, during her life, for her jointure, and in full satisfaction and bar of all dower; and also in lieu and full satisfaction of any share or distributary part of any personal estate, which the said Sir Thomas Drury should be possessed of or entitled to, and which she should or might claim or demand, by virtue of the statute for the distribution of intestates estates; or otherwise howsoever. And Sir Thomas Drury, in consideration of the said intended marriage, and of the portion which the respondent was possessed of or entitled to, and which would accrue to him in case the said marriage should take effect, did, for himself, his heirs, executors, and administrators, covenant with the said Joseph Townsend and Thomas Matthews, their executors and administrators, that the heirs, executors, and administrators of him, Sir Thomas Drury, in case the respondent should survive him, should pay her, during her life, the clear yearly sum of £600 half-yearly; and also that in case any lands of the said Sir John Tyrrell, deceased, should in anywise descend or come to the respondent, during her said coverture, then Sir Thomas Drury and the respondent should and would immediately thereupon convey, settle, and assure all such lands to the use of Sir Thomas Drury, during his life, remainder to the use of the respondent and her assigns, during her life; and after her death, to the use of the said Sir Thomas Drury, and his heirs and assigns for ever.

This deed was executed by Sir Thomas Drury and the respondent, being then an infant under the age of twenty-one years, in the presence of Elizabeth Kellaway, the respondent's then guardian, who was a subscribing witness thereto. The marriage was solemnized soon after, with the privity and approbation of the said [179] Elizabeth Kellaway; and the respondent, at such marriage, was entitled to a portion not exceeding £2000.

On the 20th January 1759, Sir Thomas Drury died intestate, being seised in fee simple of a real estate of the yearly value of £2600; and he was also at his death possessed of a personal estate to the amount of £60,000 or upwards; and at his death left the respondent, his widow, and the appellants the Countess of Buckinghamshire and Jocosa Catharina Drury, his only children and co-heiresses at law, being both then infants.

Soon after the death of Sir Thomas, letters of administration of his personal estate were granted to the respondent, and she possessed the same or great part thereof; and afterwards insisted, that as she was an infant at the time of the execution of the aforesaid indenture of settlement, and at the time of the solemnization of her marriage, she was not bound to accept the provision thereby made for her, but that



she was entitled to dower out of the real estate of Sir Thomas Drury, and to her distributive share of all his personal estate.

And therefore the appellants, the Countess of Buckinghamshire (then Mary Ann Drury, spinster) and Jocosa Catharina Drury (both then infants) by their next friend, in Trinity term, 1759, exhibited their bill in the Court of Chancery against the respondent, stating the beforementioned particulars, and praying that an account might be taken of the rents and profits of the real estate of Sir Thomas Drury, received by the respondent, and also of the personal estate, and the interest and profits thereof, and of his debts and funeral expences; and that the clear surplus of his personal estate, after payment of his debts, might be brought into Court, and placed out at interest for the benefit of the appellants, [180] during their minority; that proper persons might be appointed to receive the arrears and growing rents and profits of the real estates, and also of the personal estate, during the minority of the said appellants; and that out of the rents and profits of such real estate, and the interest and produce of such personal estate, the said annuity of £600 might be retained by, or paid to the respondent for the time past and to come; and that a suitable allowance might be made for the maintenance and education of the appellants for the time past and to come; and that the savings of the appellants yearly income, after deducting what should be so paid for their maintenance and education, might be from time to time placed out at interest, and improved for their respective benefit, during their minority.

To this bill the respondent put in her answer, and thereby said, that she had possessed so much of the personal estate of Sir Thomas Drury as she was able, but that she had not received any rents or profits of his real estate; and she insisted, that as she was an infant when she executed the said indenture of settlement, and at the time of her marriage, she could not nor ought to be barred by the said indenture, but was at liberty to make her election, whether she would accept the said annuity, or waive the same, and take her dower out of the real estate of Sir Thomas Drury, and her distributive share of his personal estate under the statute; and she submitted to account, having all just allowances: and if the Court should be of opinion she was at liberty to waive the annuity of £600, and to claim such rights as she was by law entitled to, in and to the real and personal estates of Sir Thomas Drury, then she waived the annuity, and claimed to be entitled for her life to a third [181] part of the real estates, as her dower; and also to be entitled absolutely to a third part of the clear residue of his personal estate, and of the interest and produce thereof. But if the Court should be of opinion, that she was bound by the said indenture, notwithstanding she was an infant at the time of executing the same, then she claimed to be entitled, by virtue of the said indenture, to a clear annuity of £600 per annum, from the time of the death of Sir Thomas Drury, payable half-yearly during her life; the first payment to be made on the 25th March 1759; and she also claimed a suitable allowance for the maintenance of the appellants her daughters, from the death of their father to that time, and also for such farther time as she should maintain them.

This answer being replied to, depositions were taken in the cause, whereby it appeared that the respondent was born on the 23d December 1716, and intermarried with Sir Thomas Drury, on the 11th October 1737.

The cause was heard (a) before Lord Chancellor Henley, on the 27th, 28th, and 29th February 1760, and the 3d, 4th, 6th, and 7th of February, and 1st June 1761; on the last of which days, his [182] Lordship decreed, that it should be referred to

(a) Vide Harg. Co. Litt. 36, 6, note 7, where, speaking of this case of *Drury v. Drury*, Mr. Hargrave says, "The points determined by Lord Northington were, 1st. That the Statute of 27 H. VIII. which introduced jointures, extends to adult women only, infants not being particularly named; and therefore, that notwithstanding a jointure on an infant, she may waive the jointure, and elect to take dower. 2d. That a covenant by the husband, that his heirs, executors, or administrators, shall pay the wife an annuity for her life in full for her jointure, and in bar of dower, without expressing that it shall be charged on any particular lands, or be secured out of lands generally, is not a good equitable jointure within the statute. 3d. That a woman, being an infant, cannot by any contract, previous to her marriage, bar herself of a distributive share of her husband's personalty, in case of his dying intestate."

the Master to take an account of the personal estate of Sir Thomas Drury, come to the hands of the respondent, and of his debts and funeral expences, which were to be paid out of his personal estate, in a course of administration; and his Lordship declared that the respondent, being an infant at the time of her executing the indenture of the 5th of October 1737, was not barred of her dower in the intestate's real estate, nor of her share of his personal estate, under the Statute of Distributions; and therefore his Lordship ordered, that so much of the bill as sought to bind the respondent by the said agreement, should stand dismissed, and that the clear surplus of the said intestate's personal estate, after payment of his debts and funeral expences, should be divided into three equal parts, whereof one-third part was to be paid to or retained by the respondent, as her share thereof, under the said statute, and the other two-third parts thereof were to be invested in the purchase of Three Per Cent. Bank Annuities, in the name and with the privity of the Accountant General, in trust, in this cause, for the benefit of the appellants, the Countess of Buckinghamshire and Jocosa Catharina Drury respectively, until they should attain their age of twenty-one years, and he was to declare the trust thereof accordingly, subject to the further order of the Court: and if the said two-third parts belonging to the appellants respectively, or any part thereof, had been already invested in Government securities, the same were to be transferred to the said Accountant General, in trust in the cause, for the said appellants' benefit; and he was to declare the trusts thereof in like manner: and the appellants were to be respectively at liberty to apply to the Court for further directions relating thereto as there should be occasion; and directions were given concerning the allowance for the maintenance and education of the appellants; and a receiver, who had been before appointed of the intestate's real estate, under an order made in the cause, was to be continued until the further order of the Court, to pass his accounts before the Master, and to pay one-third part of the clear yearly rents of the said intestate's real estate, from time to time as the same should be received by him, to the respondent, in lieu and satisfaction of her dower, and the other two-third parts of such clear yearly rents, from time to time as the same should be received, into the bank, with the privity of the said Accountant General, to the account of the cause; and directions were given for placing out such two-third parts of the said rents from time to time, for the benefit of the appellants, the Countess of Buckinghamshire and Jocosa Catharina Drury; and all parties were to be paid their costs of the suit to that time, to be taxed by the Master, out of the intestate's estate; and his Lordship reserved the consideration of subsequent costs, until after the Master should have made his report.

Soon after pronouncing this decree, viz. 14th June 1761, the appellants, the Earl and Countess of Buckinghamshire, intermarried, and the cause having been duly revived on that occasion, the present appeal was brought to reverse the decree.

After hearing counsel on this appeal, the following question was put to the Judges by their Lordships; viz.

"Whether a woman, married under the age of twenty-one years, having before such marriage a jointure made to her in bar of [184] dower is thereby bound and barred of dower within the Statute of the 27th Hen. VIII.?"

The Judges differing in opinion, they were directed to deliver their opinions "seriatim," with their reasons.

Mr. Justice Wilmot.—This question depends entirely upon the true construction of the several clauses in the 27 Hen. VIII. ch. 10 (a), relating to jointures; and in

(a) The clauses are,—

6. "And be it further enacted by the authority aforesaid, that whereas divers persons have purchased, or have estate made and conveyed, of and in divers lands, tenements, and hereditaments, unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for the term of their lives, or for term of life of the said wife; or where any such estate, or purchase of any lands, tenements, hereditaments, hath been or hereafter shall be made to any husband, and to his wife, in manner and form above expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife; that then in every such case, every woman married, having such jointure made or hereafter to be made, shall not claim, nor have



order to get at that construction, it will be necessary to [185] consider the manner of making provisions for wives upon marriages, and for the issue of those marriages; and how the law stood, both in respect of these provisions and of dower, before that statute was made, and what alteration it intended to make in this species of property.

Before that statute, the legal estate of the greater part of the real property in the kingdom was, for reasons unnecessary to be now mentioned, in the hands of feoffees to uses or trustees; and when persons who were in possession, and received the rents and profits of those estates, married and died, women were not dowable of those estates, because the legal seisin had always remained in the feoffees, and had never been in their husbands.

The consequence arising from this separation of the legal and usufructuary interest was, that husbands provided for their wives be-[186]-fore or after marriage, either by feoffments made to the uses of themselves and their wives, under the Statute of 1 Rich. III. which enabled cestui que use to convey; or by limiting uses to them by deed; or by taking conveyances of the legal estate from their feoffees to themselves and their wives, either for life or in tail; and sometimes the ancestors, or collateral relations of the husband, conveyed estates to the husband and wife for life, or in tail; and being usually made to them "jointly," this kind of provision, from thence, acquired the name of a "jointure."

The statute of the 11 Hen. VII. c. 20, was made on purpose to guard these provisions, and to avoid all discontinuances, alienations, and warranties made by wives of these estates, to the prejudice of the issue or heirs of the husband: and though the word jointure is not in the 11 Hen. VII. yet it was held 1 Leo. 261. 1 Cro. 2, that no estate, limited to a wife, is within the meaning of that statute, unless it appears to have been made for her jointure, where the inheritance was to go to the issue or heirs of the husband: and these provisions went by the name of estates made

title to have any dower of the residue of the lands, tenements, or hereditaments, that at any time were her husband's, by whom, she hath any such jointure, nor shall demand nor claim her dower of and against them that have the lands and inheritances of her said husband; but if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower, by writ of dower, after the due course and order of the common laws of this realm; this Act, or any law or provision made to the contrary thereof, notwithstanding."

7. "Provided alway, that if any such woman be lawfully expelled or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto."

8. "Provided also, that this Act, nor any thing herein contained or expressed, extend or be in anywise hurtful or prejudicial to any woman or women heretofore being married, of, for, or concerning such right, title, use, interest, or possession, as they or any of them have, claim, or pretend to have, for her or their jointure or dower, of, in, or to any manors, lands, tenements, or other hereditaments, of any of their late husbands, being now dead or deceased; any thing contained in this Act to the contrary notwithstanding."

9. "Provided also, that if any wife have, or hereafter shall have any manors, lands, tenements, or hereditaments, unto her given and assured, after marriage, for term of her life or otherwise, in jointure, except the same assurance be to her made by Act of Parliament, and the said wife, after that, fortune to overlive her said husband, in whose time the said jointure was made or assured unto her, that then the same wife so overliving, shall and may at her liberty, after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed, or assured, during the coverture, for term of her life or otherwise, in jointure, except the same assurance be to her made by Act of Parliament as is aforesaid, and thereupon to have, ask, demand, and take her dower, by writ of dower or otherwise, according to the common law, of and in all such lands, tenements, and hereditaments, as her husband was and stood seised of any state of inheritance, at any time during the coverture; any thing contained in this Act to the contrary thereof notwithstanding."



"ex provisione viri;" and from this Statute of the 11 Hen. VII. and also from the recital in the clause relating to jointures in 27 Hen. VIII. it appears, that these estates were frequently limited to the husband and wife, and the heirs of their bodies, and sometimes to the husband and wife, and to the heirs of the body of the wife; and the strictest settlement which could be made at the time of passing this Act, was to limit the estate to the heirs of the body of the wife, so as to bring it within the protection of the Act of the 11 Hen. VII. The limitation to trustees, to preserve contingent remainders, was not then invented; and therefore, if the estate was limited to the husband [187] for life, remainder to the first and every other son of the marriage, he might bar the contingent remainders before the existence of issue; or if the estate was limited to the husband in tail, he might bar the estate tail, and the remainders too, by a recovery. The most that could be done, was to vest the estate tail in the wife; and then it was under the protection of the 11 Hen. VII.; and it appears from the books, that these kinds of limitations were very frequent, sometimes of the estate itself; but oftener of the use; and it was more natural they should be so, because it was carrying the check upon alienation, so anxiously aimed at by every body, as far as the policy of the law would then endure.

And it was usual to make these kinds of limitations, not only upon the prospect of a marriage, then under immediate contemplation; but estates were settled by ancestors, and taken upon purchases, with limitations to women whom they or their sons should afterwards marry, without a view to, or so much as the knowledge of any particular woman who was to take under it.

And I lay infinite stress upon this mode and fashion of settlements at the time of making the Act, because it will open the true reason of giving them the quality of a bar of dower, and that reason will apply as strongly in the case of infants as of adults.

One great inconvenience accompanied these kinds of provisions; for whether they were made before or after marriage, if the husband had the legal seisin of any other estates, either in fee or fee tail, the wife would be entitled to dower in those estates, and keep the jointure too.

This inconvenience did not frequently happen, because the legal estate and the use were seldom in the same hand; and husbands [188] had it absolutely in their power to prevent it, by putting the estates, which they had before their marriage, into feoffees, and by taking all subsequent conveyances to feoffees, or to themselves and others jointly, so as to prevent the right of dower from ever attaching. But when the Legislature had come to a resolution to consolidate the use and the legal estate, and to unite them together to all intents and purposes, they saw very plainly, that it was necessary to make several regulations, not only in respect of the immediate and instantaneous influence which this consolidation would have upon real property, as between persons then married, but also as to persons who should marry after the Act was made.

From the preamble of the statute, it is clear the Legislature intended that one consequence arising from this union should take place in its fullest extent, and that was, in cases, where no settlements had been made upon wives, "*ex provisione viri*."

In those cases, all wives, present and future, were to have dower of all the estates of inheritance, whereof their husbands were seised during the coverture. And in this respect, the Act was very beneficial to wives. It was not an enabling Act; for it did not give a right of dower; but the consolidation amplified and enlarged the fund and subject-matter of that right, by putting all their husband's estates within the reach of it.

It is equally clear, that where settlements had been made upon wives, "*ex provisione viri*," whether they were made before or after marriage, the Legislature intended that they should not retain the estates given by those settlements, and be entitled to dower besides: and in this respect the Act was an abridgment of the right, which the common law gave them, of retaining both; and another [189] thing is equally clear, that the Act leaves widows, who were then living, exactly as it found them, entitled either to their settlement, "*ex provisione viri*," or to dower, or to both, or to neither, in the same manner as they would have been, if the Act had never been made.

When the Legislature had determined that widows should not have both jointure and dower, it became necessary to determine which they should have, either to make jointure bar dower, or dower bar jointure, or to give them their choice.

They resolved that a jointure should bar dower; but qualified and relaxed the rule, by giving a choice, where the jointure had been made after marriage.

The substance of the clauses, expressing the intention of the Legislature upon the several points I have mentioned, is, that a woman who then had, or thereafter should have, a jointure made, should not have dower in the residue of her husband's estate; but, if she was evicted of all, or any part, then she was to have a compensation out of the residue of her husband's estate; or if the jointure was made after marriage, she might refuse her jointure and claim her dower, with a proviso to save the rights of widows then existing. And it is very material in this place to observe, that the Act does not lay down two different rules, one for jointures which had been made before the Act, and another for jointures which should be made after the Act; but the rule laid down in one case, was to govern equally in the other.

It is impossible to sever the cases in point of construction, because they are connected together in the same sentence: the words are spoken in the same breath, "jointures made or hereafter to be made:" the measure of the right was to be exactly the same; and indeed the [190] clause is worded in such a manner as to shew, they had their eye principally upon the right of persons who were then married.

And though it was also intended, "*imponere normam futuris*," yet the immediate object in their thoughts, was the case of women then living, and the adjustment of their rights was to be the model by which the rights of all women, who should be married after the Act, were to be determined; and this case must now be considered as the case of an infant married at the time of the Act, and surviving her husband; and therefore the true question in this case is really no more than this:

Whether the words in this Act of Parliament, "every woman married having such jointure made," that is, having a settlement "*ex provisione viri*," with such limitations as are mentioned in the recital, or which fall within the equity of those limitations, did not comprize every woman then married, whether she was an infant, or an adult person, when she married.

If the words, "being under age, or of full age," had been added to the words, "every woman married," there could have been no doubt but she would have been bound by them.

I think that it appears as clearly to be the intention of the Legislature to comprize infants in these general words, as if they had been expressly named.

1st.—The words are general, "every woman married," without distinguishing, whether they were of age or under age; and therefore, taking them in their common and ordinary signification, they comprize infants as well as adult persons.

And the exceptions and notice taken of infants in many Acts of Parliament, are a strong indication of the sense of the Legislature, that [191] even in respect of Parliamentary bars to their right, general words would include them.

The 1 Rich. III. c. 7, directing that fines conclude as well privies as strangers, excepts infants.

The statute 4 Hen. VII. c. 24, excepts them particularly, and that Act is worded in such a manner as to shew, most manifestly, the Legislature thought that the words, "the fine to be a final end, and conclude as well privies as strangers to the same," would have comprized infants, if they had not been excepted.

And the case of *Stowell and Zouch*, in Plowden's Commentaries, is a direct authority in point, that in a case which does not fall within the exceptions of that law, the general words extend to infants, as well as adult persons:

A disseisor levied a fine: two years past the disseisee died, leaving an infant heir at law, who insisted that he was not barred by the fine till five years after he came of age; but as the exception did not extend to that case, and the time began to run in the life of his ancestor, it was held that it should run against him, as if he had been an adult.

1 Rich. III. c. 1, enabling cestui que use to make feoffments, proceeds upon a supposition that general words would include infants; and to guard against that consequence, adds to the general words, "any person or persons being of full age."

The 23 Hen. VIII. and 21 Jac. 1, Statutes of Limitations, except them particularly, upon an apprehension that the general words, "person or persons" would have included them.

The statute 31 Hen. VIII. c. 13, sect. 16, enacts, "that the King shall hold and enjoy all such honours, castles, manors, [192] lands, &c. as he hath obtained, and



has by way of exchange, bargain, purchase, or other whatsoever mean or means, according to the true intent and meaning of His Highnesses's bargain, exchange, or purchase, notwithstanding any mis-recital, mis-naming, non-recital, or not naming of the honours, castles, &c. comprised or mentioned in the writings or bargains made between the King's Highness and any other party or parties, or of the towns or counties where they lie—with a saving of the rights of all persons, except the persons themselves, of whom the bargain, exchange, or purchase was had, their heirs and their wives."

This Act took away the right of dower from the wives of the grantors; and the exception of wives out of the saving, shews the sense of the Legislature upon a title of dower—that it was "a small thing and casual," and therefore took it away from her, though she was not so much as party to the grant.

The husband might then have defeated dower by felony as well as treason; and as he might have deprived his wife of it by a crime, the Act gave the same effect to his grant.

The exception out of the saving, evidences the intention of the Legislature to take the dower away, without any equivalent at all.

So in *Needler v. Bishop of Winchester*, Hob. 224, Lord Hobart speaking of this statute, says, "As touching the meaning of the statute to this purpose: the purposes of these statutes were to establish conveyances to and from the King, according to natural equity, *secundum equum & bonum*," which is "*Lex legum*," without respect to legal ceremonies: but it was never meant to enable those persons, or their grantees, who by natural defects or disablements were, either by the law of nature, or by the law of the [193] land, disabled to grant; and therefore, if an idiot, lunatic, or an infant under seven years of age, had made a grant to the King, this statute had never made these good, for "*jura naturæ sunt immutabilia*."

"To conclude, as this statute doth not confirm a grant made of that, which is not the grantor's to give; so these weak persons are owners of the lands, to hold and retain to themselves, but are esteemed in law as not owners to give them away; and therefore it was a needless explanation in the Statute of Wills, that idiots, and the like, should not be enabled to devise."

"The objection that was inferred out of the saving of the statute, where wives were excepted, that therefore they were meant to be bound, moves me nothing: for (besides that it is a weak, implicit, and indirect inference to let in so great an absurdity and incongruity of law) that exception doth not reach unto the wives that are parties, that is, to such as join in the grant of their own estates; but to the wives of the parties to the grants, that is, having nothing but of the wives title of dower, which being a small thing and casual, they were content to free the King's estate of; the words are "other than the parties, their heirs, and wives; so they put the wife in rank with the heir."

The Statute of Wills being conceived in general words, the 34 Hen. VIII. takes infants out of those general words; and though I concur with Lord Hobart in thinking that it was not necessary to insert such an exception, because an Act enabling persons to convey by a will, could never have been construed to capacitate a person to convey, who could not convey by deed; yet the more unnecessary it [194] was, the more strongly it fortifies the inference drawn from it in favour of the extent of the general words in an Act of Parliament.

But many cases have been put where the law implies an exception, and takes infants out of general words, by what is called a "virtual" exception.

I have looked through all the cases; and the only rule to be drawn from them is this, that where the words of a law, in their common and ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the law, from the general purpose and design of the law, and from the subject matter of it.

Whereas in the present case, I will shew, 1st. An intention to include them, from other parts of this law, from the general view and design of it, and from the nature of the claim which is to be affected by it.

2d.—That this Act hath been expounded in such a manner, soon after the making it, as to shew that the bar doth not arise from the agreement of the woman to a jointure before marriage; but from the energy and force of the Act of Parliament, substantiating the settlement against her for this particular purpose,



3d.—That if it was doubtful, usage is the proper decider of that doubt ; and that the usage has been in favour of this construction.

4th.—That there are the greatest judicial authorities for it ; only one case, which passed “sub silentio,” against it.

1st.—Most of the women of great families and fortunes were married under age, and the marriage of infants was given, or sold, like any other personal property. The Legislature could not but know, [195] that a multitude of wives, then existing, had been married under age. The 16th section of the Act proves decisively, that it did arise in their minds ; for that clause takes notice, for another purpose, of heirs being within age or of full age, which shews that these different periods of time were then in their contemplation ; and infancy therefore must have arisen in their minds as well as coverture. Indeed, the idea of one disability cannot present itself to the mind of a lawyer, without the other. They are so connected together, and the consequences arising from both, in many cases (not in all) are so exactly the same, that they will obtrude upon the imagination at the same time. And when there is a proviso qualifying the bar in a particular instance, it is really equivalent to saying, “We mean the bar should take place in all cases whatsoever, except in the instance we have expressly provided for.” And the language of the law upon this subject is, that in all cases of statutes with provisos, they shall be taken generally, and in the most extensive sense, in all particulars, not restrained by the proviso, by force of the general words.

If they had not thought the general words would have barred *femes covertes*, in respect of jointures after marriage, it was a vain and useless proviso.

It was absurd and ridiculous to take persons out of the Act, who were not in it ; but the Legislature, by this proviso, have in reality given their opinion upon this question—they have in effect said, “The general words will extend to jointures made upon persons under all kinds of disabilities ; but as that is not our intention, in respect of jointures made after marriage, we will take them out of the generality of the law ; but leave jointures, before marriage, to bar dower in every other case whatsoever.”

[196] If it is said, that this was only a clause of caution ; the same caution which produced the proviso in favour of *femes covertes*, would have extended to infants, in case they had meant to give the same election to both.

And Lord Hobart, in *Sherley v. Wood*, Hob. 71, understands the law in this manner ; his words are, “The Statute of Uses hath a general purview, that jointures made for wives, without distinguishing before or after coverture, shall bar dower ; and then comes a proviso, that if it be made during coverture, she may refuse it, and take her dower ; which is a kind of remedy provided for her out of the generality of the law, and therefore must be pleaded by her :” that is, a *feme covert* is within the general words ; and she must take herself out of the general words, by bringing her case within the proviso.

The case put by Dyer in *Plowd.* 360, is very apposite to this case. The Statute of Fines, in 18 Edw. I. mentions infants, and not *femes covertes*, which is the reverse of this case ; and Dyer is of opinion, that because *femes covertes* were not mentioned, they were bound by a fine and non-claim, under that Act.

This proviso relating to jointures after marriage, does not take a *feme covert* out of the enacting clause generally, as it would have done, if it had said, “provided this Act shall not extend to *femes covertes* ;” no—*femes covertes* were the objects of the enacting clause. The bar was created and opposed to them by the designation of married women ; and the proviso only removes the bar, at their election, in a particular case ; and therefore, even in respect of jointures after marriage, *femes covertes* are still within the general words to every purpose whatsoever, but the special purpose [197] of making an election whether they will take their jointure or dower.

For suppose a jointure is made after marriage, and a woman accepts it, and brings a writ of dower : if she is not within the general words of the enacting clause, she must have both.

To another purpose a wife, in respect of a jointure after marriage, is within the enacting clause ; for suppose she was to elect her jointure, and afterwards be evicted. If she is not within the enacting clause, she is not within the proviso which immediately follows the enacting clause, and gives the compensation, viz. “provided that if any

such woman be evicted, she shall have a compensation." What woman?—every woman having a jointure mentioned in the enacting clause, and no other; and therefore, unless the enacting clause includes a woman, in respect of a jointure after marriage, she could have no compensation out of the residue of her husband's estate, upon an eviction of all or any part of her jointure made after marriage.

If infants were not included in the general words of this law, they must have been entitled both to their settlements and dower; for this is the only clause in the Act which can take that common law right from them; and if an infant elects a jointure made after marriage, and is evicted, she is not within the compensating proviso, unless she is within the general words of the enacting clause; for it can extend to no other.

But to avoid that inference, which proves too much, it has been said that women may be so far included in these words, as to prevent their being entitled to both their jointures and dower; yet still it [198] must be understood to leave them to that right which the common law gives them, of disagreeing to these estates when they came of age: that even before this Act of Parliament, they were not obliged to take the estates limited to them by these settlements, "ex provisione viri;" and that it would be a most harsh and severe exposition of this statute to take away a right, which they had, of refusing those settlements.

But if they are included in the general words for one purpose, they must be included for every purpose to which the provision of that clause extends. And I do not contend that this clause takes away the right which infants have of disagreeing to their settlements after the death of the husband. They might disagree to them after this Act if they pleased, as they might have done before the Act; but still the statute gives these settlements the energy of a bar.

It was the existence of a settlement made before marriage at the time of the Act, and of a settlement made before marriage since the Act, which constitutes the bar within the meaning of this Act of Parliament.

If the settlement existed at the time, the bar attached the instant the Act passed. The right of dower was that moment annihilated, as to all women who were then living, and had jointures made before their marriage. To this purpose the statute impregnated the settlement with the quality of a bar, which could not be varied either by accepting or refusing the settlement afterwards.

And when a settlement was made after the Act, before marriage, the right of dower never arises. The statute interrupts the right: there is no inchoation of it by the marriage. In that particular it [199] is a repeal of the law of dower; it is saying that a marriage so circumstanced shall have no effect "quoad dotem:" it is as much a plea in bar as "never coupled in lawful matrimony."

But it may occur, that a jointure, when refused, is void "ab initio; and therefore, that the wife, in that case, is not a woman having a jointure, when she claims her dower:

When an estate is refused, it does not become void to all intents and purposes, as if it had never been: for suppose an estate conveyed to a feme covert, or an infant, and the grantor afterwards makes his will, and devises it, and the feme covert, or infant, afterwards refuses; the will of the grantor will not be good. *Butler and Baker's case*, 3 Co. 25.

But suppose it was void at common law, yet a statute may give it a being and an effect for a particular purpose, and at the same time leave it, for every other purpose, to all the consequences which it would have had, if the Act had never been made.

If she had a jointure when the Act passed, or, since the Act, has a jointure at the time of the marriage, and may take that jointure if she pleases; the Act has drawn the line upon her, and says she shall have no choice. For the Act is not, "every widow having a jointure when she demands her dower;" but, "every woman married having such jointure made or hereafter to be made;" and a jointure which had been limited to an infant before marriage, was a jointure made, and so effectually made, that she could not disagree to it till her husband died; and in that respect differs widely from a conveyance made by an infant of her own estate, which she may avoid at any time.

[200] All books, which treat of dower, speak of it as an inchoate, inceptive, initiate right, given by the marriage, and consummated by the death of the husband.

The death of the husband does not give it, but completes it; and if a settlement



before marriage prevents the right from ever beginning, the death of the husband cannot consummate what never began ; much less a refusal, which must be posterior to the death of the husband.

The case, put at the Bar, of a fine levied of a jointure made before marriage, and of one made after marriage, is in point to shew, that the bar is created by the settlement in the one case, and by the acceptance of it in the other. If a fine is levied by husband and wife of a jointure made before marriage, the wife cannot claim dower in the residue of her husband's estate ; but if it is levied of a jointure made after marriage, she may.

What is the reason of the difference ? because the right of dower had never existed in the one case, but it had in the other ; and nothing could bar it but acceptance, which could not be till after the marriage, and then there was nothing to accept.

And is it to be conceived, that when the Legislature was forming a law of such importance to the public, which was to be, and really has been, and now is, the basis of all the real property in the kingdom, and they were considering the consequence of that law in respect of married women, (and in the case of women, married infants must have occurred) they should leave so many married women upon a virtual exception in one case, and guard them by an express proviso in another ?

[201] It is very material to observe, that this Act of Parliament, even in its great and principal object, the union and consolidation of the legal estate and the use, takes into its grasp infants, as well as adult persons, in general words : the words are, "where any person or persons shall be seised to the use of any person or persons." Suppose the legal estate had at that time descended upon an infant, and the use at that time were in an infant : this Parliamentary conveyance would certainly have taken place, in such a case, exactly in the same manner as if they had been of full age, or an Act had passed in any particular case enabling one infant to convey to another.

Upon what foundation would such a construction have been made ? Because the words in their proper and ordinary signification comprehend infants ; and there was the same reason to unite the legal estate and the use in the case of infants, as of adult persons.

But it may occur, that in such a case there could be no prejudice : it was only vesting the legal estate where in equity and conscience it ought to be.

Answer :—1st. It shews that the Act was dealing with infants by general words.

2. That no prejudice could arise to infants, by giving their settlements the effect of a bar, which the Legislature did not intend in the case of adult persons.

What was the reason of making a jointure before marriage bar dower, and not letting dower bar the jointure ? They found an infinite number of estates at that time under settlements, with limitations made by husbands and their ancestors to wives in tail, because that was the strictest settlement which the law then knew.

[202] The injustice of repealing these settlements, which are domestic family-laws, adapted to the circumstances and exigencies of every particular family, must have determined them in a moment not to lay the least foundation for breaking in upon them ; and as they could be made from no other motive but a desire to secure a proper provision for wives surviving their husbands, the Legislature saw there could be no hardship in refusing them a choice of dower, in opposition to their settlements ; and though dower in their husbands estate (even before the union effectuated by this Act, but particularly after this Act) might, in some particular instances, be more valuable than the estates provided for them by these settlements ; yet this inequality, in particular instances, was most amply compensated to the sex in general, by putting such an infinite quantity of property within the reach of dower, where no particular provisions had been made for them. "*Nulla lex satis commoda omnibus est—id modo quæritur, si majori parti et in summâ re prodest.*"

The rule laid down by the Legislature was this : let women, who have no settlement, take their dower in all their husbands estates, whether those estates were vested in them before this Act or by this Act : but let the women, who have settlements made before their marriages, acquiesce under those settlements, and abide by the provisions which have been thereby made for them, whether they are great or small, adequate or inadequate ; whether they have been made by the agreement of themselves or their friends, or have been the mere spontaneous acts of the husband or his ancestors.



The objection of fraud, so much relied upon, does not exist, as applied to a settlement made before the Act; for a settlement could [203] not be made to bar dower fraudulently, when it could not be made to bar it at all.

But (it is said) though it could not be made fraudulently to bar dower, yet the wife might have disagreed to the settlement, and have refused to accept the estate given to her by it.

It is a very foreign supposition, that an estate should be limited to her for a provision not worth her acceptance, when she could lose no other advantage by accepting it; but suppose it was "*damnosa hæreditas*," did the Legislature mean to take away her right to disagree, and force the estate upon her, "*nolens volens*?" Certainly not. She might agree or disagree to the settlement, just as she might have done before the Act; but the bar, which the Act has given to the settlement before the time of agreeing or disagreeing comes, cannot be avoided by her refusing to accept it. It is the will of the Legislature, acting upon settlements then existing, which constitutes the bar, and not the agreement to those settlements.

Suppose instead of making these settlements a bar of dower, they had given women a right to elect, to take which they would, what would have been the consequence? It would have put it into the power of every woman in the kingdom, where the estate was limited to her in tail, to have defeated the limitation to the issue, and thereby to overturn the strictest settlements which were then existing, or could then have been made: for she could not refuse for herself only; because the estate tail being to vest in her, either totally or not at all; if she refused to accept the estate tail, it must vanish as to the issue; and wherever the dower was more valuable than the estate limited by the settlement, she would have been balancing the difference, and tempted to make an election of her [204] dower; and the issue who were purchasers for a valuable consideration under their father, as well as their mother, must have lost the estate.

To illustrate my meaning by an instance—by a settlement before marriage, an estate stands limited to the husband and wife, and to the heirs of the body of the wife by the husband to be begotten, leaving the reversion with the husband. The husband sells the reversion, or limits it over to his brothers or other collateral branches of his family, and dies, leaving issue. The wife surviving says, "I was an infant when this settlement was made, and therefore I will refuse the estate given by this settlement, and have my dower out of the whole estate." What would have been the consequence? The issue of the marriage would have been disinherited, and the estate gone to strangers, or to the collateral branches of the family.

Did the Legislature intend to leave this right in an infant any more than in an adult? When the settlement was made, it was thought to be a proper provision.

Women may accept or refuse their jointures as they please; but if they do refuse them, they shall not have dower; and when that temptation was taken out of their way, there was no danger of their defeating the limitation to the issue of the marriage by a refusal.

It is said that the motive which induced the Legislature to give *femes covertæ* an election, in respect of jointures after marriage, was because they were "*sub potestate viri*," and incapable of contracting:—that infants are equally incapable, and therefore ought to have the right of election.

That is saying in so many words, that a person to whom no right is given by the Act to elect, shall be in the same situation as a person [205] to whom a right is given by the Act to elect; which is in reality to destroy the distinction which the proviso in this Act has made and established.

Suppose the incapacity of contracting to be the reason for giving an election in the case of a jointure after marriage, and this objection had been made at the time of passing the Act. "You give *femes covertæ* a choice as to jointures after marriage: why do not you give infants a choice as to jointures made before marriage? They are equally incapable of contracting." The plain and obvious answer must have been, "The cases of an infant before marriage, and of a woman after marriage differ most essentially: a *feme covertæ* is under the absolute controul of her husband: he would be contracting with himself. The principal contract, the marriage, is past; and by that marriage the wife has acquired an inceptive right of dower, which he shall not take from her. But an infant is not under the controul of the man, before she has married him. She is under the controul of her parents or guardians: and, though a

marriage without their consent cannot be rescinded, yet the law expects and requires their consent, and punishes all marriages contracted without it."

"Settlements are made by the interposition of parents and guardians. They are the persons whom the law appoints to direct the infants in these stipulations, and to oppose to the intended husband. 'Ad ea quæ frequentius accidunt, jura adaptantur.' A marriage, without their consent, would not have entitled the wife to dower: for though the ecclesiastical law did not rescind the contract, because it could not restore her to what she had lost by the execution of it, yet the bishop would not have certified such a [206] marriage to be 'legitimum matrimonium.' It was not a contract to affect a right which she then had, as is the case of a jointure made after marriage; but it is a contingent right merely, which she is to derive through a contract, which the law enabled her to make. Her own estate is not affected by it."

"Conditions, express or implied, bind infants. This is a kind of condition annexed by the husband to the disposal of himself. If she takes him, she ought in justice to abide the terms on which she accepted him: she ought not to retain the benefit of the contract, and then reject the condition upon which the husband entered into it."

"We find an infant competent to the principal contract; and therefore will consider her competent, as to this precedent contract which induced the husband to enter into it."

"By giving the wife a right of election in the case of a jointure after marriage, we leave the husband's estate exactly in the same situation as when the settlement was made, subject to the right of dower which the marriage had given; but by giving a right to elect dower in the other case, we should subject the husband's estate to a right which it was not subject to when the settlement was made, and which he might have effectually prevented at that time, either by not marrying her at all, or keeping his whole estate out of the reach of that right. And the law makes an essential difference between the privilege of infancy, in respect of rights vested in infants, and a title to things which never were vested in them."

If an infant had title to enter for mortmain, and did not enter within the year; or if he did not enter into lands purchased by his [207] villein before the villein had aliened them; he could not enter afterwards in either case; for there he had nothing but a title to a thing which never was in him. Plo. 364 b.

Though the common law says, "that persons must treat with infants at their peril; because they will be bound by the contracts they make with them, and infants retain their right of avoiding them;" yet that regards only contracts affecting their own original property, not meaning that they should derive an interest out of the property of another person. It would be a fraud upon the husband; and the case cited at the Bar out of 2 Leon. 108, *Piggot and Russet*, is a strong instance that infancy shall not protect a fraud; and that an infant may, by his own assent, preclude himself of a contingent right even in his own inheritance, viz. "If tenant for life, being of full age, and he is in remainder within age, levy a fine, and afterwards the infant reverses the fine as to him, for the inheritance, he shall not enter for the forfeiture, because he joined in the fine, and so assented to it."

Upon what principle does this case stand? If a tenant for life levy a fine, it is a forfeiture: and when the tenant had reversed it, it was totally void as to him, "ab initio," and as if it had never existed; and yet the same reason might have been urged which is offered in the present case.

He could not preclude himself of this right of entry for the forfeiture. The law gives him as good a right to enter upon such an alienation, as if the tenant for life had died. It is a contingent right which every reversioner or remainder-man has in the estate; and an infant can by no Act prejudice such a right. But the com-[208]-mon law says, he shall be bound by his assent, as he had been a party to the Act under which he would derive his right.

I have not been considering what the law would have been, independently of this Act of Parliament, but mentioning such reasons as distinguish the case of an infant, before marriage, from a feme coverte, and shew the justice of the Legislature in making a difference between infants jointured before their marriage, and women jointured after their marriage, and opposing the bar to one, and relaxing it in favour of the other.

The difference arises from the different situation the parties were in at the time of making these settlements.



The Legislature would not take away a right which the wife had acquired by her marriage; but they would hold her to a settlement made when she had no right at all.

It may perhaps occur, that a right of election is given to waive a settlement after marriage, and yet a settlement after marriage could no more be fraudulent before the Act, than if made before the marriage; and the right of the issue may be defeated by an election of dower in that case as well as the other. It is true it could not be fraudulent; but it differs widely from a settlement before marriage in another respect. By a settlement before marriage, the issues of the marriage are purchasers for a valuable consideration under their father's marriage, as well as their mother's; but in case of a settlement made after marriage, the settlement is merely voluntary, and the issue not entitled to the same protection.

Perhaps it may be said, that though a settlement could not have been made fraudulently before the Act, yet it might after the Act.

[209] If this objection of fraud had any weight in it, which I shall shew it has not, it might have been a reason for laying down different rules as to jointures then made and afterwards to be made; but it cannot warrant us to lay down two rules, when the Act has only laid down one.

I must repeat the position again in this place: that this case must be determined exactly in the same manner, as if it had been the case of an infant married at the time of the Act; and then how would the argument have stood? The possibility of a fraud to come, shall defeat a settlement made when there was no possibility of any fraud at all.

This leads me to the case of a pocket jointure, or a jointure made fraudulently to bar dower, which seems to have been the most plausible objection in this case; but when it comes to be examined closely, will appear not to have the least weight in it: for a jointure made fraudulently, to bar dower, is not the jointure which the law acknowledges and sanctifies. It must be a "competent livelihood of freehold, for the life of the wife." The pattern and model of the jointure to be made, is given by the Act. It must be such a jointure as was made before the Act. What was that? a jointure without fraud; because a jointure before the Act could not have the least shade of fraud in it.

A copy after that original is what the law means by a jointure: but can the common law examine this fraud? Competency is a very vague indefinite term: how is the line to be drawn with respect to this competency? How! as in all other cases whatsoever—by a jury, under the direction of the Court which tries it.

[210] The circumstances of the parties, their rank and quality; the proportion of the jointure to the quantum of the whole estate; the consent of parents or guardians in ascertaining it; and every fact which shews the transaction fair, and every fact which shews it fraudulent, must be laid before the Court to direct their judgment upon it.

A pocket jointure, made upon a woman without her privity, or upon an infant with her privity, without the interposition of parents or guardians, would be such an evidence of fraud, as would be sufficient to condemn it; and it is not without a precedent in the common law, that the validity of the act of an infant should depend upon the fairness of it: for if an infant makes a partition, and it is equal, it will bind him; if it is unequal, it will not. Co. Lit. 171. The validity of the partition depends upon the fairness of it.—A beautiful instance of the care the law takes of infants with respect of their own property, by making it the interest of the party, who treats with them, to do them complete justice.

The case supposed would want no trial at all; for it would be fraud apparent, like the case put in Hardres, 56, *Attorney-General v. Shurt*. "The King was entitled to one tun out of every ten tuns of wine imported. A merchant imported nine tun and a half. The King demanded and had a tun.—The Court said it was fraud apparent, without proof."

It would be endless to enumerate instances where the common law takes notice of fraud, and annuls acts done from so vicious a motive.

If the common law had not strength and activity enough in it to condemn an act founded in iniquity, it would ill deserve the character [211] Lord Coke gives of it, who says, "that it has been fined and refined by an infinite number of grave and learned men, and is the perfection of human reason:" whereas, if it was incompetent



to such a question, I should think it had been fined and refined out of all its spirit, and was the corruption of human reason.

I will mention two or three cases upon this head, and allude to twenty. 3 Co. 77, *Fermor's case*.—A lessee for years, and at will, of freehold estates, and also a copyholder of lands lying in the same town, had also lands of inheritance lying in the same town; and by a deed he conveyed all the leasehold and copyhold lands to a man for his life, and then levied a fine of so much land in quantity as would comprize the leasehold and copyhold, as well as his own inheritance, by covin and practice to bar the lessor of the inheritance of the leaseholds and copyholds.

Five years elapse, and the lessee continues in possession, and keeps paying his rent to the lessor. The grantee of these estates dies, and the lease for years expires, and the lessee would then have set up the fine, and five years non-claim, to have barred his lessor.

The book says, that the case, being of great importance and consequence, was referred to all the Judges: and what did they say? Though the fines are the general assurances of the realm, and the Act of Hen. VII. has declared that they ought to be of the greatest strength; yet the Legislature never intended to establish a fine levied by fraud and practice, and therefore it was held no bar, by all the Judges. The Statute of Hen. VII. intended to make a fine and non-claim a complete bar; but not a fine levied fraudulently to cheat people.

[212] So this statute intended to make a jointure a complete bar; but it must be a jointure to support and maintain a wife, and not a jointure made fraudulently to cheat and starve her.

In *Fermor's case*, there is a variety of instances where the common law takes cognizance of fraud, and avoids almost all kinds of acts when they are infected with that poisonous ingredient.

A person in custody for felony may, before conviction, “bonâ fide,” and for a valuable consideration, dispose of his personal estate. A person in that situation made a bill of sale of his goods, to make a provision for his son. He was afterwards convicted, and the sheriff seized the goods contained in the bill of sale, as forfeited. The son brought an action against the sheriff for the goods; and Holt, Chief Justice, said, that there was a fraud at common law, in such a case as that was; and that such a conveyance could not be intended to any other purpose than to prevent a forfeiture, and defraud the King.

So I say, in Holt's words, that such a conveyance, as has been supposed at the Bar, cannot be intended for any further purpose than to defraud the wife: and I will only mention one other instance where the law controuls very legal acts, if the manner of obtaining them has been fraudulent.

An assignment of dower by a disseisor shall bind; but if the widow hath colluded with the wrong-doer, it shall not, because the covin shall suffocate the right, and so the wrongful manner shall avoid the matter that is lawful. Co. Lit. 35 a.

But perhaps it will be asked, how is this fraud to be come at? Is there any precedent to be produced of deducing such a question [213] of fraud before a Court of Law?—No such case has ever yet existed; but when it does exist, a way will very easily be found to get at it.

Pleading is only telling with accuracy and precision what the law is; and if the law says an act done to defraud ought to have no legal effect, there seems to be no great mystery in saying so, either by a special plea, or upon some general issue.

For instance, a writ of dower is brought, the tenant pleads a conveyance made before marriage of particular lands to the wife for her jointure. The plaintiff might reply, that it was made by fraud; and upon a general issue of “fraud or not fraud,” the whole might come before the Court under such an issue; or the plaintiff might reply the several facts which evidence the fraud, and the case be brought before the Court upon a demurrer.

But taking the case put in its fullest extent, it is doing no more than what is practised every day in effect, by putting the estate into trustees, and taking joint purchases after marriage to prevent dower; and a strict settlement made before marriage, with a power of revocation, will prevent dower, and, at the same time, preserve to the husband an absolute dominion over the estate; and therefore, all the objection of prejudice to infants, as the law now stands, vanishes in a moment: for what detriment can it be to infants to preclude them from dower, by a small estate, when they may be equally precluded from it without giving them any estate at all!

Another reason against giving a right of election to a woman when she came of age is, that the right must remain in suspense until that time, both in the case of a jointure made upon an infant before marriage, and after marriage.

[214] For suppose the husband dies, leaving an infant wife: she brings a writ of dower, and the jointure is pleaded in bar—and infancy is replied. She is not to have both—which is she to have during her infancy?

If the jointure is good, and bars till disagreed to, there must be judgment against her in the writ of dower: and if she disagrees to jointure, and avoids it “*ab initio*,” how is she to get at her dower when she comes of age? for there is a judgment in dower against her. And if she does not sue a writ of dower, but takes possession of her jointure, is the right of dower, said to be consummated by the death of the husband, to be turned by a construction of this Act into a contingency, and lie in suspense till the infant comes of age, and be totally uncertain whether it shall ever exist at all?

This question is determined in a book, published in the year 1632, called the “*Laws and Resolutions of Womens Rights*.” There is a section in that book with this title:

“What is a Sufficient Refusal or Agreement of or to a Jointure made after Coverture?” And there the case is put: “If she bring a writ of dower, and declare upon it, this is peremptory, although she be under age, covert or not covert of a second husband; for the law saith, that they which have discretion to acquire and get things, have sufficient discretion to give and preserve those things gotten. Therefore, if an infant come to any thing by purchase, he shall not in that have any advantage, or be in better plight than a person of full age.” And the same book enumerates many instances of infants being bound by their own elections.

An estate to an infant of two acres, the one for life, the other in fee: feoffment of one, though under age, is a sufficient election. [215] If rent be given to an infant, and he bring writ of annuity: his election is determined, and he shall not avow as for a rent when of full age.

If infant recovers debt, and sues an execution by elegit, it shall bind him.

And when Littleton, who is so very correct a writer, says, sect. 41, that if after the death of her husband, the widow enter and agree to dower, “*ad ostium ecclesie*,” or, “*ex assensu patris*,” then she is concluded claiming any other dower; it must be intended of an infant, because in the section next but one preceding, where he does not intend to include an infant, he expresses himself, and correctly says, “where a man of full age endows;” and in 47th sect. he puts the case of a man seised in fee simple, being within age.

The different form of pleading a jointure made before and after marriage, is extremely material to prove, that it is the act of the husband which makes the bar in the one case, and the subsequent agreement of the wife which makes the bar in the other.

Where the jointure is made after marriage, and is pleaded in bar of dower, there is an averment that she accepted it. But when the jointure is made before marriage, acceptance is not pleaded at all.

In the case in Co. Ent. 172, the wife is not so much as a party to the deed of jointure, and she is so far from availing herself of her not being a party or privy to the deed, that she replies there was no such deed; which is an implied admission, that if there was such a deed, she was bound by it.

In 2 Brownlow, 181, acceptance is not pleaded. “*Doctrina Placitandi*,” 149. “If an estate is made to the wife, before the coverture or afterwards (if she after the death of her husband enter and [216] agree to it) for the term of her own life, or for a greater estate, this is a bar.”

These rules are extracted out of legal principles, and are the pith and marrow of the law. The entry and agreement, after the death of the husband, can relate only to the estate made after marriage; because in the case of an adult agreeing to a jointure before marriage, it is admitted that acceptance after the husband’s death is not necessary; and as the rule is laid down generally, it must be understood as generally to comprise an infant as well as an adult, or otherwise so accurate a book as that is, would have taken the distinction.

2d.—I will now shew that this Act has been expounded in such a manner, as to prove that the lien or bar doth not arise from the agreement of the woman; but from

the energy and force of the Act of Parliament, substantiating the jointure made by the husband.

Between the 27 Hen. VIII. and 13 Eliz. which was about the space of thirty-five years, it appears that it had come in question before the Judges, whether a woman could refuse a jointure made before marriage?

In Plowden, 396, *Lord Leicester's case*, which was in the 13 Eliz. (before *Vernon's case*, which was in 14 and 15 Eliz.), Anderson says, "The Act of 27 Hen. VIII. c. 10, which enacts, that women shall not have dower where lands were assured to them and their husbands for a jointure, has a proviso, that if any feme has lands assured after marriage to her for life, that then such feme may at her liberty, after the death of her husband, refuse to have and take the lands so assured to her for her jointure, and demand her dower. And because that the words are, 'Assurance after mar-[217]-riage,' it had been taken, that if the assurance be before marriage, that she shall not refuse; for by the implication of the words, the Judges have taken the intention of the makers of the Act to be so."

In what case, or how long before that time, the Judges had put that construction upon the Act, does not appear; but it must have been in less than thirty-five years since the making of the Act.

This question, and the determination upon it, must have arisen upon a case where the woman had not previously accepted the jointure: for if, previous to the marriage, she had accepted it, no question could have arisen whether she was bound by it. It could never be a doubt whether she could refuse what she had once accepted. And though this is to be understood of a woman of full age, yet, if the agreement of a woman of full age is not required by the law to constitute the bar, the argument, drawn from the incapacity of an infant to agree, or the privilege of an infant to disagree, falls intirely to the ground.

4 Co. 3 a. *Vernon's case*. It is said, "that a woman cannot, after the death of her husband, waive a jointure made before marriage, and this by force of the proviso." And 1 Inst. 36 b. Lord Coke lays it down, that a jointure made before marriage was not waivable at all.

And the position is echoed through all the books which speak upon this subject, so emphatically, that it must be meant of a jointure which had not been previously accepted: for there was no occasion to raise Judges from their graves to tell us, that a woman could not refuse what she had once accepted.

[218] But suppose the construction only doubtful, what is the rule? Usage is the best decider of the doubt. "Optimus legum interpres est consuetudo." Where the penning of a statute is dubious, long usage is a just medium to expound it by. Lord Vaughan, 169.

3d.—As to the opinion of the conveyancers of the present age, though as able as any who ever lived, yet it has not been laid before us with that certainty which it ought to be, if our judgment were to be directed by it.

I prove the opinion of conveyancers for two centuries by this medium: it is now about two hundred years since the Statute of Hen. the VIII. was made.

That jointures have, in fact, been made upon infants before marriage, ever since the statute, and for many years past under the direction of the Court of Chancery, is a fact too notorious to be disputed: every great family in the kingdom is in possession of such settlements, and yet there is not one single instance where they have ever been disputed.

In some instances wives might die before their husbands: in others, the jointure might be more beneficial than the dower; but there must have been many hundreds where it was otherwise: and if it could be conceived that there never has been an instance where the jointure has been of less value than the dower, there is no reason to disturb the usage, from the apprehension of a fraud which has never been practiced.

If there have been instances of jointures inadequate to the dower which wives would have been entitled to, and those jointures have [219] never been rejected, and dower resorted to, it shews the sense of two centuries upon the question.

The practice proves the opinion; and the uninterrupted acquiescence under the practice proves the rectitude of the opinion.

4th.—As to authorities, the cases of *Price and Seys* (a), and *Harvey and Ashley* (b),

(a) Barnard. Ch. Ca. 117.

(b) 3 Atk. 607.



are in point: I heard them both, and took a very particular note of the latter (c); but for fear of any mistake, I have [220] the notes taken of those cases by the late

(c) The following note of this case of *Harvey v. Ashley*, is taken from Mr. Justice Wilmot's MSS.

*Harvey and Dorothy his Wife*, against *Ashley and his Wife and Others*.—The plaintiff Dorothy being fifteen years of age, and entitled to £5000 under her grandfather's will, if she married with the consent of her mother, and to other contingent and future provisions, married Mr. Pitfield her cousin-german. Previous to the marriage, a settlement was made, dated 29th of June 1737, between Mr. Pitfield, Mr. Ashley and his wife, the trustees, and the young lady, Dorothy, whereby Mr. Pitfield's estate was settled in strict settlement, the other part being already settled; the £5000 is agreed to be paid, and to be applied to exonerate a part of Mr. Pitfield's real estate; there was also a contingent provision of £3000, which Dorothy was entitled to, and agreed that one moiety should be paid to Mr. Pitfield, and the other moiety sold: and an agreement was also made for settling another part of Dorothy's personal estate, which she was entitled to under the will of her grandfather; the £5000 was paid, and £4000 more of her personal estate was applied in paying off the incumbrances affecting the estate of Mr. Pitfield. There was issue only one child of the marriage, Mary, an infant: in August 1740, Mr. Pitfield died. December 1740, Dorothy married Harvey; June 1743, attained twenty-one; 10th January 1745, the bill was brought to set aside the marriage settlement, and for other purposes."

"Lord Chancellor (Hardwicke).—The first point is, whether the plaintiff Dorothy, and Mr. Harvey in her right, are bound by this marriage settlement, by the original nature and force of the agreement taken abstractedly."

"The first objection is, that Dorothy was an infant, and could only be bound by her election, and that no other persons could bind her properly by their contract. But marriage agreements differ from all others. The principal contract is the marriage; and an infant female may contract at the age of twelve. All the other parts of the contract are collateral incidents, entered into to secure some provision for the party marrying and the issue, and may be greater or less according to circumstances."

"As soon as the marriage takes place, the principal contract is executed, and cannot be set aside or rescinded; the state and the capacities of the parties are changed, and children born, or to be born, are purchasers under it; purchasers both under their father and their mother; therefore it was admitted by Mr. Wilbraham, that the Court would take care how they broke in upon settlements, made on the marriage of infants; because the principal contract being good and not rescindable, it may affect the issue of the marriage, and the rights of third persons, to avoid them. On this ground it is, that the difference has always been observed between the execution of other agreements in specie, and of marriage settlements."

"Other agreements are entire; if either party fail, no execution ought to be in specie; but in marriage agreements, though the father or mother, or the friends of either, do not perform them, the children are entitled to call for a performance from the other party, because they are purchasers from both; the Court may lay their hands on the father or mother's estate or interest in the thing settled to make it good."

"But if this Court should interpose to set aside, or give relief against, any part of a marriage settlement, it must relieve against and avoid the whole: for every part makes the consideration of the whole of every thing; and it is impossible, where there is no fraud, to say this part is unreasonable; you have gained too much on one side, and therefore that shall be deducted. This makes it a different bargain, and, in consequence, the uses of the estate must be broken in upon on the other side. Nay, in the present case, the interest of the plaintiff Dorothy may be greatly concerned. If she takes back any part of her fortune, she must waive and renounce her jointure, and the limitation of the fee to herself."

"Consider what may be the consequence—her mother dies, her second husband becomes entitled to the moiety of the surplus of the grandfather's property in her right (now settled), which he may dispose of as he pleases, and she may be stript both of jointure and portion."

"The law has entrusted the father (or guardian) with the marriage of his children; but they ought not to use it to their disparagement. Suppose he does it fraudulently

Lord Chief Justice Ryder, whose judgment, accuracy, and fidelity to his clients, were as eminent as in any advocate who ever yet existed. And in the case of *Prior and Seys*, he states, that the point was argued at the Bar, and that the Lord Chancellor

and corruptly, is the agreement therefore to be set aside or broken in upon, or the children not to have the benefit of what is stipulated? By no means; but the guardian may be compelled to make satisfaction, or the husband, if he is party to the fraud."

"In the case of a father; if a child has a fortune independent, and the father disposes of the child in marriage corruptly, and takes an advantage to himself, this Court would relieve against the father. On this ground depend the cases of relief against private clandestine agreements, made in fraud of the public open agreement."

"But this case comes within none of these reasons of disagreement—cousin-german—heir male of her mother's family—a natural match to desire—no pretence of any corruption, fraud, or ill practices in the father or mother—no lucrative advantage taken to themselves. On the contrary, every thing done on their parts to advance the child. The mother consents to the marriage—accelerates her right to the £5000, and vests it immediately—confirms a method to charge the father's estate with £3000, of which, in the event, she might not have been entitled to one shilling—this they leave, for the benefit of her and her children, to disencumber the settled estate, and for the provision for the children."

"The second objection is, that they have not made so beneficial a bargain for this daughter as they might have done. If it were so, is that a sufficient reason for setting aside a marriage agreement? The law has entrusted the parents with the care of the marriage of their children; there are many considerations, which may induce them, besides strict equality, or advantage in settlements—inclination of the parties—rank and quality of the person—convenience and propriety in families—bringing together and uniting different parts of the same estate; all these are proper reasons. The Statute of Jointures is a strong evidence of the judgment of the Legislature upon this point. Jointure on an infant before marriage, though not equal to dower, is a good bar. It is true that the greatest part of the provision for this lady arose from her grandfather; but was it ever thought that a father could not effectually contract for the marriage of his daughter, and the disposing and settling of her portion, though that portion rose from a collateral relation?"

"Most portions arise from settlements, of which the children are purchasers, and not in the power of the father. No instance of a private Act of Parliament applied for to settle such a money portion."

"Third objection. Suppose this might be done as to vested portions, because they are in the power of the husband; yet not as to contingent interests, because these are not in the power of the husband."

"I will not enter now into the question about the husband's power to dispose of the possibilities of the wife.—*Theobald and Duffay* goes a great way; but it would be very extraordinary and mischievous to say, the father could not do it. Many portions, arising under marriage settlements of fathers, are contingent; sometimes depend upon survivorship, and the contracts concerning them are to prevent that absolute power the husband would have over them, when they became vested; the objection relied upon, takes its rise from the event having fallen out one way, that is, the husband dying before the contingency."

"But suppose Mr. Ashley had died during the life of Mr. Pitfield, and no care taken or provision had been made about this share of the surplus. All agreements of this kind are made to prevent the power and right of the husband arising from the marriage; and it would be most dangerous for a Court of Justice to enter into the question, whether they are more or less beneficial for the infant. As I said at first, I know no precedent where a marriage settlement of this kind has been called in question in this Court; but cases have been, where agreements have been entered into by infants, with the consent of their guardians, or by guardians on their behalf, which this Court would not suffer to be broke in upon."

"As to so much of the bill as seeks to set aside or otherwise break in upon the settlement dated 29th June 1737, made on the marriage of Dorothy with Charles Pitfield, her former husband, let it be

"Dismissed."



(Hardwicke) said, "It was clear in law that if a man married, and before marriage, in consideration of it, [221] and of her portion, makes a jointure on his wife; though she was an infant, she cannot waive her jointure and set up her dower. So it is expressly laid down, 1 Inst. 37. Now in equity, where there is a settlement, in consideration of marriage, and of the wife's portion, consisting of securities, if the husband dies before they are got in, his executor shall have them, and not the wife. The husband would become a purchaser of the wife's portion; and his representatives [222] might compel her to assign those securities to them, though she was, at time of the marriage, an infant."

"There may, indeed, be some distinction; for if there was any collusion in making a jointure, merely to bar her dower, and not to make a provision for her, suitable to her fortune and quality, these circumstances might alter the determination of a Court of Equity. The present case, indeed, is that of an 'agreement' only for a jointure; but that will make no difference in equity, as things contracted to be done, are considered as done, and marriage articles are usually, [223] in Courts of Equity, strongly supported: the Court will certainly compel the heir to perform them; and the wife is considered as fully by them as by an actual jointure. This is agreeable to the reason of the case of *Blow v. Lady Hereford*, 2 Vernon, 501."

In the case of *Harvey v. Ashley*, Sir Dudley Ryder was counsel for the infant; and the case of *Price v. Seys* being cited, he says, "As to *Price v. Seys*, the dower being barred is no more than the effect of the Statute of Jointures, which makes all jointures of infants, as well as of women of full age, a bar." It is there taken for granted, by one of the greatest lawyers that ever was in Westminster Hall, that it was a settled point; and laudable as his zeal was for all his clients, yet the conviction of his own mind was so strong, that he did not make the least effort to controul it.

The opinion, which was given upon great deliberation, has been so fully stated already, I will not repeat it: and I take upon myself to say, that no man at the Bar entertained the least doubt of the legality of that opinion.

As to the case of *Cray v. Willis*, I cannot find any note of it taken by any body (a).

(a) This case is very shortly stated in 9 Vin. Abr. tit. Dower, 2, 3, c. 18. By the register's book it appears to have been as follows: *Jeremiah and Elizabeth Cray, Infants, Plaintiffs*, against *James Willis, Mary Cray, Widow, and Others, Defendants*.

The plaintiffs, as the infant children of Jeremiah Cray, deceased, filed their bill in the Court of Chancery, against James Willis, Mary Cray, the widow and administratrix of the said Jeremiah, and others; stating, "inter alia," that the said Jeremiah Cray died in 1731, intestate, possessed of real and personal estate, leaving the plaintiff Jeremiah his heir at law, and the plaintiff Elizabeth, his only daughter (both infants) the defendant Mary Cray, his widow, and mother-in-law to the plaintiffs, four brothers (one of whom was dead), and three sisters, all infants, and that the defendant James Willis had been employed by the intestate as his steward; and praying that the defendants Mary Cray and James Willis, might account for the personal estate and rents come to their hands. The defendant Mary Cray, by her answer, admitted the relationship, and that the intestate left her with child, which was afterward born a daughter, named Mary Carne Cray, and stated that the intestate, before her marriage (she being then under age) by indenture charged several of his real estates with an annuity of £200 to her for life, and after her death, upon trust, to raise a like sum yearly, and pay it amongst the children of the marriage; but that in the said indenture, the same was not agreed to be in bar of dower: and therefore she hoped she should not be concluded thereby, but have her option, either to abide by the said settlement, or take her dower, whichever should appear most for her advantage. The defendant James Willis admitted his employment, and set out an account. The defendants, the infants, alledged, that the intestate, as administrator "de bonis non" of their late father, possessed his personal estate to the amount of £20,000. The defendant Samuel Cray alledged, that Elizabeth Cray, his late mother, gave the residue of her personal estate (of the value of £7000) to him and Hannah, his sister, since deceased, and made them executors; but that they being infants, administration was granted to the intestate during their minority. And the cause coming on to be heard at the rolls, on the 14th May 1734, his Honour decreed and ordered, that the plaintiffs do bring an administration to John, Mary, Elizabeth, and Hannah Cray, before the Master (Holford), who was to see what claims the defendants had on the



[224] Sir Dudley Ryder was then Solicitor General, and most probably in the cause, or at least must have heard it; and though every minute [225] in his notes, upon every thing which passed in Court, yet there is not the least notice taken of it in his note books. And if this point had been debated, or it had been considered as any authority, it is almost impossible to conceive that the two cases, of *Price and Seys*, and *Harvey and Ashley*, should not have produced it.

It must have been a case which passed "sub silentio;" and though the answer mentions the wife being under age when the jointure was made, yet the reason insisted upon by the answer, as stated in the decree, was, "that it was not agreed to be in bar of dower; and she therefore hopes she shall not be concluded thereby, but have her option, either to abide by the said settlement, or take her dower, which she thinks most to her advantage." And neither the answer nor the decree puts her right of election upon her infancy. It seems to have proceeded upon an apprehension, that a jointure, within the statute, must be mentioned in the deed to be in bar of dower. But if such a construction had been given upon the maturest deliberation, it is not to be opposed against the opinion that has been cited.

As therefore the words and reason of the law, the manifest and clear intention of the Legislature, (evidenced by the proviso) the subject matter of the right, springing out of a contract they were capable of making, all conspire to make the bar operate upon infants as well as adult persons; as it would check the most advantageous marriages they could make, if they were to have the election contended for; (for a jointure, fairly made, is a much more beneficial interest than dower; and if it is fraudulently made, there is strength enough in the common law to controul it; and by a conveyance to trust-[226]-tees before marriage, or by a strict settlement with power of revocation, the right of dower may always be defeated:) as the construction I put upon this Act can never operate to the prejudice of infants, but, by enabling them to marry into the greatest families and fortunes in the kingdom, must frequently operate to their advantage; as this construction has been sanctified by the practice of two centuries, and the opinion of the greatest magistrates, I will conclude with a question asked by Camillus in Livy:

"Quæ ratio est expertis alia experiri?"

Mr. Baron Gould, Lord Chief Baron Parker, and Lord Chief Justice Pratt, delivered their opinions in the negative; Mr. Justice Bathurst, Mr. Baron Adams, and Mr. Baron Smythe, with Mr. Jusctie Wilmot, in the affirmative (a).

intestate's estate; and that the defendants, the widow and James Willis, should come to an account for the personal estate come to their hands, and that the clear residue should be divided into three parts, one to be retained by the widow, and the remaining two-thirds to be subdivided into thirds, whereof the plaintiffs should each have one, and the remaining third to be subdivided into thirds amongst the plaintiffs and the widow. And that the receiver should be continued, and pass his accounts annually before the Master, who was to see what was the annual value of the estate; and when the same should be seen, the defendant Mary Cray, was to make her election, before the Master, whether to abide by her jointure of £200 a year, or waive it and take her dower; and if she should elect to take her dower, the Master was to assign her her dower, out of the intestate's real estates, and see what was due to her on account thereof, which was to be paid by the receiver out of the rents.

(a) It appears from a MS. note of Mr. Justice Wilmot, that Lord Hardwicke and Lord Mansfield were of opinion with the majority of the Judges; and that Lord Mansfield said, "The general question is, if Lady Drury, having the provision stipulated for her by her marriage articles, is not barred of her dower. That infants are not bound by their agreements, was never held universally any where in the world: by our law, some bind absolutely, some are void, some are voidable. If the transaction were fair, a bargain and sale of lands by an infant for necessities would be good: if an infant pays money with his own hand, without a valuable consideration, he cannot get it back again; if he receives rents, he cannot demand them again when of age. What then is the agreement in this case, and what are the circumstances of it? It is an agreement in order to the infant's advancement; marriage is so. What sort of a marriage! With the consent of her father and guardian. Lady Drury was then near twenty-one: there is no objection as to the fairness of the transaction. She

[227] Whereupon, and upon due consideration and debate of what had been offered on either side in this cause,

It was ordered, that so much of the said decree complained of by the said appeal, whereby an account is directed to be taken of the personal estate of the intestate Sir Thomas Drury, &c. be affirmed, and that the residue of the said decree be reversed : and it is hereby declared, that the respondent is bound by the agreement entered into in consideration of and previous to her marriage with the said Sir Thomas Drury, and that the same ought to be performed and carried into execution, and that the respondent is thereby barred of her dower, and of any share of the said Sir Thomas Drury's personal estate, under the Statute for the Distribution of Intestate's Estates.

### [228] IN THE KING'S BENCH.

BADDELEY *against* LEPPINGWELL. Trin. 4 Geo. III. 1764, v. 3 Burr. 1533.

This was an action of trespass, for breaking and entering the plaintiff's close. The defendant pleaded, 1st, the general issue, "not guilty ;" and 2dly, a justification under a grant in fee from the lord of the manor of Hedingham Borough, in the county of Essex, on the 10th December 1761. Plaintiff replied, that before the said grant, viz. on 3d July 1754, the lord granted the said close to the plaintiff and her sister Ellen, and their heirs in coparcenary : that Ellen died, and afterwards, on the 24th June 1756, the lord granted her moiety to the plaintiff in fee. The defendant rejoined, and insisted on his title, under the grant to him of the 10th December 1761 ; upon which issue was joined.

The cause was tried at the Lent Assizes for Essex, in 1764, before Mr. Justice Bathurst.

The trespass was proved upon the issue taken on the plea of "not guilty ;" and upon the second issue, a special case was reserved, to the following effect :

Thomas Ives, being seised of this copyhold estate, and having surrendered the same, by his will devised it to Sarah Boreham : the words in his will, upon which the case turned, were as follows : "I give to Clement Boreham, the house I now live in, for his [229] natural life, he paying thereout 40s. a year to Robert Boreham.—I give and bequeath my two copyhold tenements, &c. (being the premises in question) to Sarah Boreham, she paying thereout 40s. a year to her sister Elizabeth Boreham."

Sarah Boreham, by her will, dated 4th June 1744, devised the premises to Elizabeth, her sister, in fee. Elizabeth married one Baddeley, and had issue by him the plaintiff, and her sister Ellen. Ellen died an infant, and upon her death, her moiety came to the plaintiff.

On the part of the defendant, it was contended, that Thomas Ives did not devise the estate to Sarah Boreham, in fee ; but only for her life ; and that the reversion descended upon his heir at law. That he had a brother named John ; that John left a son Thomas, who surrendered to the defendant Leppingwell, and that the devise

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had only £2000 for her fortune ; it was an advantageous bargain for her at the time. . . . Better terms may be obtained for infants, by parents and guardians, than when they are of full age : by much the greatest number of women are married infants ; but they are not to be an instrument to defraud others—no difference if premeditated fraud, or it turns into a fraud. If the Statute of Hen. VIII. had never been made, Courts of Equity would have given relief ; but I am most clearly of opinion, that infants are barred under that statute : that Act was made for uses, not for jointures ; this is a provision arising out of the general consequences of uses. . . . Then consider the usage and transactions of mankind upon it : the object of all laws with regard to real property is quiet and repose. As to practice, the greatest conveyancers, the whole profession of the law ; Sir Orlando Bridgeman—Lord Nottingham—there was not a doubt at the Bar in *Harvey and Ashley*. Mr. Fazakerly always took it for granted, that infants were bound. The usage began on a legal determination within thirty years after the statute. Marriage settlements would be totally subverted without the interposition of the Legislature ; and I concur with Lord Hardwicke in opinion, that no man living could draw such an Act of Parliament. I never will put such an exposition on the law, as to make it necessary to apply to Parliament to rectify it."



to Sarah Boreham, being for life only, defendant was intitled to the estate under Thomas, the heir at law.

The plaintiff, in answer to this defence, insisted, first, that Sarah Boreham took the fee under the will of Thomas Ives; and secondly, that if she did not, yet, as the issue was joined upon the fact of the grant made to her and her sister Ellen, the operation and validity of the grant could not be controverted upon this issue.

The questions submitted to the Court were,

1st.—Whether Sarah Boreham took an estate in fee, or for life only, under the will of Thomas Ives?

2d.—If she took an estate for life only, whether defendant could take advantage thereof on the issue joined?

[230] Mr. Leigh for the plaintiff contended (on the 1st question) that where a testator lays such a charge upon the estate devised, as may render it a burthen to the devisee in any year, the devisee shall take in fee; and that in the present case, Sarah the devisee may be a loser by the devise, unless she takes a fee; for the annuity is not restrained to Sarah's own life, but is a continuing annuity: and he cited the case of *Reed v. Hatton*, 2 Mod. 25.

And on the 2d question. As this is merely a possessory action, it is not necessary for the plaintiff to set out a title, unless the defendant had set out one himself, which he has not done. The prior grant to Thomas Ives, set forth in the rejoinder, ought to have been "specially" pleaded: but defendant has only traversed the grant to the plaintiff, by which only the legal operation of the grant, not the plaintiff's title, is put in issue. He cannot, upon this traverse, go into the title of Thomas Ives, or give evidence of any thing foreign to the point in issue. The plaintiff could not tell how to direct her evidence; for defendant might as well claim under any other person as Thomas Ives. The issue being taken on the grant, it is enough for us to prove the admission, which we did prove. If the defendant could have invalidated it, that ought to have been by pleading "specially."

Mr. Ashurst, for the defendant, admitted that where a devisee is charged with the payment of a sum in gross, he shall have a fee, though the estate be not devised to him "and his heirs;" but an annual payment, "out of" the thing devised, will not create a fee; because the devisee cannot lose by the devise. Here the value of the estate devised is £5, 6s. per annum, and the charge is only [231] 40s. per annum; therefore, the devisee was sure not to be a loser.

And as to the 2d question, that upon this traverse nothing but the effect of the grant can be controverted. The pleading in cases of freehold is different from that in cases of copyholds. A copyholder, in the eye of the law, has only an estate at will, and he may alledge an admittance as a grant. The lord can only transfer an estate according to the surrender: if he exceed this authority, his admittance is good only "pro tanto." Now, if Sarah Boreham was, as we contend, only tenant for life, she had no estate which she could devise at her death; consequently the admission of the plaintiff and her sister Ellen is, in effect, a grant of "nothing." The defendant therefore in his rejoinder denies that the lord granted the estate, and shews a title in himself: and as the plaintiff, being a copyholder, could not plead a title, but could only plead it as a grant from the lord, the defendant could only traverse the grant, which he has done; and having traversed the plaintiff's title, he properly sets up his own.

Mr. Leigh in reply insisted that the charge of the annuity might have continued longer than the devisee's life, and therefore the devise might have been prejudicial; and relied on the case of *Ansley v. Chapman*, in Cro. Cha. 157, and *Reed v. Hatton*, before cited, and on *Lee v. Stephens, et Al.*, 2 Shower, 49, where a devise to James, conditionally, that he should "allow to Nicholas, meat, drink, &c. during his life," was adjudged a fee. He likewise cited *Humberton v. Howgill*, in Hobart, 72. The present devise, he said, was intended as a provision for both sisters, and it was not meant that the annuity should cease upon the death of Sarah; and it was payable [232] out of the estate, not out of the rents: and as to the second point, that the defendant could not put the plaintiff to shew any other title, than the grant of the lord: the difference of pleading is only in point of form.

Lord Mansfield and Mr. Justice Dennison being both absent, Mr. Justice Wilmot on this day (a) declared the opinion of the Court:



There are two points referred to the Court ;

1st.—Whether Sarah Boreham took an estate in fee, or for life, under the will of Thomas Ives ?

2d.—If only for life, whether the defendant could take any advantage of the plaintiff's want of title upon the issue joined on these pleadings ?

The first question is the material one ; for if she took a fee, the lord's grant to the plaintiff and Ellen her sister, and their admittance, would operate as a grant of the fee ; and we think Sarah Boreham took a fee under the will of Thomas Ives.

The case upon the will is simply this : Thomas Ives, seised of a house in which he lived, and of two copyhold tenements, which he had surrendered to the use of his will, and having a daughter, Elizabeth Boreham, and many grand-children, of which Sarah the devisee was one, made his will, dated the 3d December 1740, by which he devises the house to Clement Boreham for his life, "he paying thereout 40s. per annum to Robert Boreham, the testator's grandson," and after Clement Boreham's decease, to be equally divided between Robert, Sabil, and Jeremiah Boreham, the children of Robert Boreham, deceased (who were his grandsons) ; and he gave his two copyhold tenements to Sarah Boreham, "she paying thereout 40s. per annum to her sister Eli-[233]-zabeth Boreham : " then he gave £40, between his two grand-daughters, Anne and Mary Boreham, and made several other bequests.

The principle upon which all cases, arising on the construction of wills must depend, is admitted by the counsel on both sides, viz. that the intention of the testator is to be collected from the whole will considered together, and such a construction to be made as will effectuate that intention. But that collection and inference must be drawn from the will itself, "*ex visceribus testamenti* ;" and all wanton, arbitrary, whimsical conjectures of intention, are to be banished from the mind, when it is to judge upon such a question ; for though the intention need not be evidenced by a "necessary implication," as in the case mentioned out of Vaughan ; yet it must be a clear, apparent intention, evidenced by the words of the will, in such a manner as to leave the mind quite satisfied of that volition of the testator ; and therefore let him use what words or expressions he will, if they disclose what he means, it is the law to his family, and must be obeyed ; and the indulgence which the law shews to this kind of instrument, is owing partly to the words of the Act of Parliament, which enables persons to devise at their will and pleasure, and partly in respect of the situation which men are in when they make their wills, incapable of getting advice ; and therefore the law delivers them from the vassalage of form and technical words, and only expects that their meaning should be told in writing.

As this is the principle, and the only difficulty lies in the application of it, other cases, unless they were the same in all circumstances, rather obscure than illuminate these kinds of questions. When the mind is in pursuit of the testator's intention, dissimilar cases are [234] "*ignes fatui*," that mislead the mind, instead of directing it ; and therefore the counsel very properly avoided loading their arguments with multitudes of cases, and only mentioned two or three, which came the nearest to the case in question, and which I will take notice of presently ; and the counsel have put the question upon its proper point, viz. Whether an apparent intention to give the fee, can be collected from the "words" of this will ?

I collect that intention from the different penning of the devise to Clement Boreham, with the limitation over upon it, and of the devise to Sarah Boreham.

When the testator meant to give an estate for life, he has said so ; and has expressed that intention very particularly by words apt and proper for that purpose, "for and during the term of his natural life, paying thereout 40s. a year to his grandson Robert ;" and finding, from that partial disposition, that he had something left in him still to give, he devises that house, after the death of Clement Boreham, to be equally divided between Robert and Jeremiah Boreham : but in the devise to Sarah, he omits the words "for and during the term of her life," which he would certainly have inserted if he had intended it.

This difference of expression paints the distinction which his mind had taken between giving part of his estate in the thing devised, and his whole interest in it : the devise to Sarah follows the devise to Clement immediately : if he wrote, he could not but see them ; if read to him, he must have heard the sound of the words ; all rested with him. For though a devise to A. generally, unassisted by other clauses which mark the intention, would give only an estate for life, yet it is plain the testator

did not think so; for if he had, it was [235] quite unnecessary and nugatory to have inserted the restrictive words "for life." This is therefore one decisive mark drawn from the will itself, to shew that when the testator meant to give an estate for life, he said so; and consequently, that when he gave the thing generally, he did not mean an estate for life only; and indeed I believe all men, unacquainted with the law, when they mean a restriction, they express it; and when they give the thing generally, they mean the absolute property of the land, as much as of a personal chattel; and the custom of devising which prevailed antecedent to the 32 Hen. VIII. and was a relic of the Saxon law, was to devise lands, "ut bona et catalla."

Another circumstance of intention is, limiting the estate over upon the first devise, where it is expressly given for life, and making no limitation over upon the second; indeed he might intend to limit a remainder over on one estate and not on the other, and therefore this alone would not be sufficient to warrant the inference of a different intention; but still it strengthens the other evidence, and acts as an auxiliary proof of the intention.

But the most material passage in the will, from whence I collect the intention, is the condition of paying the annuity to Elizabeth Boreham.

Mr. Ashurst very forcibly urged, that the word "thereout," is a very emphatical word, and brings the case directly within the distinction in *Collier's case*, 6 Co. that where the condition is to pay generally, there the fee will pass, by reason of the possibility of loss; but where the sum is to be paid out of the rents and profits, then as there is no possibility of a loss, because he is not to pay till he has received, there it will not enlarge the legal operation of the de-[236]-vising words and give a fee; and that the word "thereout" is equivalent to saying, out of the rents and profits; and I think it is, and if it had been a sum in gross, it would have been a very different question.

How far the different penning of the two clauses which I have already mentioned, might have influenced the question, independent of the condition, is a matter of speculation, not worth debating; for here it is not a sum of money in gross, but an annuity to the devisee's sisters, who were both grand daughters of the testator: they both stood in an equal degree of relation to him, and it is manifest he was providing for them both: it is impossible to conceive he meant to make the provision for one grand daughter to depend upon the life of another, and to disinherit his own grand child in favour of his brother: and especially when by a subsequent clause in his will, he gives £20 a piece to two other of his grand daughters, Ann and Mary Boreham; that bequest gives them the absolute property in that money, and that legacy is equal in value to the annuity at the rate of 10 years purchase; and as he seems to have aimed at an equality, the pecuniary legatees would be sure of £20, whereas Elizabeth might have nothing if Sarah died within the year: and it would be directly contradicting the legal operation of the words in the will, and the very construction which words of the same import ought to have as to Sarah Boreham. For the defendant admits and insists that the devise to Sarah Boreham gives her an estate for life: if so, why will not the devise of the annuity to Elizabeth Boreham give her a life estate in the annuity? and if it does, Sarah must take the fee. For the security must be intended to answer the thing secured: the annuity cannot come out of the thing devised as long as the annui-[237]-tant lives, unless the devisee takes the inheritance, and it really almost amounts to a necessary implication: for if an estate is given to a particular person, and an act directed to be done with that estate, or any payment to be made out of it, which cannot be done but by vesting the inheritance in the first devisee, it must necessarily give the inheritance, and is divided by very thin partitions from a necessary implication; it is certainly a violent presumption, which Lord Coke says, 1 Inst. 6, is "plena probatio;" and a full proof of intention, out of the will itself, is the proof which the mind is to pursue and to endeavour to attain; and it is something like the case of *Shaw and Weigh*, 10 Geo. I. 1 Eq. Ca. Ab. 184, where an estate was devised to trustees generally, without any words of inheritance; but it was upon trusts and to support estates which required an estate of inheritance in the trustees, and therefore it was held to give it; and the case cited by Mr. Leigh of *Reed and Hatton*, 2 Mod. 25, comes near this case, but it is not exactly the same; so far it resembles it, that the house is given upon condition that he pay unto his sisters £5 a year: the word "paying" in this case makes a condition, and is exactly the same as the words in that case, "upon condition that he pay:" but in that case the payment



is not directed to be made out of the estate, but quarterly; and the first payment might be in one month after the testator's decease, and before Robert could have received any profit; and therefore the possibility of a loss was an ingredient in that case; but still the case applies to prove that they took the annuity for their lives under the words "upon condition that he pay to his sisters £5 a year." For what the Court says does not prove, as Mr. Ashurst contends, that they were given for lives expressly, but must be taken as their sense of the operation of the words marked in [238] italics, and could be printed in that letter for no other purpose but to inform the reader that those were the very words of the will; and the Court relies upon those words, as plainly proving that the testator intended the devisee a fee simple.

The case in Cro. Cha. 157, *Ansley v. Chapman*, was cited by Mr. Ashurst to meet this objection. There was a devise of lands by several clauses to several sons, and particularly to Michael and Henry; then the testator declares that they shall bear a proportionable part of £40 a year to his wife for life; and yet the Court held that payment did not enlarge their estates into a fee: but Mr. Leigh gave the true answer: the charge was not made for the wife by the will; for it recites a prior obligation to pay it, and therefore the payment did not at all depend upon the duration of the estates which the sons took under the will. Mr. Ashurst did endeavour to take off the force of the argument arising from the devise of this annuity, by observing that the annuity, in the first devise, determined with the life of the devisee who was directed to pay it, and if he meant it in that devise, he might also mean it in the other: but the annuitant is one of the persons to whom the estate is limited in remainder, for as there is no other of that name mentioned in the will, they must be intended to be the same: but if not the same, there is a very essential difference between the cases: the estate is expressly given for life to the devisee in the first clause; whereas in the second, it is given generally; the words in the first clause must controul any presumption of intention in the one case; but because he hath framed his devise in such a manner in one case that the annuity must drop with it, there is no foundation to infer, that where he has framed the devise in a different manner in another case, that he intended the annuity should [239] drop with it. The reverse is rather to be presumed, and that if he had had the same intention in both, he would have expressed himself in the same manner.

As we think Sarah Boreham took a fee simple under the will of Thomas Ives, and consequently, that the plaintiff and Ellen had the fee when they were admitted by the lord, the question upon the pleadings becomes quite immaterial: but if the fact was, as the case states it, that Thomas Ives, as the nephew and heir of the testator, was entitled to this copyhold estate, in case Sarah took only an estate for life; and consequently, that the defendant Leppingwell under him, and as his surrenderee, had the legal title to this estate, I should have thought that upon this issue, the grant of the lord to the plaintiff and Ellen, would have been a mere nullity, and that the plaintiff's proving the fact of the grant, without any right at all, would not have proved the issue against the defendant's having the real right to the estate.

Originally copyholders were mere tenants at will, a class of middle men between freeholders and villeins; free as to their persons, but not as to their estates; inferior to freeholders, who were free both as to their persons and estates; superior to villeins, who were free neither as to their persons nor estates; and in very ancient times, the word freehold, was meant to describe an estate which could not be taken away by the lord, in opposition to every other species of estate, which always lay at the mercy of the lord: by degrees, this species of estate acquired a stability; custom, which is immemorial usage, clothed it with one material quality, analogous to a freehold estate, viz. that the lord should not "ad libitum" resume it; that the heir, where it was a copyhold of inheritance, should be entitled to the estate, paying a fine, certain or uncertain, [240] "according to the custom of the manor," upon his admittance; and the fine not being due till admittance, it became the lord's interest to admit him; but still the admittance gives no right, and even in the case of a surrender, the estate acquired by the surrender depends entirely upon the right which the surrenderor had at the time of the admittance: the lord, in both cases, is a mere instrument, and the only difference between an admittance on a descent and a surrender is, that it is necessary, in the one case, to entitle the lord to his fine, and it is necessary, in the other, both to take the estate out of the surrenderor, and also to entitle the lord to his fine; but, in either case, no estate really passes from the lord; and even after the



surrender, and before the admittance, the estate remains in the surrenderor, and is not vested at all in the lord, not even in "transitu," between the surrender and admittance; and though every admittance may be pleaded as a grant, yet it really operates as a grant only in respect of the lord, and against his right as lord; for to every other person and purpose whatsoever, it is valid or void according to the right of the parties. The surrender controuls the admittance in all cases whatever; if the surrender is for life, and the admittance in fee, the estate of the copyholder is according to the surrender, and not according to the admittance: so if the lord admits A. and B., where the surrender is only to A., the whole estate is in A.; or if the surrender is absolute, and the lord admits upon condition, the condition is void; the reason given is, because the lord has only a customary power to admit, according to the surrender, and so far as he exceeds that power, the Act is void. 4 Co. 28 b. In the case of a descent, the admittance is of still less validity, for it is not so much as necessary to complete the title; [241] and if the lord admits twenty different persons as heirs at law, the unadmitted real heir at law will have a good title against them all; and the grant in the present case is stated expressly to have been made to the plaintiff and her sister Ellen, in "coparcenary," which shews the nature of this grant; and therefore if they had no title as heirs at law, the grant and admittance were totally void, and the defendant could traverse nothing else but the grant; for the allegation, "by virtue whereof they were seised," is not a matter traversable; but the traverse is taken properly to the grant, which puts the right of the copyholder properly in issue; and the grant is good or void, and the plea proved or disproved, as that right is determined.

As to the case of *Humberton and Howgill*, in Hob. 72, where it is said, "If issue be taken directly, enfeoffed or not enfeoffed, it must be avoided by covin specially pleaded, for it is a feoffment tiel quel." 1st. This was not the point of the case: but, 2dly. The feoffment was good to every intent and purpose, except as against creditors; whereas, in the present case, it is void against every body; for even the lord himself may admit the real owner, and the first admittance will not defeat or frustrate the second. And in that case, if feoffment by a person incapable from the nature of the estate, or other incapacity, which renders the Act totally void,—it would prove the plea. It is then said, that a possessory action is not sufficient to destroy the plaintiff's title. 4 Rep. 71. 6 Co. 15. He must shew the title in himself, and he relies only on the grant of the lord.

But if Sarah Boreham took only a life estate, Leppingwell had a title under the heir at law, and then the grant of the lord to him is substantiated; and though possession is sufficient against a [242] wrong-doer, yet it is not against the real owner, who has a right of entry, which would be the present case, if Thomas, the nephew, was the customary heir: if he was not, then the defendant is an entire stranger and wrong-doer, and the plaintiff's possession would enable her to maintain the action, and the merits would be against the defendant upon both the questions; but as the law is clearly with the plaintiff on the 1st question, she is entitled to the

Postea.

### [243] IN THE KING'S BENCH.

THE KING *against* ALMON. Hil. 5 Geo. III. 1765.

[See *Miller v. Knox*, 1838, 4 Bing. N. C. 587; *Ex parte Martin*, 1879, 4 Q. B. D. 215. Applied, *In re Johnson*, 1887, 20 Q. B. D. 72. Approved, *Attorney-General v. Kissane*, 1893, 32 L. R. Ir. 271; see *R. v. Gray* [1900], 2 Q. B. 41; *R. v. Davies* [1906], 1 K. B. 41.]

Mr. Justice Wilmot (*a*).—This is an application made to the Court by the Attorney General, for an attachment against Mr. Almon, for publishing a pamphlet, containing

(*a*) This opinion was not delivered in Court, the prosecution having been dropped, in consequence, it is supposed, of the resignation of the then Attorney General, Sir Fletcher Norton; but it was thought to contain so much legal knowledge on an important subject, as to be worthy of being preserved. The occasion of it was a motion in the Court of King's Bench, by the Attorney General, for an attachment

many libellous passages upon this Court, and upon the Chief Justice for his conduct both in Court and out of it: and it charges the Court, and particularly the Chief Justice, with having introduced a method of proceeding to deprive the subject of the benefit of the Habeas Corpus Act; and though the Chief Justice is [244] named and marked out in that passage, yet the whole Court is most manifestly, and in express words, involved in it.

The passage reflecting upon the Chief Justice for amending an information out of Court, is in page 126, and is laid before the Court in this manner. Mr. Barlow, by affidavit, informs the Court, that upon the 18th of February, he received directions from Mr. Wallace, to get an information against Mr. Wilkes amended, by striking out the word "purport," and inserting the word "tenor:" that he applied to Lord Mansfield for a summons, to shew cause why it should not be amended, and sent two copies of the summons, one to Mr. Hughes, the clerk in Court for the defendant, and another to Mr. Phillips, the solicitor for the defendant, which he believes were left at their houses. That on Monday, the 2d of February, he attended Lord Mansfield, and there met Mr. Hughes and Mr. Phillips; and Lord Mansfield then asked them what objections they had to such amendment: that they said they could not consent to it; and that Lord Mansfield said, he did not ask their consent, but what their objections were? and asked, if it was not usual, or the common practice, to amend informations? and read from a book several cases of amendments, and then made an order for the amendment; and Mr. Hughes confirms the account given by Mr. Barlow, of what passed at Lord Mansfield's when this amendment was made.

[245] The passage in this pamphlet represents this amendment to have been made by Lord Mansfield, "officially, arbitrarily, and illegally."

The evidence laid before the Court, of Mr. Almon's having published this pamphlet, is an affidavit made by David Bell, in which he swears that the pamphlet was sold and delivered to him at Mr. Almon's shop, by a woman belonging to Mr. Almon, and that he paid her 1s. 6d. for it.

Three objections have been made to the granting this attachment.

1st. That in the mode of prosecution, the fact, sworn by Bell, doth not sufficiently evidence a publication of the pamphlet by Mr. Almon, and that his privity to the publication ought to be proved.

2dly. That to warrant this "summary" mode of proceeding, the contempt ought to be clear and certain; that the scandal ought to be self-evident and apparent, not to be made out by private anecdotes and inferences, or any nice ingenious subtle interpretation; that it is the proper province of a jury to judge of the application and relation of a libel; and that whether these passages do or do not relate and apply to the Court, or the Chief Justice, would be much more proper for a jury to exercise their judgment upon than the Court.

3dly. But if both these points should be against them, then it is insisted upon, that under all the circumstances of this case, the Court ought not to proceed by way of attachment, but leave the offence to be prosecuted and punished by indictment or information.

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against Mr. Almon, for publishing a pamphlet, intituled, "A Letter concerning Libels, Warrants, Seizure of Papers, &c. Printed for J. Almon, Piccadilly, 1765."

In consequence of this motion, grounded on affidavits of the above pamphlet having been bought at the shop of Mr. Almon, in Piccadilly, a rule was made for Mr. Almon, to "shew cause" why a writ of attachment should not issue against him for his contempt. In answer to these affidavits Mr. Almon made an affidavit, in which he expressed his "concern and surprize at this charge, being no ways conscious of having in any act of his life been guilty of the least intentional disrespect towards that Court, nor does he now, nor did he ever apprehend or understand that the passage or extract of the pamphlet, intituled, "A Letter," &c. "was so meant or intended, or could be so construed."

As these proceedings were afterwards dropped, they are not mentioned in the reports of this period; but it appears that this opinion was prepared after the argument on the rule to "shew cause," as it takes notice of the arguments of counsel, and of the objection made to the granting of the attachment.

But as the matter never came to a final decision, it must be considered only as the opinion of the Judge who gives it.

As to the 1st objection. I cannot find out that any distinction has ever been taken between attachments and informations, as to the [246] evidence expected by the Court for granting them. Demonstration is not required in either case, but such a degree of probability, as warrants the mind to form a conclusion of the truth of the fact proposed, and to act upon it.

The fact, proposed here, is the publication of this pamphlet by Mr. Almon.

The evidence is, that it was sold in his shop by a woman belonging to him. What is the inference that the mind draws from such a sale? That it was sold under his direction, for his use, and with his privacy. Like all other probabilities, it may be answered and explained; but unless it is answered and explained, it rises so near to a certainty, that it produces in the mind that kind of assent which is called assurance; and upon that foundation Courts of Justice, as well as private men, must rest satisfied and contented as the best and only succedaneum to demonstration; and this kind of evidence has always been held sufficient to induce the Court to grant informations for libels.

In *The King and Roberts*, Mich. 8 Geo. II. it was laid down by Lord Hardwicke and the Court, to be the constant evidence of the publication of a libel, that the person bought it in the defendant's shop: and as to the objection which was made to its being bought from one who appeared to be a servant, and not the master himself; and that there might be some combination between the buyer and seller, in order to injure the master; it was said, the proof of that lies upon the master, if he would remove the general presumption of its being sold by his privacy and direction; and that this species of evidence has always been held sufficient to induce the Court to grant an information. It is also now established and settled by a [247] multitude of cases which might be adduced, and an uniform practice in pursuance of them, that this evidence is sufficient to prove a publication by the defendant, even upon a trial.

If it be sufficient to convict a man of publication upon a trial, "a fortiori," it must be sufficient to found a proceeding upon, which is so far from convicting, that it only calls upon the party to answer the charge, and defers the whole trial of that charge to his own oath.

And as Mr. Almon has made an affidavit himself in this case, and does not deny his privacy to the sale of this pamphlet, it fortifies the presumption which the law makes, and for these purposes very sufficiently evidences the publication of this pamphlet by him.

As to the 2d objection, which respects the application of the passages, it is admitted, and indeed it is upon very rational grounds now most clearly settled, that it is totally immaterial in what particular form or mode of expression calumny and defamation are conveyed.

The use of speaking and writing, is to excite in the mind of the hearer, or the reader, the idea entertained in the mind of the speaker or writer; and therefore, let the speaker or writer paint that idea how he will, and in what colours he pleases, still, if it produces an idea of calumny and defamation in the minds of the persons who hear or see it, it is a picture which the law forbids to be drawn under any form or under any disguise whatsoever; and Courts of Justice have for many years said, that they would not renounce their senses upon such occasions, but would see with the same eyes that all other people do.

[248] It is totally immaterial what terms are made use of, whether affirmative, negative, past, present, future, ironical, hypothetical, or interrogatory; if they convey scandal, Judges are bound to understand it in the plain, popular, and obvious sense which the words import, and not suffer the slanderer to shelter himself by any delusive colouring whatsoever.

But really there is no colouring at all in this case, except making use of the future tense instead of the preterperfect.

The passages, 122 to 126 (a), contain a direct, plain, explicit charge upon this Court.

(a) "I hope we shall never see any Chief Justice, especially in that great Court of criminal process, the King's Bench, who shall deny, or delay, the issuing one of these writs (of habeas corpus) to any man who applies for it, but award the same instantly, upon the prayer of any one, as a writ of right, to which the subject is entitled for asking, by motion of course, without any affidavit whatsoever. In many cases, as, for example, in that of "close" confinement, it may be impossible for the



of an intention to defeat the Habeas Corpus [249] Act, by introducing a rule to be attained by an affidavit, instead of granting the writ "of course," and averring that a man was two years obtaining his liberty under one of these rules. The passages expressly mention the Chief Justice in that great Court of criminal process, the King's Bench, in "*apertâ Curiâ*."

[250] And as the Chief Justice can neither deny nor delay the issuing of an habeas corpus, without the concurrence of the other Judges, it is imputing that denial or delaying to them. But it does not rest there, for it says, "if speaking to a friend, sending a letter, or making an affidavit, be required by the Court, it will be a virtual denial of the writ;" which is saying that, by requiring an affidavit, they have virtually

party either to speak to a friend, send a letter, or make an affidavit; and, consequently, if either be required by the Court, it will be a virtual denial of the writ; it is a means of defeating the Habeas Corpus Act. The requisition of an affidavit, puts it likewise in the power of a Judge, to object to its form or contents, and to say the same is not full enough; and yet, before another can be had, the party guilty of the violence, upon being apprized of what has passed, may, by means of this delay, remove the prisoner to some other place, or shuffle him into some other hands, nay, hurry him into a ship and carry him to the East or West Indies, and then all attempt for redress will come too late, and be in vain. An application to the King's Bench for an habeas corpus in term-time, used to be esteemed, I remember, a mere 'motion of course.' 'Our inheritance is right of process of the law, as well as in judgment of the law.' The condition of the subject would be still worse, if any Chief Justice, instead of granting the writ prayed for, should force the party into the taking of a rule upon the prisoner, to shew cause why he detained the person imprisoned; and this last miserable remedy would still be rendered less adequate, if the person applying was obliged to give notice of such rule to the Solicitor of the Treasury, as well as to the person imprisoning; and even this again would be still made more grievous, tedious, and precarious, if the Judge should be critical upon the affidavit of the service of notice, and be extremely rigid in its being most punctually set forth in every the minutest circumstance. What a noble field for delay, evasion, and final disappointment, would this open to every committer of violence; and how easy would it be, in the mean time, to dodge the man imprisoned from place to place, and from hand to hand, so as to render it utterly impracticable for any friend to procure his enlargement. A bold and daring minister might thus easily transport a troublesome, prating fellow, to either India, long before any 'cause could be shewn' upon such a rule. I am informed, that a freeholder, pressed for a soldier under a temporary Act of Parliament, was two years obtaining his liberty under one of these rules; although he did his utmost by money and counsel, during all the time, to push on the hearing of his case upon the merits: indeed he had the great good fortune not to have his regiment removed farther than from Falmouth to Carlisle, in the whole time; for, had it been ordered abroad, I do not see how he could have had any relief at all, until the end of the war; before which he might have died of diseases, or been knocked on the head by the enemy. But it would be even still much worse, if any Judge should take it into his head for six months together, that noblemen were so great as to be privileged from paying obedience to a habeas corpus at all."

"Or, if any Chief Justice, contrary to the usage of Judges, who are to have no ears for any thing that is to come in judgment before them, until the same is brought on judicially, should, weeks before any Crown-trial, officiously send for the proceedings to see whether they were legal, and upon discovering an error on the prosecutor's side, should summon the attorney of the other side, and tell him he must consent to the setting right of this error, to the end that the 'tenor' of the pleading might be such as judgment could be pronounced thereupon; and notwithstanding the attorney should protest he could not consent thereto upon the account of his client, and that the same was a criminal prosecution, and that such alteration of the record was not warranted by any adjudged precedent, should nevertheless arbitrarily direct it to be done, without either having the point debated before himself by counsel, or brought on before the whole Court for their opinion; and that the defendant, being found guilty by the jury, should be deprived, by such amendment, of taking advantage of the error aforesaid, in arrest of judgment, which he might otherwise have done, and the same would have been fatal to the prosecutor, &c. &c."

denied the writ; "that it is a means of defeating the Habeas Corpus Act; that an application for an habeas corpus used to be a 'motion of course;' that the condition of the subject would be still worse, if any Chief Justice, instead of granting the writ, should force the party into a rule, and that notice of such rule should be given to the Solicitor of the Treasury; if any Judge should be of opinion that noblemen were privileged from paying obedience to the habeas corpus; and that a peer could not be attached by the King's Bench, for treating the Court with opprobrious language."

What innuendo, inference, deduction, nice and subtle or ingenious interpretation is to be made, for applying this to the Court and the Chief Justice? What anecdote is to be known, unless the proceedings in this Court are anecdotes, and the records of it are secrets and mysteries, impervious to human eyes, and unknown even to the Judges themselves.

As to the other passages relating to the Chief Justice amending the information, the application is equally obvious, direct, and necessary; for what Chief Justice can make amendments in criminal prosecutions before trials in which the Crown is concerned, but the Chief Justice of the King's Bench?

[251] If the words "Lord Mansfield," had been printed in capital letters, it would not have pointed him out more visibly to the public, than the words "Chief Justice," applied to the amendment of an information; and where, from the manifest context of all the passages relating to a Chief Justice, it is evident that the Chief Justice, mentioned in the first part of the passage, page 123, is the same person who is carried through all the passages, and that is, the Chief Justice in that great Court of criminal process, the Court of King's Bench.

Affidavits are only necessary where the person does not appear with clearness and certainty upon the face of the libel; but the affidavit of the Chief Justice himself, or of the whole Legislature put together, could not have connected the person and the passage together more strongly than the words themselves do: and the affidavit made by Mr. Barlow and Mr. Hughes does not fix the relation, or add the least additional evidence, in respect of the allusion, but only to shew, "*ex abundanti*," that there was not the least foundation for any part of the assertion.

The affidavit only shews that it was a malignant fiction, formed upon a transaction which did pass before the Chief Justice, and a libellous misrepresentation of it; and, if no such affidavit had been made, it would have appeared, upon the face of the paper, to have been an infamous aspersion and libel, unrelated to any transaction whatsoever; and there is nothing for a jury to determine, but whether the Court of King's Bench is the Court of King's Bench, and whether Lord Mansfield is the Chief Justice in it.

But suppose there were facts upon which a jury might exercise their judgment; is it not half the business of this Court to examine [252] and try those facts upon applications for attachments? And though I wish as well, and have as high an opinion of trials by jury, as any man has or ever had; and where facts are doubtful, this Court often directs issues to ascertain them; yet attachments are only process to bring parties into Court; and where facts are clear, plain, and as manifest as words can make them, to what end, intent, and purpose, are we to desire any further information or satisfaction about them?

I think no affidavit is necessary to connect the passages either with the Court or the Chief Justice, but that the relation is self-evident, and appears to a demonstration upon the face of the pamphlet.

The third and last objection is, that, supposing this pamphlet to contain passages libelling the Court or the Chief Justice, yet that it is not proper for this Court to proceed against the delinquent by way of attachment, but that it should leave him to be prosecuted by indictment or information.

There are two points to be considered under this objection.

The first respects the passages affecting the Court, and the Chief Justice acting in Court: the other respects the passage reflecting upon the Chief Justice for the amendment made out of Court.

I will first consider what has been said with respect to attachments in general, and the distinction made between the propriety of applying them to one species of contempt and not to another; because that part of the argument goes to all the passages in the pamphlet, whether they reflect upon the Judges for what they do in the Court, or in their judicial capacity out of it.

I will then consider the other point about the amendment made by the Chief Justice out of Court.

[253] It has been argued, that the mode of proceeding by attachment is an invasion upon the ancient simplicity of the law; that it took its rise from the Statute of Westminster, ch. 2; and Gilberts History of the Practice of the Court of Common Pleas, p. 20, in the first edition, is cited to prove that position. And it is said, that Act only applies to persons resisting process; and though this mode of proceeding is very proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt to the authority of the Court; yet that papers reflecting merely upon the qualities of Judges themselves, are not the proper objects of an attachment; that Judges have proper remedies to recover a satisfaction for such reflections by actions of "*scandalum magnatum*;" and, that in the case of a peer, the House of Lords may be applied to for a breach of privilege; that such libellers may be brought to punishment by indictment or information; that there are but few instances of this sort upon libels on Courts or Judges; that the Common Pleas lately refused to do it; that libels of this kind have been prosecuted by actions and indictments; and that attachments ought not to be extended to libels of this nature; because Judges would be determining in their own cause; and that it is more proper for a jury to determine "*quo animo*" such libels were published.

As to the origin of attachments, I think they did not take their rise from the Statute of Westminster, ch. 2; the passage out of Gilbert does not prove it; but he only says, "the original of commitments for contempt 'seems' to be derived from this statute;" but read the paragraph through, and the end contradicts the "seeming" mentioned in the beginning of it, and shews that it was a part of the [254] law of the land to commit for contempt, confirmed by this statute; and indeed, when that Act of Parliament is read, it is impossible to draw the commencement of such a proceeding out of it: it impowers the sheriff to imprison persons resisting process; but has no more to do with giving Courts of Justice a power to vindicate their own dignity, than any other chapter in that Act of Parliament.

The power, which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it, 1 Vent. 1. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabrick of the common law; it is as much the "*lex terræ*," and within the exception of Magna Charta, as the issuing any other legal process whatsoever.

I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say, that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do,—immemorial usage and practice; it is a constitutional [255] remedy in particular cases, and the Judges, in those cases, are as much bound to give an activity to this part of the law as to any other part of it. Indeed it is admitted that attachments are very properly granted for resistance of process, or a contumelious treatment of it, or any violence or abuse of the ministers, or others, employed to execute it. But it is said that the course of justice in those cases is obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon Courts or Judges, which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libelling Judges for what they do in their judicial capacities, either in Court or out of Court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever.

By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. 12 Co. 25. The King is "*de jure*" to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King "*concerning his justice*."



The arraignment of the justice of the Judges, is arraignment of the King's justice : it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them ; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction [256] whatsoever ; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the Court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the Judges themselves. It seems to be material to fix the ideas of the words, "authority" and "contempt of the Court," to speak with precision upon the question.

By the word "Court," I mean the Judges who constitute it, and who are intrusted by the constitution with a portion of jurisdiction defined and marked out by the common law, or Acts of Parliament. "Contempt of the Court" involves two ideas : contempt of their power, and contempt of their authority. The word "authority" is frequently used to express both the right of declaring the law, which is properly called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power : but by the word "authority," I do not mean that coercive power of the Judges, but the deference and respect which is paid to them and their acts, from an opinion of their justice and integrity.

Livy uses it according to my idea of the word, in his character of Evander :— "*Autoritate magis quam imperio pollebat :*" it is not [257] "*imperium ;*" it is not the coercive power of the Court ; but it is homage and obedience rendered to the Court, from the opinion of the qualities of the Judges who compose it : it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was deposited in their hands ; that authority acts as the great auxiliary of their power, and for that reason the constitution gives them this compendious mode of proceeding against all who shall endeavour to impair and abate it ; and therefore every instance of an attachment for contumelious words, spoken of a rule of the Court (of which there are great many) is a case in point to warrant an attachment in the present case, where a rule of Court is the object of the defamation : and it would be a very strange thing that Judges, acting in the King's Supreme Court of Justice in Westminster Hall, should not be under the same protection as a bailiff's follower, executing the process which those Judges issue : it is not their own cause, but the cause of the public, which they are vindicating, at the instance of the public ; for I do not think that Courts of Justice are to take their complaints up of themselves : it must be left to His Majesty, who sustains the person of the public, to determine whether the offence merits a public notice and animadversion ; and in this state of the proceedings, they are only putting the complaint into a mode of trial, where the party's own oath will acquit him ; and in that respect it is certainly a more favourable trial than any other : for he cannot be convicted if he is innocent, which, by false evidence, he may be by a jury ; and if he cannot acquit himself, he is but just in the same situation as he would be in, if he was convicted upon an indictment or an information ; for the Court must set the punishment in one case as well as the other : [258] they do not try him in either case ; he tries himself in one case, and the jury try him in the other.

An action of "*scandalum magnatum*" is only to redress the private injury—compensation, and not punishment, is the object of it ; and though some Judges may have sought pecuniary satisfaction, yet others have thought more liberally, and disregarded all private emolument or gratification for the personal injury, and resented the indignity as the cause of the public ; and the conduct of the Court of Common Pleas, in respect of the libel published by the court martial, is an authority in point upon this part of the case.

As to proceeding in the House of Lords for a breach of privilege, the scandal upon the noble Lord does not affect him in the character of a peer, but as the Chief Justice of this Court; and if it did, I cannot think it a more favourable mode of prosecution than an attachment, where his own oath will acquit him. As to leaving such libels to be prosecuted by indictment or information, that juries may judge, "quo animo," they were written or published; I am as great a friend to trials of facts by a jury, and would step as far to support them as any Judge who ever did, or now does, sit in Westminster Hall; but if to deter men from offering any indignities to Courts of Justice, and to preserve their lustre and dignity, it is a part of the legal system of justice in this kingdom, that the Court should call upon the delinquents to answer for such indignities, in a summary manner, by attachment, we are as much bound to execute this part of the system as any other; for we must take the whole system together, and consider all the several parts as supporting one another, and as acting in combination together, to attain the only end and object of all laws, the safety and security of the people.

[259] The trial by jury is one part of that system; the punishing contempts of the Court by attachment is another; we must not confound the modes of proceeding, and try contempts by juries, and murders by attachment. We must give that energy to each, which the constitution prescribes. In many cases we may not see the correspondence and dependance which one part of the system has and bears to another; but we must pay that deference to the wisdom of many ages as to presume it; and I am sure it wants no great intuition to see, that trials by juries will be buried in the same grave with the authority of the Courts who are to preside over them.

The constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of Judges, and for punishing and removing them for any voluntary perversions of justice. But if their authority is to be trampled upon by pamphleteers and news-writers, and the people are to be told that the power, given to the Judges for their protection, is prostituted to their destruction, the Court may retain its power some little time, but I am sure it will instantly lose all its authority; and the power of the Court will not long survive the authority of it: is it possible to stab that authority more fatally than by charging the Court, and more particularly the Chief Justice, with having introduced a rule to subvert the constitutional liberty of the people? a greater scandal could not be published.

A rule was first made in Hilary term, 1757, in the case of *The King and Charles Thacker*, and was calculated entirely to meet the case of persons pressed under the 29 Geo. II. c. 4.

It had been doubted, (not by the Court,) upon former Press Acts, whether the judgment of the commissioners, as to the fitness of the [260] men impressed, was not intended by the Legislature to be final; but as it was an authority only in the commissioners, complaints were made of their exceeding and abusing it, and writs of habeas corpus granted; but the facts, stated in the return of these writs, being only controvertible in an action for a false return, according to the opinion of the House of Lords in the year 1759, great delay must have arisen in cases which required immediate dispatch; and in case no return was made by the officer, but that he had the party in his custody, and had him ready in Court, according to the command of the writ (and as he was a stranger to the propriety of the press, he could scarcely make any other,) all the pressed men in the army must have been discharged, to the manifest hazard of the nation, who had been under a necessity of having recourse to that expedient for recruiting the army; but still, in that case, or if the man had not been in actual custody, but at large, and had left the army without a military commission, it must have been, in both cases, at the peril of his being afterwards tried and punished as a deserter, in case he was a proper object of the press; and therefore, to give a full, complete, and adequate relief to the party pressed, and to give the Act of Parliament that operation which the Legislature intended, and which that supreme law, the safety of the people, required, and which must have been endangered by discharging all the pressed men, (because the persons, who made the returns, were, and from the nature of the case, must have been, strangers to the facts which did or did not make them objects of the press,) the Court, in Hilary term, 1757, first made a rule upon the commissioners under the Act of Parliament, as having exceeded their authority, to shew cause why the party should not be discharged out of the custody of Mr. Hayward, [261] the keeper of the Savoy, where Thacker was confined; and that



Hayward should not suffer him to be taken or sent away, until the Court should further determine therein, and that notice of that rule should be given to the Solicitor of His Majesty Treasury in the mean time. By this rule, the question of the fitness of the man, viz. whether he was an object of the Act or not, was brought before the Court much more expeditiously than it could have been done by an habeas corpus, where the facts of the return could not be controverted by affidavits. He was secured, by the provision in the rule, from being taken or sent away in the mean time; and by making the Crown and the commissioners parties to the rule, the question received such a complete determination, as delivered the party absolutely from the condition of a soldier, in case it was determined for him; and if it was determined against him, he might still have recourse to an habeas corpus, and take the sense of a jury upon the facts which should be contained in the return to that writ; and no habeas corpus was ever denied to any body who prayed it upon a proper foundation. This rule was offered to the people as a more beneficial remedy, but was not imposed upon them in the place of the habeas corpus. The manifest and apparent utility of it, made it the option of the Bar in many subsequent cases, in preference to the writ of habeas corpus.

I was not in Court that term the rule was made (*a*), but I was informed of it, and most cordially approved of it. I mention the circumstance of my not being here at that time for two reasons; 1st. To express my sorrow that I had not a share in the formation of it. 2dly. To avoid any imputation of applauding myself in what I am going to say about it.

[262] In more temperate times, this rule would have been treated as a heaven-directed thought for the better supporting the liberty of the people, in the execution of an Act of Parliament, which breaks in upon that equality which the law most anxiously affects to establish for all who live under this Government, and which nothing but the necessities of the State can ever reconcile to the genius of a free constitution. It was the best expedient which the most consummate prudence, and the warmest wish for the happiness of the people, could have invented, to give the State all the benefit which the Legislature really meant they should receive from that law; and at the same time to guard individuals against any abuse of it; and in times to come, it will be one great memorial of the zeal and affection of the Judges who made it, for the liberties of the people.

It was said, that this pamphlet was an answer to a libellous pamphlet on another Court: I never read any pamphlets, and therefore do not know what that pamphlet was; but as to litigated questions between the two Courts, on the Habeas Corpus Act, I know of none; and a libel upon one Court of Justice, is a very odd way of answering a libel upon another: I should rather think that both the pamphlets came out of the same quiver; I am sure the same malignant spirit, the same evil genius of this nation, guides the hand of the persons who calumniate any Court of Justice: and as to the Court of Common Pleas not taking up a complaint of this kind, what was the nature of that complaint? If properly proved, or how it came before them, is not stated: but I am fully persuaded, from my knowledge of their wisdom and justice, that if such a complaint as this had been laid before them, they would have acted as we do upon it.

[263] If an attachment is a constitutional mode of proceeding for libels upon Courts of Justice, they must be competent to the question of "*quo animo*" they are published; and especially in this stage of the proceeding, which is only to bring the party into Court to tell his own story. It is the intention which, in all cases, constitutes the offence. "*Actus non facit reum, nisi mens sit rea.*" It would be a contradiction in terms to admit Courts to have a cognizance of the offence, and yet not admit them to be Judges of the only ingredient which makes it so.

As to the passages relating to the amendment made by the Chief Justice out of Court, there is no necessity of giving any opinion upon that part of the case, as the attachment ought to go for the other passages reflecting upon the Court and the Chief Justice, for acts charged upon him as done in Court; but as that point has been argued very elaborately, I will give my opinion upon it. The legality of this amendment was never controverted: it could not be controverted: it was founded upon

(*a*) Sir Eardley was at this time in the Court of Chancery, being one of the Commissioners of the Great Seal.



precedents, and upon that immutable principle of all practice, the bringing the real merits of the case in question before the Court: the whole doctrine of amendments turns upon that principle.

The objection to granting the attachment upon this passage is, that it respects the Chief Justice only, and neither reflects upon the Court, nor the process of the Court; that orders made by Judges at their chambers cannot be enforced by attachment, till they are made orders of the Court; and that the disobedience must be subsequent to their being made orders of the Court; and a doubt has been rather hinted at than made, as to the legality of orders made [264] by Judges at their houses or chambers. And the passage, in 2 Inst. 103, was mentioned as condemning this practice.

When the practice first began I cannot find out; my search and inquiries have been as fruitless and ineffectual in that respect as Mr. Dunning's. Popham, 180.—One hundred and forty years ago, an order was made by two Judges in vacation, to stay a judgment:—a very extraordinary interposition, but no complaint of it as illegal. But whenever it began, it stands upon too firm a basis to be now shaken;—constant immemorial usage, sanctified and recognised by the Courts of Westminster Hall, and in many instances by the Legislature; and it is now become as much a part of the law of the land, as any other course of practice which custom has introduced and established: but though difficult to find out when it was introduced, yet it is very easy to see why it was introduced—for the ease and convenience of the suitors of the Court;—to accommodate them at a much easier expence, and with less trouble, in a great variety of cases, and especially in vacation-time, when they could not have access to the Court; and when there was a great multiplicity of business, the saving of the time of the Court in adjusting trifling matters, which might be so much better employed in momentous ones, was no inconsiderable motive towards establishing it. And still, it is the business of the Court, which is done at chambers; that is, it is business which must be done in Court, if it could not be done at chambers.

And the passage in Lord Coke, 2 Inst. 103, when duly considered, relates only to rules, orders, awards, and judgments, made at chambers, "*ex parte*;" where a man may lose his cause, or receive great prejudice or delay, in his absence, for want of defence; and [265] the passage, cited by him out of Seneca, very fully explains Lord Coke's meaning to relate to orders or rules, "*parte alterâ inauditâ*:" whereas, Judges never make orders in chambers, without hearing both parties, or giving them an opportunity of being heard. And there is nothing in the constitution of the Court, which forbids the business of it being done by one Judge; for one Judge, sitting in Court, has the authority of the whole Court; and a libel upon him, would be a libel upon the Court in the strictest sense of the word; and certainly a libel upon a single Judge, for an opinion given in Court, controuled by the other three Judges, although it could never be called a libel upon the Court, yet would be a contempt of the Court, and be proper for an attachment; and therefore the question resolves itself at last into this single point, whether a Judge, making an order at his house or chambers, is not acting in his judicial capacity as a Judge of this Court, and both his person and character under the same protection, as if he was sitting by himself in Court? It is conceded that an act of violence upon his person, when he was making such an order, would be a contempt punishable by attachment; upon what principle? for striking a Judge in walking along the streets, would not be a contempt of the Court. The reason therefore must be, that he is in the exercise of his office, and discharging the function of a Judge of this Court; and if his person is under this protection, why should not his character be under the same protection? It is not for the sake of the individual, but for the sake of the public, that his person is under such protection; and in respect of the public, the imputing corruption and the perversion of justice to him, in an order made by him at his chambers, is attended with much more mis-[266]-chievous consequences than a blow; and therefore the reason of proceeding in this summary manner, applies with equal, if not superior, force, to one case as well as the other; there is no greater obstruction to the execution of justice from the striking a Judge, than from the abusing him, because his order lies open to be enforced or discharged, whether the Judge is struck or abused for making it.

The greatest objection upon this part of the case has been, that this Court will not enforce obedience to a Judge's order, by an attachment, before it is made a rule of Court; and that the refusal to perform it must be subsequent to its being made

a rule of Court; and from thence it has been inferred, that it can be no contempt of the Court to libel a Judge for making an order, because it would be no contempt of the Court to disobey it. But, upon consideration, I think the inference is not a just one.

The right of the Court to controul these orders is to preserve a uniformity of practice, and to prevent any clashing which might arise from four distinct and separate exertions of the same jurisdiction. The refusing to issue an attachment for the breach of such an order, before it is made an order of the Court, was founded upon the same principle: we will not enforce obedience to it till we have adopted it; but that provision only respects the effect of the order when made, and does not the least apply to the capacity or character in which the Judge makes it. He is still opening and exercising the jurisdiction of the Court, and is doing the business which must otherwise be done in Court, exactly in the same manner as we do at the side Bar; and surely a libel upon the Judges for what they do at the side Bar, within a few yards of the Court, would be as much the object of an attachment as for any thing done in [267] Court. Custom legitimates the practice at chambers, as much as at the side Bar; and custom may qualify and modify the acts they do in both places.

But still they are emanations of judicial power, and whether they have more or less weight, they are acts done by the Judge in the same capacity and character in which he sits here; and whether he is swearing an affidavit out of Court, or pronouncing a solemn opinion in Court, the reason of resenting the indignity is the same, and "*ubi eadem est ratio, ibi idem est jus.*"

It may perhaps merit a less punishment to libel a single Judge in Court or out of Court, than to libel the whole Court; but the quantum of the offence does not vary the mode of prosecuting it; it is an offence "*ejusdem generis*" although "*inferioris gradus*:" and I cannot explore a single reason which can be urged to cover the Judges in Court against calumny and detraction for what they do there, which does not hold equally true, though in a less degree, when applied to what they do in their judicial capacities out of Court: the quantum of the offence is different, but the quality of the offence is the same.

Suppose the pamphlet had charged all the Judges with corruption in making four orders in different causes, it would have been a greater offence than charging one: but if it is not a proper mode of proceeding in the case of a single Judge, it would not be proper in the case of the four; for though the libel would, in that case, take in the whole Court, yet if the reason which is urged, of the inefficacy of their orders till made rules of Court, is sufficient to take them out of the protection of the Court in the case of one Judge, it must hold in the case I mention; for each order may afterwards be con-[268]-trouled by the other Judges, when they come to sit collectively together as a Court.—See the consequence: if a bailiff's follower, at the time of executing a process to arrest a man, should be called a rogue and abused, the Court is to grant an attachment; but if the four persons whom the King appointed to execute one of the noblest branches of his regal function, which the usage says may be done out of Court as well as in it, are represented to the people as acting in their judicial capacities out of Court corruptly, illegally, or oppressively, they are not to be under the same protection as a bailiff's follower; but the Chief Justices and Judges of this Court must wait at the door of the grand jury chamber, with their indictments in their hands, and afterwards attend the trial, which must still be before one of themselves, in order to get at that justice which the meanest person in the kingdom, acting under their authority, has a right to, in the first instance, by an attachment.

If the practice of making orders at chambers is a legal one, the protection must and ought to follow it. If the people are told that the Judges act unjustly and impiously at chambers, can they think that they act otherwise when they sit here? Does not the scandal follow them into this Court, and mark them out as objects for the finger of scorn to point at? Would it not, must it not, necessarily bring this Court into contempt, to say, the Judges at their Chambers make orders or rules corruptly? The difference between the force, the weight, and the energy of an order and of a rule, respects only the mode of executing them; but the imputing corruption to the Judges who made either, equally murders their fame, which is the vital part of their authority when they sit here; and really in every shape which this question presents itself to my understanding, I can make [269] no difference between a Judge



acting in Court, or judicially out of it, but that he has not the same plenitude of power in the one case which he has in the other. But still he acts by virtue of the patent constituting him a Judge of this Court, and of the power which the law gives him in that character and capacity. When he issues his warrant as a conservator of the peace, the Court punishes the officer, who disobeys it, by attachment: Why?—Because it is the act of a Judge in his judicial capacity; indeed it is an obstruction to process in that particular complaint. But suppose he was calumniated for issuing such a warrant, would not the Court grant an attachment for it?

The Court of Chancery has always punished the abuse of their Masters, or of commissioners of bankrupt, whilst acting in the execution of their offices, in this summary manner, by attachment; and I should think a libel upon them, or upon the Master of the Crown Office, or on the civil side, for acts done by them in their official capacities, would be within the reach and reason of this mode of proceeding. It is the business of the Court, transacted by their officers; and though under the controul of the Court, that only respects the effects of what they do, and not the capacity in which they do it.

Perhaps it may be said, though attachments are granted for the abuse of officers in the actual service of process, yet never for a libel upon them for what they have done in that capacity; and therefore no argument can be drawn from the practice of issuing attachments in favour of bailiffs abused in actual service, any further than whilst a Judge is in the actual execution of his office: but the principles upon which the Court proceeds, in granting attachments [270] for abusing bailiffs in the execution of process, and abusing Courts for their judgments, must be attended to, in order to find out the difference between the case of libelling a bailiff, and libelling a Judge of the Court.

The principle upon which attachments are granted, in respect of bailiffs, is to facilitate the execution of the law, by giving a summary and immediate redress and protection to the persons who undertake it. The law considers it as a contempt of the authority of the Court, to abuse and vilify the person who is acting under it.

But the principle upon which attachments issue for libels upon Courts, is of a more enlarged and important nature,—it is to keep a blaze of glory around them, and to deter people from attempting to render them contemptible in the eyes of the public.

Bailiffs are neither appointed by the King nor the Court; a libel upon them terminates only in the defamation of a private individual: it is only telling the people, that a person employed to execute process has abused his authority. But a libel upon a Court is a reflection upon the King, and telling the people that the administration of justice is in weak or corrupt hands; that the fountain of justice itself is tainted, and, consequently, that judgments, which stream out of that fountain, must be impure and contaminated.

The authority of the Court is contemned by abusing a bailiff in the actual service of process: but the justice of the Court is not arraigned, nor is the Court rendered contemptible in the eyes of the people by imputing misbehaviour to him; and therefore an attachment for a libel upon a Judge for what he does at chambers, does not proceed upon any principle analogous to the case of a libel upon a bailiff, but falls directly within the principle of libelling the [271] Court, which is imputing to the King a breach of that oath, which he takes at the coronation, to “administer justice to his people;” and a Judge, at his chambers, is as much in the administration of that justice, as when he is in Court, though his acts have not the same efficacy as the acts of the whole Court; and orders for amendments do in some respects differ materially from mandatory orders, enjoining a third person to pay money or perform any particular act; for obedience cannot be enforced to such mandatory orders, till the Court has expressly recognized them; but orders for amendments require no act of the Court to authenticate them. When the alteration is made in pursuance of such an order, and there is no application to discharge such an order, but it is acquiesced in by all parties, it becomes the act of the whole Court; and the part amended is as much a part of the record of the Court as any other part of it; and when this pamphlet was printed, the record had been amended in pursuance of the order made by the Chief Justice; and therefore to every intent and purpose the amendment had been adopted, recognized, and was become the act of the Court, by the acquiescence



of the parties, as emphatically and effectually, as if it had been originally ordered by the Court (*b*).

[272] IN THE COMMON PLEAS.

ROE, ON THE DEMISE OF GEORGE DODSON, ESQ. *against* GREW AND OTHERS.  
—In Ejectment. Hil. 7 Geo. III. 1767. 2 Wilson; 322.

[S. C. 2 Wils. 322; 95 E. R. 834 (with note).]

This was a case on an ejectment for the recovery of certain lands in the county of Middlesex, which was tried before Lord Camden at the sittings after last Easter term, whereby it appeared—

That Daniel Dodson was seised in fee of the premises in question, and devised them in these words; viz.

“Item. I give, devise, and bequeath unto my nephew, George Grew, all that my mansion-house or dwelling, with the out-houses, stables, buildings, orchards, gardens, and lands thereto belonging, situate and being at Waltham Cross, in the said county of Hertford, now in my own possession, and used therewith: and also all those my meadow lands in Fowley, in the parish of Cheshunt, in the said county of Hertford, also in my own possession: and also all that my one close of pasture land, in Waltham Cross aforesaid, now in the possession of William Hunt: and also all those my three acres of common field land, lying and being in Brickwall Field, Swan Field, and White-horse Field, in Waltham Cross aforesaid, now in the possession of myself and the said William Hunt: and also all those my three acres of land, [273] lying and being in Bellsmore Lane, in the parish of Enfield, and county of Middlesex; and all other my lands, tenements, and hereditaments in Enfield aforesaid: and also all those my chambers in Lincoln’s Inn, No. 5, now in my own possession, in the said county of Middlesex:—to hold all and every the aforesaid messuage, lands, tenements, hereditaments, chambers, and premises, with their and every of their appurtenances, unto him the said George Grew for and during the term of his natural life; and from and after his decease, to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and for want of such issue male, then I give all and every the aforesaid premises unto my nephew George Dodson, his heirs and assigns for ever.”

That in the devise to George Grew, the words “heirs male of his body” were originally written, but that the word “heirs” was scratched out, and the word “issue” inserted in its stead, in the same hand with the body of the will, but in different ink.

That George Dodson, the devisee in remainder in the said will, was George Dodson, the lessor of the plaintiff.

That the testator devised other estates to the said lessor of the plaintiff in fee.

That George Grew, and the lessor of the plaintiff, were the testator’s nephews; and that he devised the residue of his estates, both real and personal, equally between his said two nephews.

That George Grew had no child at the time of making the will: that he entered on the premises, suffered a recovery thereof, and died without issue male.

[274] On this case a verdict was given for the plaintiff, subject to the opinion of the Court upon this question, viz.

Whether George Grew took an estate tail, or for life only, under the said will?

Lord Chief Justice Wilmot.—I think this is an estate tail. The general rule is a clear and a just one, that the intention of the testator is to be collected from the whole will, and such a construction made as will effectuate that intention, provided that intention does not contradict, or clash with, any legal principles or positive rules of law: for though the Statute of Wills gives a power to parties to devise at their will and pleasure, yet that will and pleasure are bounded and circumscribed, and must not pass the line which the law has laid down for the modification of real property

(*b*) Vide note (*a*), p. 243, also the case of *Rev v. John Wilkes, Esquire*, Hil. term. 10 Geo. III. 4 Bur. p. 2527, where the subject of amendments, made out of Court, is fully discussed.

upon principles of general utility: they cannot create perpetuities; they cannot lock up property for a longer time than a life or lives in being, and twenty-one years afterwards, in the case of infants; they cannot give a fee, and say it shall descend to all the sons, or to daughters exclusive of sons; they cannot restrain a tenant-in-tail from suffering a common recovery; and therefore in these, and all similar cases, the law, which is the will of the whole community, must controul the will of individuals. But this case is not affected by any intention crossing the law, for it is equally lawful to give the one estate as the other; the word issue has no fixed technical meaning annexed to it; and the only true question in this case is, what was the intention of the [275] testator, and whether that may be best effectuated by giving an estate for life or in tail?

It is stated in the case, that George Grew died without issue male; but that event will not vary the construction of the will, which must be considered exactly in the same manner as if he had, or might have had, many sons; and looking at the devise, in that view, of there being many sons, will have a most powerful influence upon the exposition of it, when the intention comes to be nicely and critically examined: for though the testator certainly intended, in the first instance, to give George Grew only an estate for life; yet if he, as certainly, intended that all his sons should take in succession one after another, and they cannot take in that manner but by lodging the estate tail in George Grew, then it comes to this case: here are two things intended, one an estate for life to G. Grew, another an estate in succession to all his sons in tail male "ad infinitum:" can they both take place? If they can, they ought; if they cannot, then balance the two intentions against one another, and see which is the weightiest and most comprehensive, and give that an effect. Courts substitute themselves in the place of a testator; and suppose the question to have been asked him—"You have willed two things, which cannot both be obeyed exactly according to your will, and therefore one must yield to the other:" what must have been the answer? "I wish to be obeyed in the principal, capital, and most material destination I have made, and to reject the secondary and subordinate one."

There are three points to be considered:

1st.—If he intended a successive inheritance to all the issue male of George Grew, "ad infinitum," in preference to G. Dodson?

[276] 2dly.—Whether that intention can take place, if George Grew has only an estate for life?

3dly.—If it cannot, then which of the two intentions must govern the construction? That is, if the words "for life" must give place, or the words expressing an intention of giving "a successive inheritance" to the issue male of G. Grew?

As to the 1st. point.—The will is clear: testator had two nephews, G. Grew and G. Dodson; he gave particular estates to each; this estate he gave in settlement;—others to Dodson in fee;—the residue of his real and personal estate equally between them. They were both equally objects of his favour and bounty, except that he gave Grew's estate with remainder to Dodson; his name possibly produced that difference in the limitations; but it was not to take place whilst any issue male of G. Grew existed; a general failure of that line is to open the succession to Dodson, and therefore a construction to let him in sooner would directly encounter the manifest intention of the testator, who was making each of his nephews the distinct root of succession to particular parts of his estate.

It was objected, that the word is only descriptive of an individual, and the words "of the body of such issue male" are in the singular number. Issue, in its natural, ordinary signification, means "all;" it may be restrained. If first, next, or any other similar words had been used, he might have confined its general meaning; but as it stands in the will, it comprehends "all." The word "body" in the singular number, was not meant to point out one individual, viz. the first issue, and to exclude all the rest; but to limit the operation of the devise to one at a time in a course of succession, and to exclude the issue from taking all together, which might have been more doubtful, [277] if the word had been in the plural number, "bodies:" but without express words, the Court will not make an exposition productive of such absurd consequences. If only one son, it must be the first; the existence of a son for a moment determines the limitation; and if ten more sons had been born after, they cannot take, but the remainder limited to G. Dodson is to fall into possession, in direct opposition to the will, which says it shall take place for want of "such issue male"—such; what?



Issue male of the body of G. Grew ; comprising and embracing every branch arising from him ; not one, but all the male line derived from him.

It was also objected, that "issue" is more properly a word of purchase.—It is used in the "Statute de Donis" without an idea of purchase annexed to it, and it acts in a double capacity, as will best answer the intention ; and though it was substituted in the place of the word "heirs," which was scratched out ; and it was fairly argued he might intend it as a word of purchase, yet it does not carry the argument a jot further than the words "for life" do ; for if they take by purchase, they must all take as joint tenants for life and tenants in common of inheritance : could that be his intention ? For if he had ten sons and nine leave issue, the tenth must have the whole estate by survivorship ; and when all are dead, then the estate must break into ten parts, and there can be no cross-remainders ; so that when there was a failure of issue of one son, that part must go over to Dodson, when no part was intended to him whilst there was any issue male of the body of G. Grew.—He intended all to take, but in a course of succession.

2dly.—Can this intention take place, if G. Grew takes only an estate for life ?

[278] It may, by construing the word "issue" to mean, first and every other son in succession. Suppose he had said, I mean by issue, first and every other son, it must have been so expounded, because words are only pictures of ideas upon paper ; and therefore if he puts a meaning on the word himself, it must be understood as he meant it : but he has not said so, and therefore he leaves the word to act in its own natural character, and in that shape it will not endure to be expounded, "first and every other son in succession ;" for, "ex vi termini," it means "all," and hath not an eye of successive priority in it ; and there is no case where it ever was construed to mean first and every other son in succession, and to create a series of contingent remainders one after another ; which it must do, or the principal intention of the testator be disappointed ; and when it is descriptive of the estate and operates as a word of limitation, and gives an estate tail, it is not the "word," but the "law," which regulates the descent to all the sons successively, upon its own favourite principle of primogeniture. It has been argued, that if we can collect from the will that he meant first and every other son in succession, why not construe it so, and thereby complete every part of the intention ? Because it would be doing violence to the word "issue," and forcing it out of its known established sense, when the meaning of the testator may be as effectually complied with by giving it one of its natural energies, as a word of limitation : and though the intention, collected from the will, is to govern the construction, yet there must be words used which are proper and fit for that purpose. It would confound the use of all language, and introduce the greatest barbarity and confusion, to make words stand for ideas in opposition to the sense which usage has put upon them : and as a word of li-[279]mitation it does not defeat the estate for life ; for without fine or recovery, which is not to be presumed, an estate tail is only an estate for life.

As to whether the words, "heirs male of the body of A." operating as words of purchase, will have the same effect, and take in all the issue male of A. as effectually as if they operated as words of limitation ; I do admit, upon the authority of Co. Lit. and the case of *Southcote and Stowell*, 1 Mod. 226, 237, and Freeman's Reports, 216, 225, that when the estate once vests in an heir male of the body of A. by purchase, that any other heir male of the body of A. may take by descent ; and the reason seems to be, because it is "quasi" an estate tail from A. ; and the will of the donor gives it a descensible quality, after it is once vested, as to all the lineal male descendants from A. as well as to all the lineal male descendants of the first purchaser.

But still it will not have the same consequence as if they acted as words of limitation ; for suppose A. has a son who dies in his father's lifetime leaving daughters, and A. has other sons, they can never take at all, for the second brother cannot take because he is not complete heir ; whereas if it was an estate tail in A. it would descend upon the second son and take in all the descendants : and it is impossible to make it equivalent to a limitation to the first and every other son, without violating and confounding the legal operation of words, and producing consequences not warranted by the will : for upon a limitation to the first and every other son, the remainders all vest the instant the sons are born ; and when a son is of age, he may, by a fine, bar all his issue : but where the limitation is "to the heir male of the body of A." no estate vests till A. dies ; and if there are [280] no trustees to preserve, &c. A. may



bar the remainders at any time after the sons are born, as well as before; and a fine levied by his eldest son will not bar his issue if he dies before the father, because the issue will take by purchase, and not from the father.

3dly.—Which intention ought to take place (a)?

If the testator had put the issue and remainder-men into the power of G. Grew, it is not to be presumed he would defeat them. If he had given contingent remainders to the issue, and they were to take by purchase, he might defeat the issue before they were born.—If estate tail, a chance—if confined to one issue only, the rest had no chance;—better to have a chance of something—the remainder was of no estimation after estate tail, vested or contingent, “quâcunque viâ.”

But suppose the question asked, “you meant a strict settlement with trustees to preserve contingent remainders; but the words will not warrant the expounding the will in that manner. G. Grew must either take an estate tail, which will let in all his issue male, but with a power of defeating them and George Dodson; or an estate for life, which will let in G. Dodson, in exclusion of the sons of G. Grew?” His answer must have been, “I do not intend G. Dodson any thing, whilst there is issue male of George Grew.”

It was certainly the intention of the testator that G. Grew's sons should take in succession, which they could not do, if he was only [281] tenant for life. I am of opinion that he was tenant in tail, and that judgment must be given for the defendant.

The other Judges delivering their opinions to the same effect,

Judgment for the defendant.

#### [282] IN THE COMMON PLEAS.

Between JOHN DRINKWATER, ESQ., Plaintiff, *against* THE ROYAL EXCHANGE ASSURANCE COMPANY, Defendants. Mich. Term. 8 Geo. III. 1767. 2 Wilson, 363.

This was an action of covenant brought against the defendants on a policy of insurance, in which the plaintiff declared that by a certain deed, commonly called a policy of insurance, made by the aforesaid Royal Exchange Assurance Company, it was witnessed, that the capital stock, &c. of the aforesaid corporation should be subject and liable to pay, make good, and satisfy any loss or damage which should or might happen to a certain malt office by fire, within the space of twelve calendar months from the day of the date of that instrument or policy of insurance, not exceeding the sum of £500: provided always nevertheless, and it was thereby declared to be the true intent and meaning of that deed or policy, that the said stock estate and securities of the said corporation should not be subject or liable to pay or make good to the assured any loss or damage by fire which should happen by any “invasion, foreign enemy, or any military or usurped power what-[283]-soever:” provided also, that that deed or policy should not take place or be binding on the said corporation, if the said malt office, at the time when any such fire should happen, should be in the possession of, or let to any person who should use or exercise therein the trade of a sugar baker, apothecary, chemist, colourman, distiller, bread or biscuit baker, ship or tallow chandler, stable-keeper or inn-holder, or should be made use of for the stowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the said cases the said deed, and every clause, article, and thing therein contained, should cease, determine, be utterly void, and of none effect. And plaintiff further saith, that the said malt office in the said deed mentioned, on the twenty-eighth of September, in the sixth year aforesaid, was burnt, consumed, and totally destroyed by fire, which did not happen by any “invasion, foreign enemy, or any military or usurped power whatsoever;” and that the said malt office, at the time when the said fire happened, was not in the possession of, or let to any person who used or exercised therein the trade of a sugar baker, &c.

To which the defendants pleaded, 1st, that they did not break the said covenants, nor any one of them, in manner and form as the said plaintiff hath above thereof complained against them, and issue thereon. The defendants, for further plea, say, that plaintiff ought not to have or maintain his said action against them, because they

(a) The latter part of this case is rather imperfect, and seems to contain only short heads of argument, which were probably filled up in the delivery.

say, that whatever loss and damage above supposed to have happened, by the burning and destroying the said malt office by fire, as plaintiff hath above alleged, all such loss and damage was caused and did happen by means of an unlawful attack and invasion made on the said malt office by an usurped power unlawfully exercised by a [284] great number, that is to say, 300 persons, unlawfully, riotously, and tumultuously assembled, in breach of the peace of our lord the King, to the terror of the inhabitants of the City of Norwich, and that the said fire above supposed did happen by such usurped power as aforesaid, and this defendants are ready to justify; wherefore they pray judgment whether plaintiff ought to have or maintain his action as aforesaid against them, &c.

Plaintiff, as to the 2d plea above pleaded in bar, saith, that he, by reason of any thing in that plea above alleged, ought not to be barred from having or maintaining his said action therefore against them, because, protesting that the said plea, and the matters therein mentioned, are altogether insufficient in law to bar or preclude the plaintiff from having or maintaining his said action against the said Royal Exchange Assurance Company; nevertheless, for replication plaintiff saith, that the loss and damage by the said malt office being burnt, consumed, and destroyed by fire, in the said declaration mentioned, did not happen by any usurped power whatsoever; and thereupon issue is also joined; and on the trial before the Right Honourable Sir John Eardley Wilmot, Knight, Lord Chief Justice of His Majesty's Court of Common Pleas at Westminster, a verdict was given for the plaintiff, and £469 damages, subject to the opinion of the Court of Common Pleas on the following case; viz.

That the defendants entered into the policy as stated in the declaration. That the plaintiff paid the premium, and complied with all the terms of the policy on his part to be performed.

That on Saturday the 27th of September, 1766, a mob arose in the City of Norwich, on account of the price of provisions, and did [285] mischief to one house and a mill, by throwing about and spoiling the flour at a baker's house, and spoiling and damaging the mill. That on the King's proclamation being read, the mob dispersed and continued quiet. That about two of the clock in the afternoon of Sunday, the 28th of the same September, another mob arose on the same account, and began to pull down, and afterwards set fire to and burned down the malthouse in question; and afterwards forcibly and riotously damaged the houses of two bakers, and spoiled their furniture; that the said mob had no offensive weapons on their going to the said malthouse; but on their return therefrom, ten or twelve of them had sticks in their hands, and one of them had a spit, bent double.

That, after the mob had damaged the last of the said bakers houses, the magistrates, who had not received any notice or information of any mob being risen on that day until after the said malthouse was on fire, immediately, on receiving such notice thereof, assembled, with their assistants, to the number of thirty, and thereupon opposed and knocked down several of the mob, and in fifteen minutes dispersed the whole of the mob, and the mob never afterwards assembled any more: that the Royal Exchange Assurance Company was created in the year 1720.

That the company had, at the time of the said fire happening, made assurances in the City of Norwich, on houses and goods, to the amount of £300,000, but had not any fire engine there, nor any fire men resident there; but that there were several fire engines kept in the said City of Norwich.

That it is usual in policies of assurance in the Sun Fire Office to insert, over and above and besides the words of exception contained [286] in the present policy, the additional words of "civil commotion" also.

The question therefore for the opinion of the Court is:

Whether the plaintiff, under the circumstances of this case, is entitled to recover in this action?

This case was twice argued at the Bar, and, after time taken to consider of it, Mr. Justice Gould was of opinion that the malthouse, being burnt by a mob, which rose to reduce the price of provisions, it was burnt by an usurped power, within the true intent and meaning of the proviso in the policy. He cited Popham, 122, and was of opinion that judgment ought to be given for the defendants.

Lord Chief Justice Wilmot, Mr. Justice Clive, and Mr. Justice Bathurst, were of a different opinion.

Lord Chief Justice Wilmot.—I am of opinion that the firing of the malthouse by



the mob, as described in the case, is not a firing by the usurped power meant in the proviso.

Policies of insurance, like all other deeds and instruments, which evidence the agreements of men with one another, must be construed according to the true intent and meaning of the parties who make them; and though my brother Lee says they should be construed liberally, and my brother Burland says they should be construed strictly, against the insurer, who is the speaker in this proviso; yet I know of no other rule, but to collect the intention from the whole instrument taken together, and to effectuate it; and the utmost [287] to be inferred from the rule is, that the turn of the scale, in a doubtful case, should be against the speaker; because he ought to have expressed himself with more perspicuity. To find out this intention is often very difficult; for when agreements are committed to writing, all extrinsic evidence of intention is shut out; and words being the only marks of that intention, it frequently happens, that sometimes from the imperfection and poverty of language, and sometimes from the barbarous and inaccurate application of it, it is extremely doubtful and obscure what are the ideas which the parties denote by the words they employ to express them. Where they paint simple and determinate ideas with precision and certainty, the features of the mind are as visible as the features of the body are in a picture: but the misfortune is, that words often paint very complex ideas as distinct, simple ones; and then the eye of the mind is embarrassed in the pursuit of that particular idea they are meant to delineate; and the words "usurped power" are two of those equivocal words which perplex this question; and in all cases of this kind, Courts of Justice have no other clue to lead them out of the maze, but to consider the import of the accompanying words, to take the general scope and design, as well as the particular sentence in which those words are found, into consideration together: the context must be carefully and accurately examined, and, above all things, the popular and ordinary use of the words, in respect of the subject about which they are used, must be attended to.

Usage is one of the great master-keys which unlocks the meaning of words,

*Quem penes arbitrium est et jus et norma loquendi.*

[288] The words in the body of this policy clearly take in all fires, let them arise from what cause they will; and therefore unless the fire by the mob, described as in this case, is taken out of the general words by the proviso, the plaintiff's right to recover must be admitted.

The words of the proviso are, "Fires which should happen by an invasion, foreign enemy, or any military or usurped power whatsoever."

It was first argued that the word "invasion," and especially connected with the word "whatsoever," might mean any unlawful attack; but this was given up on the last argument, and very rightly; for every wilful felonious burning would have been included in such a construction, and all the intermediate words would have been rendered insignificant and useless; whereas they were plainly inserted to describe some wilful fires in opposition to others. If they do not except all cases, when houses are fired wilfully, what are the cases they do except?

The cases of fires happening in the time of "invasions from abroad, and rebellions at home," are when the King's Government is externally or internally attacked, and armies are employed to defend and support the Government established by law, or to subvert it, and establish and support a Government usurped contrary to law. These words are descriptive of convulsions which shake the whole nation to its foundations, and menace a dissolution of that system of Government under which we live;—when the laws lie dormant and inactive, and the functions of magistracy are in a state of suspense, and firing houses and towns is known to be a necessary and unavoidable consequence, from friends as well as foes. These are the outlines of the picture [289] which these words draw on my eye upon the first reading of them, and the more I have looked upon them, the deeper the impression is upon my mind; and the time when this company was created, and which must be the time when these policies were first framed, is very material, viz. 1720, only a few years after an usurpation of regal power both in Scotland and England, and just at the dawn of another rebellion ready to break out; and though the virtues of the Royal Family have totally extinguished every disloyal sentiment in this kingdom now, yet it was not so romantic a caution at that time, to guard against fires happening from rebels as well as from enemies.



As the time furnishes a strong presumption, that a general usurpation of sovereign power by the Pretender was then in contemplation, and was what the company meant by these words; so the time furnishes a powerful argument to me that rebellious mobs were not intended to be included in them.

It is truly said by the defendants counsel, that this was not many years after the Riot Act; that rebellious mobs had been, and were, very frequent, and were not likely to decrease, from the ill humour which the year 1720 must have occasioned: and can it be supposed that they would descend to such minute provisions as they have made about trades, particular kinds of commodities carried in and kept in this malt-house, and at the same time leave mobs and insurrections to be signified by words which must be strained, and wrenched out of their popular meaning, to reach them, when the word "mobs" would have completely spoken their intention?

It has been said, because they had happened, and were more likely to happen than rebellions, therefore they must intend to comprise [290] them in these words; but I feel the weight of that argument the other way: if this had been the more material object to attend to, they would have explicitly mentioned it.

But to come a little nearer to the words, and to a more critical examination of them. "Invasion and foreign enemy" manifestly relate to an external attack; and as pirates are said to be "*hostes humani generis*," they may fall under the description of foreign enemies. But the general meaning of the words is a hostile attack upon the nation.

"Military and usurped power" are the next words. The word "power" has a variety of significations: it would be pedantic affectation to enumerate them; but in this place it can only mean force, or authority to use and apply force; and the words which accompany it, must ascertain the nature and kind of authority.

The word "power," in conjunction with "military," may mean to include "fires from soldiers;" from that class, rank, degree, and order, which is known and distinguished in all States by the name of "military power," in opposition to "civil power."

But the material word upon which this question turns is the word "usurped:" it certainly does not mean simply "used," for though sometimes "usurped," in Latin, has that import; yet, in English, it always carries the idea along with it, of using that which another person has a right to use, and that is a frequent signification of the word in Latin; and indeed, in its legal, as well as its popular, signification, it describes the unlawful assuming the exercise of a right belonging to another, as, the usurpation of an advowson, usurping franchises. Mr. Lock defines usurpation, getting into possession of that which another has a right to, viz. a change of persons and [291] not of forms and rules of Government; and in common parlance it marks a rebellious assumption of illegal authority.

The context shews that the executive power of foreign States, the legal executive power, and the usurped executive power of our own State, were the powers the company had in their eye. The power usurped must be a power "*ejusdem generis*" with the antecedent powers pointed out in that proviso; and the reason of excepting fires from one of those powers, might naturally lead them to extend the proviso to all of a similar nature.

It has not been contended, that these words take in fires arising from individuals, acting upon private motives: if one, or fifty in conjunction, had set this malt-house on fire from any private pique or malice, it would be impossible to say the fire had happened from an usurped power, unless the act done made an usurped power, which is confounding two ideas together, that must be carefully separated in examining this question; for the power from whence the fire must arise in this case, must not owe its existence to the act done, but must be existing, as an usurped power, before the act done; and therefore it is argued that here was a power usurped before the house was fired; that is, a power usurped to reduce the price of provisions; that this is a branch of regal power, and that it is not the totality of regal power which this proviso means.

There is no occasion to give any opinion upon cases where there is a general insurrection, or mobs "*more guerrino, arraiati cum vexillis explicatis, cum armis defensivis et offensivis, cum tympanis et tubis*:" where captains are appointed, and the form and order of war appear in the face of it, and where the avowed purpose of such [292] a corps is to pull down "all" bawdy houses, "all" meeting houses, "all

enclosures," or to abate the price of provisions "every where;" for here it would clearly and indisputably amount to a levying of war against the King, and be a constructive high treason.

In such a case, I might have some doubt; though, according to the idea which the word "usurped" raises in my mind, I could not call such a power an usurpation, but a power illegally assumed to do what no power could lawfully do; for I see no power in the King to reduce the price of provisions; and if there is no such "regal" power, there can be no such "usurped" power, which I consider as a power opposed to and standing in the place of a power "de jure:" and though this doctrine of constructive high treason in the cases in Popham, 122. 2 Anderson, 4. Kelyng, 70, and many other cases which have since happened, are determined upon very wise and salutary principles, we are here construing and expounding the words of a private contract; and therefore the question is not, what will turn a riot into a rebellion, in legal consideration, but what the parties mean by the words "usurped power," when invasions and armies and soldiers are in their contemplation, and the subject matter of the proviso, where those words are found? and though the law is fully settled upon that point, yet none but lawyers, who had dipped into the cases of constructive high treason, could have thought this a case of levying of war against the King, which carries, in the popular signification, a war to dethrone and attain the totality of his Government; and we should be very sorry, in a question of private property, to pronounce people guilty of constructive treason, before Government had prosecuted them, and it appeared judicially, by the record, that they had been guilty of it.

[293] But however the law may stand upon a clear case of constructive high treason, or rebellious mob, yet this is a common mob; and I know no difference between one mob and another, except it be a rebellious mob, which, as described in the cases, would amount to a levying war against the King; and in such a case it might be more doubtful, because it would have "speciem belli," which is the idea excited in my mind by the words "usurped power," and which is to act within the meaning of this proviso.

But here the mob rose, Saturday, the 26th of September, 1766, on account of the price of provisions, and threw the flour about a baker's house and damaged a mill. Did they use any resistance, and refuse to obey the law? The very reverse: the proclamation was read, and they dispersed; there is not an eye of rebellion in this; they hear the law and obey it. The next day, another mob arose on the same account: they began to pull down and fired the malthouse, and damaged the houses of two bakers; they had no offensive weapons when they went to the malthouse; thirty people dispersed them in fifteen minutes, and they never assembled more.

As this mob does not agree in any single circumstance with the outward and visible form of a rebellious mob, as described in the cases, so it wants the essential property necessary to constitute a rebellious mob, viz. a universality of purpose respecting the whole kingdom, "to pull down bawdy houses in general, to break open prisons in general, to pull down all enclosures;" 1 Hale's Pleas of the Crown, p. 135: for, if it was directed to particular instances, as, not to make a general abatement of the prices of victuals or corn, but in some particular market, or within some precinct, it was not a rebellious [294] mob; by which I mean a mob under such circumstances as would amount to a levying war against the King, that is, against his office and Government.

They rose on account of the price of provisions, and fell upon a baker and miller the first day, and upon a maltster and two bakers the second day. The utmost that I can collect from these facts is, that they thought the price of provisions was owing to the persons who followed those occupations, and therefore chastised and punished them: for here is no setting a price, or forcing them to sell at a rate they thought a proper one. The facts stated evidence anger, resentment, and indignation against particular trades, and it seems to have been a sudden swell of their passions, transporting them into a felony, but I see no marks of treason in it, as described by the cases; there was no previous concert for that purpose, not the least avowal or manifestation of a design to make any general abatement of the price of provisions all over the kingdom, or any where except Norwich. Supposing the destruction of provisions to be a mode of abating the price of provisions, and that by punishing these millers, bakers, and maltsters, they hoped and meant to abate the price of provisions at Norwich; yet it wants universality of purpose, which is the distinguishing feature of

a rebellious mob, and it wants that "*speciem belli*," which Lord Hale lays so much stress upon in his describing and defining such a rebellious mob as would make the actors in it traitors.

But it is said, fires from mobs are more likely to happen than fires from regular armies, either acting for or against the State; and therefore that we should give these words a liberal, enlarged construction; and that it is a hard case to make the defendants answer for a loss arising from a "*vis major*," not to be prevented by any caution, and that, if doubtful, the scale should turn in their favour.

The firing of houses by mobs does not often happen. Conflagration affects friends and enemies alike; and therefore pulling down houses, when mobs go beyond breaking of windows, is the common mode of expressing their resentment; but war knows no distinction between friends and foes; and firing houses and towns indiscriminately are the unavoidable consequences of it.

In my opinion there is a prodigious difference between mobs and armies. The laws, executed with spirit, will always suppress a mob: the magistrates did it with ease in this case. The undaunted courage of an individual, or the personal appearance of a man of credit and reputation, disperses or assuages these fevers of the people: experience, as well as history, shews it, according to that beautiful simile in Virgil:

*Ac, veluti magno in populo quum sæpe coorta est  
Seditio, sævitque animis ignobile vulgus;  
Iamque faces et saxa volant; furor arma ministrat:  
Tum, pietate gravem ac meritis si forte virum quem  
Conspexere, silent—arrectisque auribus adstant:  
Ille regit dictis animos et pectora mulcet.*

But suppose a mob fired a house before they dispersed, all hands are instantly employed to extinguish it; but against armies, neither the courage, nor character of individuals, can silence the thunder of cannon, or prevent the bursting of bombs; the inhabitants think of [296] nothing but saving their own lives, and instead of the activity of firemen to check fire, soldiers become firemen to spread it: the probability of its spreading in one case bears no degree of proportion to the probability of its spreading in the other; the danger is not so great, and the resistance much more easy; the reason for guarding against the one does not apply so powerfully as against the other.

As to the hardship of the case, it is clear there are cases of equal hardship, which are more likely to happen, and do more frequently happen, and yet cannot possibly be reached by these words; viz. the "*felonious*" firing by one or more, or by any mob, if it is not a rebellious one. A year seldom passes without our trying people for such firings.

If the law has not thought proper to provide against cases equally hard, and twenty times more frequent, why should we extend it to a rare case, when it is admitted to be ineffectual to reach a frequent one? As to the cases of carriers, gaolers, and lessees, they do not influence this case; but because the law, for wise reasons, makes them answerable against inevitable accidents, it does not follow from thence that a person must be answerable against such accidents, upon a private contract, unless it is conceived in such terms as manifestly indicate an agreement to be answerable for them.

The general words of the policy clearly manifest such an agreement in all such cases, not excepted by the proviso; and I cannot think it a sound construction of these words to extend them, upon account of the hardship, to a very unusual case, and, at the same time, leave the common and ordinary cases, of equal hardship, totally unrelieved by them.

[297] The words of the plea are, "*unlawfully, riotously, and tumultuously assembled*," which shew they had not the least apprehension of any thing more than of a common mob.

I am of opinion therefore that there must be judgment for the plaintiff.

And accordingly, there being three Judges against one, the *postea* was delivered to the Plaintiff.



## [298] IN THE HOUSE OF LORDS.

## Appeal from the Court of Chancery in Ireland.

RICHARD KEILEY, ESQ. Executor of John Keiley, Esq., Deceased, AND HENRY SNOW AND SHAPLAND CAREW, ESQRS., AND THE REV. HANS THOMAS FELL, Executors of Robert Snow, Esq., Deceased, Appellants; *against* JOHN FOWLER, Son and Heir at Law and Administrator of Richard Fowler, Deceased, and Nephew and Executor of William Fowler, Deceased, Respondent. 1st February 1768.

## [V. Brown's Cases in Parliament, vol. 6, 309.]

Sir John Osborne, Bart. being seised (amongst other lands and hereditaments) of the towns and lands of Sleady and Ballykerrins in the county of Waterford in Ireland, in consideration of £60 paid him by William Cronyn, by lease dated December 2, 1719, demised the same to said William Cronyn, to hold from 1st May, then last, for nine hundred and ninety-nine years, subject to the payment of the yearly rent of £100 sterling, and to a quit rent of £16, 8s. per annum.

William Cronyn, being in possession of the premises under this lease, made his will, dated July 15, 1726, and thereby devised (*inter alia*) in the following words, "I do leave and bequeath to my daughter, Jane Cronyn, all my worldly substance lands, stock, [299] corn, debts, and household goods, provided she marries by the consent of my executors hereinafter mentioned, subject notwithstanding to my debts and legacies: but in case my said daughter should marry without the consent of my executors, she is to have for ever only twenty cows and a horse, as for her whole fortune. I do hereby appoint my very good friend Arthur Usher, in the county of Waterford, Esquire, and William Wigmore, of Cappoquin, in the said county, clerk, sole executors of this my last will and testament, revoking and renouncing all former wills. Furthermore I do appoint that, in case my said daughter should die without issue, that all my substance, as before mentioned, shall return back to my executors, to be distributed and disposed of as I shall hereafter direct; and that my daughter's husband shall at least be worth £1500 sterling."—The testator then goes on, giving various specific and pecuniary bequests to his wife, his relations (the Fowlers) and several of his friends, and to his executors; and then closes his will with the following clause, "And lastly, in case my forementioned daughter, Jane Cronyn, shall marry without consent of my executors aforesaid, or shall die without issue, I do ordain and appoint that all the goods, chattels, lands, and other my worldly substance, to her before bequeathed, shall return to my executors, to be by them distributed in manner following, to wit: to my nephew, James Donagon, £100; to Hester Gambon, £50 sterling; and to each of my executors aforesaid, £50; to my said daughter twenty cows and a horse only, as before in this case bequeathed; and the remainder to be equally divided among the children of my sister, Elinor Fowler."

[300] William Cronyn died soon after, and on the 6th May, 1727, his executors proved the will, and acted in the trusts thereof, and possessed themselves of his estate and effects, and received the rents and profits of the said leased lands, Jane being, at her father's death, an infant.

By marriage articles, dated the 10th February, 1731, in consideration of a marriage intended to be had between Stephen Sowton and Jane Cronyn, with the consent of the executors, it was agreed (*inter alia*) that the said term of nine hundred and ninety-nine years, in the lands of Sleady and Ballykerrins, should be assigned to trustees, in trust to pay the debts of the testator, William Cronyn; and that the said Stephen Sowton should afterwards receive the rents and profits of the premises, during the joint lives of himself and his intended wife, Jane: and the marriage was soon after solemnized.

Andrew Hill, William Cronyn's brother-in-law, in the year, 1719, mortgaged a leasehold estate, called Salterbridge and Assane, to Hugh Henry, Esquire, in trust for Thomas Stepney, Esquire, for securing £500 and interest; and William Cronyn and Francis Duggan joined with Hill, in executing a bond and warrant of attorney to confess judgment to Hugh Henry, as a collateral security for the same. Thomas Stepney dying, Hugh Henry, by deed, declared the trust of the £500, and assigned the mortgage and bond, and a judgment entered up thereon by virtue of the said warrant

of attorney, unto Charles Stepney, the surviving executor of Thomas Stepney ; and Charles Stepney, about October, 1732, issued a "fieri facias," in the county of Waterford, to levy upon the goods of the said Andrew [301] Hill, £609, 5s. 4d. The sheriff's officer, in collusion with Sowton and Hill, seized and sold by private sale, to Sowton, the lease of the estate, so mortgaged to Henry, in trust for Stepney, for £128 only ; and Sowton immediately took possession of the mortgaged premises, and kept the same for six years and upwards, and during all that time received the rents and profits thereof to his own use. But Sowton finding himself obliged to pay the residue of the £500 due to Stepney, notwithstanding the fraudulent purchase obtained as aforesaid, he applied to John Fell and Nathaniel France to lend him £600, and by indenture of mortgage, dated Nov. 11, 1763, (to which William Cronyn's executors were made parties, but refused to execute,) Sowton conveyed not only the said leasehold premises of Salterbridge and Assane, but also the lands of Sleady and Ballykerrins, for the remainder of the respective terms therein ; and for better securing the repayment of the said £600 and interest to Fell and France, he executed a bond and warrant of attorney to confess judgment thereon.

Stepney, on the 28th of December, 1736, assigned his mortgage to Sowton, who by indenture, dated 29th January, 1738, sold the residue of the term of Salterbridge and Assane to Matthew Hales for £730, but did not apply any part thereof to pay off the £600 mortgage to Fell and France ; whereupon Fell and France filed their bill of foreclosure, in the Court of Exchequer in Ireland, against Sowton and Hales, and on the 13th May, 1741, the cause was heard, and the Court decreed a foreclosure and sale of Salterbridge and Assane, but refused to make any decree touching the lands of Sleady and Ballykerrins.

[302] Robert Snow, attorney to Fell and France, finding himself disappointed by this decree in his design of obtaining the lands of Sleady and Ballykerrins, in combination with Sowton and Hales, in October, 1742, by virtue of the judgment, entered upon the bond given by Sowton to Fell and France, seized the said lands ; and the sheriff, by the procurement of Snow, in consideration of £800, sold the same to him for the residue of such term as Sowton had therein, in trust as to one moiety for John Keiley, and as to the other moiety for himself.

Jane Sowton died on the 19th October, 1743, without ever having had any issue, whereupon William Fowler and Richard Fowler, two of the children of Elinor Fowler, sister of the testator, William Cronyn, became entitled, together with the other children of the said Elinor, to the lease of Sleady and Ballykerrins ; and in April, 1747, they filed their original bill in the Court of Chancery in Ireland, against the appellant, Richard Keiley, the said Robert Snow, and several others, stating the lease, and the several matters aforesaid, and that Snow and John Keiley, to the time of his death, and the appellant, Richard Keiley, his executor, had ever since the sale made by the sheriff, under Fell and France's execution, been in possession, and received the rents and profits of the said lands of Sleady and Ballykerrins, amounting to the yearly sum of £180 sterling, above the reserved rents thereof. The bill therefore prayed an account of Cronyn's estate and effects against Usher and Wigmore, his executors, and that Snow and Keiley might be decreed to deliver up the lease of the said lands to them, and the other children of Elinor Fowler, and might account for the rents and profits thereof from the death of Jane Cronyn.

[303] Arthur Usher, one of the executors of William Cronyn, by his answer admitted the will, and that the testator died possessed of the said lands of Sleady and Ballykerrins, and a considerable personal estate. That the respondent, and his brothers and sister, named in the bill, were the children of Elinor Fowler, the testator's sister, and that probate of the will was granted to him and Wigmore, his co-executor. That they did not possess themselves of any of the testator's goods and chattels, but permitted Jane to take the same as they were bequeathed to her. That they, at Jane's request, received the rents and profits for her use, and accounted with Stephen Sowton, her husband, for the same. Believed that Sowton became possessed of the lands, and, without the defendant's consent, mortgaged them to Fell and France for £600, and executed a bond and warrant of attorney as a collateral security, who sued out execution thereon, and sold the lands to Snow in trust for himself, Snow, and Keiley, as stated in the bill. Believed that Jane died without issue.

Richard Wigmore, by his answer, admitted himself to be the surviving executor of William Wigmore, the co-executor with Arthur Usher, and administrator of his assets to the value of £1000 and upwards.



Robert Snow, by his answer, said, he believed the respondent, and his brothers and sister, were the children of Elinor, the sister of William Cronyn; and that William Cronyn was possessed of Sleady and Ballykerrins, under the said lease, for 999 years, at £100 yearly rent. Admitted the will of William Cronyn, and that the executors proved the same. Believed Jane was the only child of the testator, and the respondent and his brothers and sister nephews and [304] niece of the testator. That Jane married Stephen Sowton, on 11th November, 1736, and that he made a mortgage to Fell and France, and executed a bond and warrant of attorney, whereon judgment was entered, and "fieri facias" issued to the sheriff, who seized the said leasehold premises of Sleady and Ballykerrins, and about the 1st November, 1742, sold the same, and such other interest as Stephen Sowton had therein, to Snow for £890, in trust, as to a moiety thereof for John Keiley. Admitted that, before the said purchase, he knew of the will of William Cronyn, and the title of the said Jane thereby; and that the said bond and judgment were executed by Sowton as a collateral security for the said £600, and that the executors of William Cronyn were parties to the mortgage; but did not execute it. That Jane died in 1743, without issue; but that he did not believe the respondent and his brothers and sisters, by that means, or for that the mortgage to Fell and France was made without consent, had therefore any right to an account of William Cronyn's assets. He admitted that he refused to give them possession of the lands, or to account with them for the rents and profits thereof. Said that Stephen Sowton, from his marriage, until Snow bought the lands, received the rents and profits thereof, and that the rents had ever since been received by Keiley. That all the testator's debts and legacies were paid, except such as depended on the devise over, which he insisted was void; and that he paid the said £890; and computed the lands to be of the clear yearly value of £150 or thereabouts.

All the defendants having answered, issue was joined, and some witnesses were examined, on behalf of Keiley and Snow, to prove [305] the sheriff's sale to Sowton, and that the marriage of Jane was with consent. And an order was made, on consent, that the lease of the 2d December, 1719, should be read on the hearing, as proved.

The cause came on to be heard before the Lord Chancellor of Ireland, on the 7th, 11th, and 17th of May, 1762, when his Lordship was pleased to decree, that John Fowler, the respondent, as administrator of Richard Fowler, who was executor of William Fowler, was entitled, under the will of William Cronyn, to two-sixth parts of the lands of Sleady and Ballykerrins, for the remainder of the said term of nine hundred and ninety-nine years, and to two-sixth parts of the clear rents, issues, and profits thereof, from the death of Jane Sowton, otherwise Cronyn; subject nevertheless to the debts and legacies of William Cronyn remaining unpaid; and awarded an injunction to put the respondent into possession of the said two-sixth parts; referred it to the Master to take an account of the rents, issues, and profits which Robert Snow and Richard Keiley, and John Keiley, deceased, or any of them, had received, or, without wilful default, might have received, of the said lands since the death of Jane; and also to take an account of the debts and legacies of William Cronyn remaining unpaid, and of the personal estate he was entitled to at his death, and to enquire into whose hands the same came, and how disposed of, with other usual directions.

In pursuance of this decree, various proceedings were had before the Master, who, on the 14th of June, 1766, reported a balance due to the respondent for his two-sixth parts of the rents and profits of the estate of £1395, and that his share of the unsatisfied legacies amounted to £92, 18s. 2d.

[306] The cause came on to be heard, for further directions on the Master's report, on the 5th February, 1767, when the Lord Chancellor was pleased to decree, that the respondent should recover from the appellants the £1395 reported due to him, with interest for the same; and further decreed two-sixth of the legacies, reported to remain unpaid, to be a charge on two-sixth of the lands decreed to the respondent.

From these decrees the present appeal was brought.

After hearing counsel on this appeal, the following question was put to the Judges; viz. "When are the bequests over, in case his daughter should die without issue, to take effect, according to the true intent and meaning of the will of William Cronyn; whether upon her death, and an indefinite failure of issue at any time; or upon her death without ever having had issue; or upon her death without issue 'living at that time;' or upon her death and failure of issue during the lives of the persons to whom the bequests are made, or any of them?"



16th Feb. 1768.—The Judges having taken time to consider, Sir John Eardley Wilmot, Lord Chief Justice of the Court of Common Pleas, delivered their unanimous opinion :

As this question is framed, it is not necessary to enter minutely into the history or reason of the law in setting bounds to the disposing power of every species of property in this kingdom : it may be sufficient to say, that the law, from an indulgence to the natural wishes of men to perpetuate their property in their own families, or [307] the families they adopt, has given them a power of controul over it for one or more lives in being at the same time, and twenty-one years after in case of infancy. But public convenience, sound constitutional policy, and the spirit of liberty, which breathes through every part of our law, will not endure any species of property to be chained down any longer ; and therefore, if the testator meant, in this case, to lock up his leasehold and personal estate beyond his daughter's life, and that this bequest should hang like a cloud, to burst upon it, when there should be a failure of her issue "at any time after her death," his intention was an illegal one, and must yield to the law, and the bequest will be void. If, on the contrary, he intended, that this bequest over should take place upon the event of his daughter's dying without issue, "living at the time of her death," then his intention, being confined to a life in being, is agreeable to the rules of law, and the bequest over will be a good one ; and therefore the question proposed strikes at the true point of this case, when did the testator intend this bequest over should take effect ? For once fix that intention, and the law decides upon it without the least ambiguity.

As the law has been now settled about a century, and universally known, it ought to appear clearly and explicitly, that the testator meant an illegal limitation. The proof of such an intention lies upon the party, who asserts it. If that intention does not appear, if there is the least doubt about it ; the presumption would be, that he meant a disposition he was enabled to make by the rules of law, and not a disposition condemned by the law.

If the legal supposition is to prevail, that every man knows the law, no man in his senses could intend to do what he knew he [308] could not do. And to see what he did intend, I will examine the will ; for the intent and meaning of the will is the question.

William Cronyn, having a daughter and a sister's children, being possessed of a leasehold and personal estate, but no freehold estate, devises, inter alia, as follows :

Here he stated the will.

No man, who reads this will, could entertain a doubt, what the testator meant by it, if it had rested only upon the words "if my daughter die without issue." I speak now, and mean to be understood as speaking, abstractedly from all the cases and legal exposition of these words ; "if she die without issue," that is, if she has no issue at the time of her death, if she leave no issue at the time of her death ; not, "if she leave issue, and that issue fail two hundred years hence." Whenever that issue fails, the daughter will then become dead without issue, but she did not die without issue : for "dying" denotes that "punctum temporis," when the breath departs out of the body.

Such an exposition of these words as is contended for, produces this monstrous absurdity : it makes dying "with issue" and dying "without issue" to mean directly the same thing ; they will have exactly the same operation ; for if she dies with issue, the bequest over is not to take place ; and if she dies without issue, it is not to take place.

It is a shameful abuse of language to say, that dying without issue on this day, the 1st of February 1768, and being dead without issue, upon the 1st of February 1900, mean one and the same thing. It is repealing that great law of all language, the grammar, and confounding present and future time together. It is the most intolerable tyranny, the grossest barbarism, to say, they mark one idea ; when [309] the man who uses them, and all who read and hear them, are convinced they mark another.

The law presumes men "inopes consilii," when they make their wills ; they are often made in their last illness, upon death beds, when the ablest understandings are impaired, and they cannot express themselves with that energy and propriety which they would have done in their healths ; and therefore Courts make the words follow the intention ; enlarge, abridge, transpose, do any thing to reach the intention, when they are sure they see and know it.

But wresting and torturing words out of their natural signification, to defeat a testator's intention, is directly counteracting the injunction of the law in expounding wills, and racking a man upon his death bed, to make him say what he never meant or thought of; and therefore, independently of cases, these words alone "die without issue" would be sufficient to denote the time, when these bequests over were to take place.

But, unfortunately for devisees, claiming under bequests depending upon the contingency expressed in these words only, without any other words to restrict them, some of the greatest and ablest men have followed one another in saying, that, alone and by themselves, they must be construed to mean "being dead without issue at any future time," and that limitations over upon them are void.

I cannot help shedding a tear upon the introduction of such a solecism into the law—but I will relate how it happened: it was owing to a fundamental mistake originally, in transferring a construction which had been put upon these words, when applied to estates of inheritance, which might be entailed, to leasehold and personal estates which could not be entailed.

[310] I will shortly state the history of it: when estates of inheritance were devised to A.; and, if A. died without issue, to B.; the testator's intention was clear, that B. was not to take whilst there was any issue of A. It was equally clear, that he intended the issue of A. should inherit his estate. It was equally clear, that the issue could take only by giving an estate tail to A. which would let in his issue "ad infinitum;" and therefore, to effectuate that intention, the Judges construed these words, to give an estate tail "by implication," and to have the same effect, as if he had given the estate "to A. and his issue," which in a will gives an estate tail; and no perpetuity could be created by such a construction, because the estate tail, and the remainders over upon it, might always be barred by a recovery. The words were thrown out of their natural signification to comply with the intention.

Now examine these words, when applied to leasehold estates, which cannot be entailed. Leasehold estates originally were of little estimation in the eye of the law. In Edward the Sixth's time, all the Judges were of opinion, they would not bear any limitation over at all. Then (a) ——— considered as good, ——— if use only ——— devise to A. and if he died, living I. S. to him, ——— void. Afterwards ——— held to be good.

Then attempts were made to carry the limitations of them further, and to entail them, and limit remainders over upon them. But—no;—the Judges stopped here.—They said, you shall not entail them, and limit remainders over upon them. First, you cannot entail them so as to make them transmissible in a course of succession [311] to heirs: they must go to personal representatives; and therefore, if a term is devised to a man and the heirs of his body, he shall take the whole interest. For his issue cannot take it; and if the limitation over upon it was to be good, it would produce a perpetuity. For no recovery could be suffered of it, as there might of an estate tail of inheritance.

Then come cases where terms were given in the same words as would have given an estate tail by implication upon an inheritance, that is, to A., and, if he died without issue, to B. Having determined that these words would give an estate tail upon an inheritance, the Judges gave them the same effect upon a leasehold estate, and followed it with all the consequences of an estate tail, in respect of the limitations over. Whereas the very reasons which induced the Judges to take the words out of their natural signification totally failed, when the words were applied to a leasehold estate. For the issue could not take a leasehold estate in a course of succession, as they might take an estate of inheritance; and the danger of a perpetuity was avoided by leaving the words to operate in their natural signification, which would tie up the contingency to one life in being.

Having forced the words out of their natural signification to effectuate the intention, they should have restored them to their natural signification again, when they found it would not effectuate the intention, but entirely defeat it. Thus from giving these words the same operation, when applied to leasehold estates as to estates of inheritance, hath arisen this technical rule, "that the words, if die without issue,

(a) There are blanks in the MS. which were probably filled up in delivering the opinion.



shall mean being dead without issue at the remotest period of time;" and [312] consequently, that a limitation over upon so remote a contingency is void.

Lord Nottingham echoes this rule over and over again in *The Duke of Norfolk's case* (a). Lord Macclesfield, Lord King, Lord Talbot, and Lord Hardwicke have followed one another in saying the same thing; and we do not mean to shake that rule, because "stare decisis" is a first principle in the administration of justice, and this not from any fear of bringing appeals or writs of error in particular cases: time guards them.—But because these cases have furnished the light, by which conveyancers have been directed in settling and transferring property from one man to another. Upon the faith of an established rule and the acquiescence of Judges, and of the whole nation in it, property to the amount of millions may depend. The Judges now (as their predecessors have always done) bow down to the rule "pro salute populi," which is the supreme law of every community. But this rule doth so revolt against the human understanding, that all the Chancellors, who have agreed to the rule, at the same time have said, that, if there are any words, passages, or expressions, in a will, to shew that the testator did not mean to use the words in the "legal" but in the "vulgar" sense; that intention manifested, should repel the presumption of their being used in their "artificial and technical" sense, and shall leave the words to re-assume their natural shape, and act in their proper character.

1 Peere Williams, 199, *Nicholls v. Hooper*. Lord Harcourt says, "Where a legacy is given by a will upon this contingency, scil. if T. S. shall die without issue, this shall be taken according to common parlance, viz. issue living at his death; and it cannot be in-[313]-tended, that the testator designed, that whenever there was a failure of issue of Thomas, which might be 100 years hence, that then these legacies, which were meant only as personal provisions, should take effect."

I will only mention a few cases: *Penbury and Elkin*, 2 Vernon, 758-766, and 1 P. Williams, 563 (see the case). Parker, Chancellor, admitted the rule, but controuled it by converting five letters into two. He construed "after" to mean "at;" and yet "after" denotes an indefinite time, and "at" a definite one; but as the legal import of the words, "if die without issue," had unhinged the intention, he thought it very right and justifiable to hinge it again, by forcing "after" out of its place, and construing it "at."

The case of *Target and Gaunt*, 1 P. Williams, 432. Lord Parker said, "to such of the issue as he should appoint," must be intended issue then living, because it was to such issue to whom Henry might appoint it.

*Pleydell and Pleydell*, 1 P. Williams, 748. Issue was there held to mean sons, as Lord Hardwicke declared in *Sheppard and Lessingham*, 29th and 30th October 1751. Ambler, 122. *Forth and Chapman*, by Lord Parker, 1 P. Williams, 663. A ray of his great genius irradiated that case, and he gave the same words different constructions to reach the intention.

*Exell and Wallace*, 22 June 1751. Lord Hardwicke said, "The same words may have different operations, according to the different kinds of estates intended to be limited; and the cases of *Forth and Chapman*, and *Lord Glenorchy and Bosville*, are express authorities as to this point."

[314] *Maddox and Staines*, 2 P. Williams, 421. Lord King. There, issue was construed to mean children, sons and daughters.—*Atkinson and Hutchison*, 3 P. Williams, 258. Lord Talbot. "Without leaving issue," that is, at the time of his death.—*Beauclerk and Dormer*. Heard at Powis House, 17th June 1742. 2 Atk. 308. Lord Hardwicke adopts the legal signification of these words standing by themselves; but puts the question, whether there is any particular circumstance in the case, that can confine the words to Miss Dormer's dying without issue, at the time of her death?

(He then stated the clauses, and the reasoning upon them.)

Lord Hardwicke admits the principle, but found no such words. In *Sheppard* against *Lessingham*, Lord Hardwicke says, "Dying without issue generally is too remote, as in *Miss Dormer's case*, but here must mean, leaving issue living at the time of his death."

What do all these cases prove? That they have admitted the rule; that they have shut their eyes, as we do, upon the vulgar sense of the words, "if die without



issue," and swallowed the legal sense, bitter as it is: this was done to avoid confusion, and disturbing personal property enjoyed under the sanction of it; but, at the same time, they have caught at any word or expression, which might bring the case out of the rule.

They have remembered what Lord Hobart, (277) recommends to Judges, "to be curious, and almost subtle, 'astuti,' (which is the word used in the Proverbs of Solomon, in a good sense, when it is to a good end) to invent reasons and means to make Acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the Act."

[315] Implication is only presumed intention, and presumption only stands till the contrary appears; and therefore, if other parts of the will repel that presumption, it loses all its power of directing the construction of the sense.

I will now bring the case to its true point. What are the words in this will, which shew the testator meant a failure of issue at the death of his daughter, and not a failure of issue at any future time after her death?

His daughter, at the time of making his will, was young. He gave her all: but two events arose in his mind; an improvident marriage, and her death without issue.

The first was checked by requiring the executors consent. If she marry without consent of executors, she is to have only twenty cows and a horse. This was an event to happen in her life-time; and though it would be absurd to refer the words, as they stand in the last clause, to her death, because she could not have the cows and horse after she was dead; yet it shews the confined extent of his mind at that time, and denotes that the other event in his contemplation was an event, "*ejusdem generis*," viz. a definite event; and it would be making his imagination to take a prodigious leap from an event, which must happen in her life, to an event, which might not have taken place till the next millennium.

If she had issue when she died, he might naturally leave it in her power to do as she pleased with the property. It was most likely that her issue would be benefited by it: but, if she had no issue, he might think himself as proper a person to dispose of it to a stranger as she was.

The sense, which these two provisions, taken together, most manifestly bear, is this: "My daughter shall have nothing absolutely but [316] twenty cows and a horse, unless she marries with the consent of my executors, and leaves issue." Whereas, if the bequest over is void, she will have the whole personal estate for ever, though she leaves no issue at all.

The next words we rely upon are, that in the event of his daughter's death without issue, his whole substance shall "return back" to his executors, to be "distributed" and disposed of as he directed. Return back? when, and to whom? When his daughter dies, and to his very good friend Ushart, and to Wigmore, his executors? No—it is said, executors must mean their personal representatives, when there is a failure of her issue at any time; and that they were intended, that is, the office was intended, to make the distribution, and not the executors named in the will. We are now upon evidence of intention; not what would be the legal consequence of such a power, if it could be carried through all the mazy tracks of a legal representation at a distance; but whether he extended his ideas beyond his two friends Ushart and Wigmore, to whom he gives legacies, in the event of his daughter enjoying his whole estate; and an additional legacy of fifty pounds a piece, when either of the events happened, on which they were to have the additional trouble of making a distribution.

All was tied up in his mind to Ushart and Wigmore personally, from the good opinion he had of their judgment and integrity to distribute equally. One great trust was reposed in them, inseparable, unalienable, and intransmissible, and that was, their consent to his daughter's marriage. He makes no distinction between the executors, who were to exercise their judgment upon his daughter's marriage, and the executors to whom the estate was to return back, and whom he [317] entrusted to distribute, and to whom he gave the legacy of fifty pounds a piece for their additional trouble. He meant the same persons: he carried his ideas no further than his daughter, and Ushart and Wigmore.

The law confines one of the trusts to Ushart and Wigmore personally. The testator clearly meant the same persons in "*toto*." That legacy will not follow the personal representatives of the testator; for if transmissible, the personal representa-

tives of each executor would be entitled : whereas the executors of the executor, who dies first, cannot represent the testator ; and the administrator of the surviving executor does not represent him. The representatives of the testator are not entitled to the legacy ; for the legacy was meant to those who were to distribute, and that could only take place in Ushart and Wigmore. If the testator, therefore, appears clearly to have meant, that the estate was to return to Ushart and Wigmore, and that he intended they should make the distribution, and have the legacies for it, then it excludes a possibility of an indefinite time, which might be five hundred years after they were dead.

But there is still a further and most decisive evidence of intention, arising from the persons, amongst whom the estate is to be distributed, viz. the children of his sister.

The testator had a daughter, and six nephews and nieces, the children of his sister, Elinor Fowler. He says, "If my daughter marries with consent, and leaves issue, she shall have all my fortune ; if not, I substitute the children of my sister in her place" (taking three or four small legacies out of it). These must be considered as portions and personal provisions for them.

[318] There are established known distinctions between legacies by and to strangers, and by parents, or persons standing in the place of parents.

In the latter case, they are always considered as portions and personal provisions ; which furnishes a strong argument of personality, and it was so admitted by Lord Hardwicke, in *Beauclerk and Dormer*, 2 Atk. 311. "Something plausible might be said, if this was to be construed as merely personal to her:" but in that case, not only Miss Dormer, but Lord George and Lady Diana, were all strangers to the testator.

*Nichols and Hooper*, 1 P. Williams, 198. Lord Harcourt lays a stress upon their being personal provisions to nieces. Suppose he had had a son and five more daughters, and had bequeathed in these words, "to his son, and if he die without issue, to be distributed amongst his daughters." Would it not have been "intention apparent," that he meant a personal provision for his daughters? His nephews and nieces stood one degree further off ; but, from their proximity, they were the natural objects of his favour, after his own children.

A distribution amongst his sister's children, two hundred years hence, is too absurd and ridiculous to have entered into his head, or into the head of any man, who reads the will : and though it has been rightly said, there is a particular person named in every bequest over ; yet here, the relation of the devisees to the testator denotes portion and personal provision, and a distribution most likely to be made in their lives, if at all. And it differs from the common case in another particular : the testator seems to have meant children living at the time of the distribution.

[319] There are many cases upon the words "children living," viz. some, when the will is made : some, at the death of testator : some, at the time when payable : some, at the time of distribution : some take in children born after, and suspend the distribution.

Every case stands upon the evidence of the testator's intention, arising out of each will. In questions of intention, cases, unless they coincide in words, and every other circumstance, never assist, but perplex the exposition.

A will is the picture of a man's mind ; and one may as well look at the picture of one man to know the person of another, as look at the will of one mind to know the mind of another.

And suppose four of his sister's children, born after the testator's death, would have been entitled, if they had lived to a distribution ; but if they had died in their cradles, and only two had been living when distribution was to be made, must the father, as administrator to them, have run away with four-fifths of the estate, and the surviving children have had only a sixth part apiece ? If the testator had meant representatives, he would have said so. He confined it to children.

I will cite a case, confining distribution to children living at the time of distribution, and where the children of children, who had died in the mean time, were not suffered to partake. *Crook and Brooking*, 2 Vern. 50 and 106 (which he stated). But suppose the administrators of children, who died before the distribution, would be entitled ; yet how could the testator have thought of such a distribution ?

Every sixth part might be broken into six hundred parts, and the adjusting the



proportions be impossible; or, if it could be done, the [320] legacies would be crumbled into such minute morsels, as to be of service to nobody. And, in this particular, it differs from almost all the cases, where the contingent interest is limited to any single individual; whereas the pursuit of the representative would not be accompanied with such insuperable difficulties. And there is something very whimsical in making the transmissibility of such a contingent interest an argument to prove that it can never vest at all to be transmitted.

The small legacies of one hundred pounds, and three fifties, are another proof that he did not look at an indefinite failure of issue. They must have been meant as personal benefactions to the legatees.

Every line and word of this will shew, that the testator's eye was upon a bounded prospect; the disobedience of his daughter, or the death of his daughter, marked the horizon all around him. His thoughts appear to have never stepped beyond it.

I am sensible that there is no difference between devises of leasehold and other personal chattels: but still, when a man is talking of stock and corn, though perhaps not of itself a circumstance to determine upon, yet, in conjunction with other circumstances, it throws something into the scale.

If I have laid a good foundation of evidence to shew that the testator meant the death of his daughter, and not the failure of her issue generally, when this bequest was meant to take place; then we are warranted, by what Lord Hardwicke says in *Beauclerk and Dormer*, to call the natural signification and import of the words "if die without issue" in aid of the other passages, and as auxiliary to them; and this was my reason for troubling your Lordships at first with [321] stating the true sense and meaning of them, and to which I must beg leave to refer, not as legionary forces or principals, but as auxiliaries.

The truth is, these words are condemned by the law to be surly, rigid, inflexible, and immoveable, when they are alone; but, if they can but once be got into sensible company, they lose their gloomy, dogmatical, arbitrary disposition, and both speak and act as the rest of the company do: and combining all the words and passages in the will, and the circumstances I have mentioned, together, they form a body of evidence, which carries resistless conviction with them to our understandings, that

"The bequests over, in case the daughter of William Cronyn should die without issue, are to take effect, according to the true intent and meaning of his will, upon the death of his daughter without issue, living at that time."

Whereupon it was ordered and adjudged, that the said appeal be dismissed; and that the orders and decree therein complained of, be

Affirmed (a).

### [322] IN THE HOUSE OF LORDS.

Between JOHN WILKES, Esq. Plaintiff in Error, *against* THE KING,  
Defendant in Error. 1768.

[See S. C. 4 Burr. 2527 (with note).]

In Michaelmas term, 1763, Sir Fletcher Norton, Knight, His Majesty's then Solicitor General, (the office of Attorney General being vacant) filed an information, "ex officio," in the Court of King's Bench, against the plaintiff in error; stating, that before the printing and publishing the seditious and scandalous libel thereafter mentioned, to wit, on the 19th April, in the third year of His present Majesty's reign, His Majesty did make and deliver a most gracious speech from his throne, to the purport and effect therein set forth; and that the said John Wilkes most audaciously, wickedly, and seditiously devising, and intending to villify and traduce His Majesty, and his Government of this realm, to impeach and disparage his veracity and honour, and to represent, and cause it to be believed among His Majesty's subjects, that his said most gracious speech contained falsities and gross impositions upon the public, and that His Majesty had suffered the honour of his Crown to be sunk, debased, and prostituted, and had given his name as a sanction to the most odious measures of

(a) Vide Journals of the House of Lords, vol. 32, p. 60.



government; and also most wickedly, unlawfully, and [323] seditiously devising, intimating, and endeavouring, as far as in him, the said John Wilkes, lay, to excite disobedience and insurrection amongst the subjects of this realm, and to violate and disturb the public tranquillity, good order, and peace of this kingdom; after the making and delivery of the aforesaid speech, (that is to say) on the 2d day of August, in the said third year of the reign of our said lord the King, unlawfully, wickedly, seditiously, and maliciously published, and caused to be printed and published, a certain malignant, seditious, and scandalous book and libel, intitled "*The North Briton*;" in one part whereof, intitled "No. 45, Saturday, April 23, 1763," were then and there contained (amongst other things) divers malicious, seditious, and scandalous matters, to the effect in the information set forth.

To this information Mr. Wilkes pleaded not guilty; and Sir Fletcher Norton, who had in the mean time been appointed to the office of His Majesty's Attorney General, joined issue in that character for His Majesty.

In the sittings after Hilary term, 1764, the cause was tried by a special jury of the county of Middlesex; and Mr. Wilkes was convicted of the offences charged in the information.

Before judgment on this conviction, Mr. Wilkes absconded, and went abroad, and proceedings to outlawry were had against him upon this conviction; and on the 1st November, 1764, he was outlawed; but in Easter term 1768, he was apprehended, by virtue of a writ of "*capias utlagatum*," directed to the Sheriff of Middlesex, and being brought into the Court of King's Bench, was committed to the custody of the marshal of that Court.

In the same term, Mr. Wilkes obtained a writ of error upon the outlawry; and having assigned errors thereon, the same were [324] argued in that and the following term, and the Court of King's Bench reversed the outlawry for a defect of form in the return of the sheriff to the writ of "*exigent*."

Mr. Wilkes's counsel, having surmised to the Court some matters, which, if available, ought to have been moved in arrest of judgment, and for a new trial, the Court relaxed their general rule, requiring such applications to be made within the first four days of the term immediately following the conviction, and indulged Mr. Wilkes with leave to move then, as well in arrest of judgment, as for a new trial.

Accordingly it was argued by the counsel for Mr. Wilkes, that the Solicitor General was not the proper officer, nor had any authority to exhibit an information; and that if he was vested with such authority, it could only be temporary, during the vacancy of the office of Attorney General; and it did not appear on the proceedings, that the office of Attorney General was at that time vacant; and on this ground it was moved that the judgment should be arrested.

The application for a new trial was founded upon an objection to an order, made by the Lord Chief Justice of the Court of King's Bench, for amending the information, after "issue had been joined, and the record of the issue made up." But the Court unanimously over-ruled both the objections, and took time to consider of the judgment upon the conviction till the 17th June 1768, when Mr. Wilkes, being brought into Court to receive judgment, was sentenced to pay a fine of £500, and to be imprisoned ten calendar months in the custody of the marshal.

There was another information against Mr. Wilkes, for publishing an obscene and impious libel, intitled an "*Essay on Woman*," which was filed in the same manner, and tried at the same time with [325] the other; and upon this latter information he was sentenced to pay another fine of £500, and to be imprisoned for twelve calendar months, to be computed from the determination of the first imprisonment.

To reverse these judgments, Mr. Wilkes brought two several writs of error in Parliament, and assigned the following matters for error: 1st. That it did not appear that Sir Fletcher Norton, by whom the informations were exhibited, had any lawful power, warrant, or authority to exhibit them, and therefore the judgment was not sufficient in law to convict him. 2d. That he (Mr. Wilkes) was sentenced to be imprisoned for twelve months, to commence at a future time; whereas such imprisonment ought to have commenced at and from the time of giving the judgment, and not at any future time. 3d. That there was a variance between the record and the original information, the word "*purport*" having been altered to that of "*tenor*."

16th January, 1769. After hearing counsel on these writs of error, the following questions were put to the Judges:

1. "Whether an information, filed by the King's Solicitor General, during the vacancy of the office of the King's Attorney General, is good in law?"

2. "Whether in such case it is necessary, in point of law, to aver upon the record, that the Attorney General's office was vacant?"

Upon the second record :

3. "Whether a judgment of imprisonment against a defendant, to commence from and after the determination of an imprison-[326]-ment to which he was before sentenced for another offence, is good in law?"

And Sir John Eardley Wilmot, Lord Chief Justice of the Court of Common Pleas, having conferred with the rest of the Judges present, acquainted the House, "that they all agreed in opinion ;" and then his Lordship delivered their reasons.

Same day. As to the first question :

We think this information, so filed, is good in law.

By our constitution, the King is entrusted with the prosecution of all crimes which disturb the peace and order of society. He sustains the person of the whole community, for the resenting and punishing of all offences which affect the community ; and for that reason, all proceedings "*ad vindictam et penam*" are called in the law, the pleas or suits of the Crown ; and in capital crimes, these suits of the Crown must be founded upon the accusation of a grand jury ; but in all inferior crimes, an information by the King, or the Crown, directed by the King's Bench, is equivalent to the accusation of a grand jury, and the proceedings upon it are as legally founded ; this is solemnly settled and admitted. As indictments and informations, granted by the King's Bench, are the King's suits, and under his controul ; informations, filed by his Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure. They are no more the suits of the Attorney General than indictments are the suits of the grand jury.

Indictments and informations are both the voices of those entrusted by the constitution to awaken criminal jurisdiction, and to [327] put it into motion. Who are those persons entrusted ? A grand jury for all crimes ; the King's Bench, as well as a grand jury, for misdemeanors of magnitude.

An information, brought by the Attorney General for a misdemeanor, is as much the suit of the King, as actions, brought by attornies, are the actions of their clients, and not of the attornies who bring them.

"The King sues by his attorney," or "the attorney sues for the King," are only different forms of expressing the same thing. It is equally good either way, as appears by the cases in 2 Lev. 82, and 3 Keb. 127 ; and no legal reason, but good manners and decency, as Lord Hale calls it, have given the preference of one form to another. It is the King, who, by his attorney, gives the Court to understand and be informed of the fact complained of.

Before the statute, 4 and 5 W. & M. c. 18, every private man might lay his complaint before the Court as the King's complainant ;—this was abused, and was checked by the statute ; but it left all other informations as they were. What were then the King's informations ?—His right, of "informing" the Court, was not subjected to the check which the Act set upon the right of individuals.

The Legislature trusted the King as the great constitutional guardian of the peace of the society. The mere suggestion of an individual was too slight ; he was under no oath. The King is under the most solemn sanction in every part of his great office ; and it is wise not to controul it : he is not to be put on a level with the meanest of his subjects.

The arguing that the Attorney General only, and no other officer, was entrusted by the constitution to sue for the King, either civilly [328] or criminally, is a fundamental mistake. The Attorney General is entrusted by the King, and not by the constitution ; it is the King who is entrusted by the constitution.

The great abilities of the persons appointed to this office have made it figure high in the imagination, and annexed ideas to it which do not belong to it ; for he is but an attorney, though to the King, and in no other or different relation to him than every other attorney is to his employer ; and it is by degrees that he hath attained to that rank which he now holds in the law.

I find no traces of such an officer for centuries after the Conquest ; and that great antiquarian, Spelman, under the word "*serviens ad legem*," considers him, upon the authority of passages cited out of Bracton, as the great officer for pleas of the Crown,



and thinks the King had a serjeant in every county for that purpose; and in the proclamations made even at this day, before any criminal trial begins, the King's Serjeant is mentioned, even before the attorney; and the 5th Edward III. c. 13, which gives an averment against the sheriff's return of imprisonment in cases of outlawry at the King's suit, mentions the King's Serjeant before the attorney, and subjoins "or any that will sue for the King;" which is a strong indication that the King's suits were not considered as then appropriated to his attorney; and he had not then so much as the name of "Attorney General," which means no more than the person generally employed to sue and defend for the King, exactly in the same manner as the person generally employed by your Lordships, in your suits, is called your Lordships attorney, without putting the addition of "general" to it; and the suits instituted by the King's Attorney, or by your Lordship's attorney, are both instituted, either by special [329] and particular directions, or under a general authority, which is equivalent to a particular direction for every particular suit: and a suit instituted by the Attorney General, is entitled *The King and ———*, and the jury are sworn between *The King and ———*, in the same manner as in suits between private individuals. Whether the King, when there is an Attorney or Solicitor General, might, by one of his serjeants, or by his solicitor, when there is an attorney, now file either a civil or criminal information, it is not necessary to determine; but the passage, cited out of the Harleian manuscript, does not decide in the negative; for the first part, in Henry the Eighth's time, orders the King's Solicitor to stop one prosecution and commence another. The office of Attorney General was either vacant or full at that time. If vacant, it proves the solicitor stands in his place: if full, it proves that by particular order, the King's suit is not inseparably attached to the office of the King's Attorney.

The latter part of the passage, containing the resolution of the 1st and 2d James I. is only the adjustment of a dispute between the Attorney General and the King's Serjeant, whether the King's Serjeant could institute a suit so as to privilege it with respect to fees, &c. in the ordinary course of proceeding; and it was determined to belong to the Attorney General, in opposition to the serjeant's claim: but it does not follow from thence, that the King, if he had pleased, might not have empowered one of his own serjeants to have commenced it: and a special antecedent direction could not be necessary; for if the King afterwards avows the suit, and pursues it, it is a principle and maxim that "*omnis rati-habitio mandato æquiparatur*;" but there is no occasion in this case to have any recourse to such a ratification; for the Solicitor General is the "*secundarius* [330] *attornatus*;" and as the Courts take notice judicially of the Attorney General, when there is one, they take notice of the Solicitor General, as standing in his place, when there is none. He is a known and sworn officer of the Crown, as much as the attorney; and, in the vacancy of that office, does every act, and executes every branch of it. But, whether it be the one or the other, they only echo the King's complaint, and his application to the Court to act upon it. When the attorney dies or is removed, must the great criminal jurisdiction of this kingdom, in his department, be suspended, till another is appointed? It is said the King may appoint one. But it is a matter of great deliberation and infinite consequence to have a person possessed of all the qualities necessary for that office. Where is it to be found, that, in that interval, the noblest branch of the King's regal office becomes inactive, and the subject's right to protection is in abeyance? There is no such absurdity to be found in the law; and an hiatus in government is so detested and abhorred, that the law says, "the King never dies," that there may never be a "cesser" of regal functions for a moment; but if this whimsical conceit were to take place, the death, or removal of the Attorney General, would suspend one of those functions, though there was no demise at all. That the office of Attorney General devolves upon the solicitor, is proved by such a chain of authorities, as can leave no doubt in any man's mind upon this question.

A course of precedents and judicial proceedings in Courts of Justice, make the law: it would be endless to cite cases upon it. A course of practice for a few years has been held to controul an Act of Parliament. The case of *Bewdley Corporation*, in the 12th Queen Anne, 1 P. Williams, 207. Before the 4th and 5th of Queen Anne, [331] juries were to come out of the hundred of that place where the action arose. This was attended with many inconveniences. That law directed that the jury should come out of the body of the county; but a practice had prevailed in the Crown Office,



to award the “venire de vicineto,” as before the Act. It was referred to all the Judges. Their unanimous opinion was delivered by Parker, Chief Justice. The constant practice and precedents, both in the Crown Office and Exchequer, being “de vicineto ;” they established the practice, and said, “to make a contrary resolution in this case, would be, in some measure, to overturn the justice of the nation for several years past.” There was an interval of five or six years in that case—but here there is near a century.

*The King and The Earl of Devon*, Easter, 3 Ja. II.(a). Though the information was filed by the Attorney General, it was taken up by the Solicitor General, and shews the same powers. Proceedings were brought up into this Court, to found a complaint upon ; but there was no writ of error. The judgment was never reversed. There was not the least complaint. This House acted upon it. This is a recognition of his authority.

[332] [Here the Chief Justice stated many cases in the Exchequer, Chancery, and King’s Bench ; and particularly, *The Queen and Lawson*, Easter, 7th of Queen Anne, which was an information exhibited in the Exchequer by Sir James Montague, “Solicitor General,” and where the judgment was affirmed by Lord Cooper, Holt and Treby.]

The Attorney General is no more a sworn officer of the King’s Bench than the Solicitor General.

As to the 2d question :

The inserting the vacancy of the office of Attorney General in the record sometimes, and at other times omitting it, shews it was thought a matter of indifference. There are more criminal informations in the Exchequer, without those words than with them. At most it could be only an irregularity, which would not make the information void ; because it is the King’s suit, and the Court is well founded in opening their jurisdiction upon it ; all irregularities must be challenged in time, and if not challenged, are waived ; and the pleading and going to trial are clearly a waiver, if there had been any weight at all in this objection ; but we think there is none. In this case, the information, though filed by the solicitor, is brought into Court by the attorney, who was the same person who filed it. By so doing, he has adopted it ; and it is become his information to every intent and purpose whatsoever.

When filed—process—when brought into Court—read over and charged with it. It is now done by the officer—but it is for the attorney. If there was any foundation—it should have been objected to then. If not, it must be considered as waived.

[333] On the 3d question :

We are of opinion that the defendant, being convicted of two offences, it was necessary that two judgments should be pronounced, one upon each information.

Fine and imprisonment, or other corporal punishment, may be awarded for such offences as are contained in these informations.

The kind, and the quantity, are left by the law to the discretion of the Court, which passes the sentence ; and that discretion is regulated by the nature of the offence, and the circumstances which aggravate and extenuate it ; by the state and condition of the delinquent, and the imprisonment he has already suffered : and that discretion is always exercised with that lenity and compassion which do so eminently distinguish the administration of criminal justice in this kingdom.

That sound discretion led the Court to fine and imprisonment, as the proper and adequate punishment for these offences. A very large fine might have amounted to

(a) Middlesex.—Information filed by Sir Robert Sawyer, “Attorney General,” against William Earl of Devon, states, that he on the 24th April, 3 J. II. “vi & armis,” at the City of Westminster, in Middlesex, within the palace of our lord the King there, to wit, in Whitehall, (the King being then abiding in the said palace) one Thomas Colepepper, Esquire, then and there in the peace of God, and our said lord the King, did provoke and challenge to fight with him the said William Earl of Devon, with intention to kill and murder him the said Thomas, &c.

Plea.—And now (that is to say) on Friday, next after the morrow of the Ascension of our Lord, in this same term, before our lord the King at Westminster, comes as well Sir Thomas Powis, Knight, “Solicitor General” of the said King, who, for our said lord the King, now prosecutes in his proper person, as the said William Earl of Devon, in his proper person ; and the said earl says, &c.

perpetual imprisonment: a very small fine must necessarily have produced a prolongation of the imprisonment. By mixing them together, the keen edge of each is taken off, and the consequence of a large fine, or a very long imprisonment, carefully avoided.

A fine of £500, and ten months imprisonment, is the punishment for the treasonable libel; a fine of £500, and twelve months imprisonment, to commence from the determination of the former imprisonment, is the punishment for the blasphemous libel. The objection is, that the sentence for the blasphemous libel is erroneous, because the punishment is not to take place till another punishment is ended, either by effluxion of time or other sooner determination of it; which may be by a reversal of that judgment, or [334] the King's pardon; and that all judgments are to take immediate effect, and not to commence "in futuro." In general, the language of all judgments for offences, respects the time of giving the judgment: though the punishment, directed to be inflicted, is in no case inflicted immediately; and in many cases, the judgment directs the punishment to be "in futuro," and must be so according to the nature of the punishment.

In petit larceny—to be whipt three market days successively—to set a man in the pillory three times, at a week's or a month's distance—to find security for good behaviour from the end of a certain imprisonment, or an uncertain one, as those imprisonments are, where a fine is to be paid.

In treasons and felonies—a certain known judgment, which cannot be departed from, viz. in the present tense of the subjunctive passive: but in misdemeanors, where punishment is discretionary, the limitation as to time, seems only to be, that the punishment shall take place before a total dismissal of the party: a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment "in futuro." But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it. And every case of this kind must depend upon the peculiar circumstances which attend it.

In this case, it must be assumed, that fine and imprisonment were the proper kind of punishment to be inflicted for these offences; because the Court, intrusted by the constitution with deciding upon the punishment, has said so. The facts and circumstances which guided their judgment, in that respect, are not before your Lord-[335]-ships. They hear a report at the trial, and affidavits of every fact which aggravates or alleviates the offence; and therefore your Lordships must now proceed upon a supposition, that fine and imprisonment were the adequate punishments to be inflicted for each offence. You will be disposed to say and to think so, because they are the mildest and gentlest punishments.

The punishment might have been inflicted different ways.

1st. By imprisonment for twelve months; but as he was already sentenced to ten months, it would have been only an imprisonment for two.

2d. By imprisonment for twenty-two months; which would, in effect, have been for twelve.

But this would have been most grossly unjust, because if the first judgment should be reversed, or he had been pardoned, he would have been imprisoned twenty-two months, when the Court only intended an imprisonment of twelve.

3d. The Court might have laid a fine of £1000, with a short imprisonment for one offence; and a small fine, with an imprisonment for twenty-two months for the other.

This would have been equally unjust—for the offences are different, and have no relation to one another. The prosecutions are distinct, and the records as separate from one another as if there had been two separate delinquents; and the offences on each record, must be as separately and distinctly estimated; and though judgment happened to be passed at the same time for both offences, yet the rule of admeasuring must be the same as if the judgment had been pronounced at different times.

[336] The punishment must be proportioned to the specific offence contained in the record, upon which the judgment is then to be pronounced; and must be neither longer nor shorter, wider nor narrower, than that specific offence deserves. The balance is to be held with a steady even hand; and the crime and the punishment are to counterpoise each other; and a judgment given, or to be given against the same person for a distinct offence, is not to be thrown into either scale, to add an atom to either.



To lay a fine of £1000 for one offence, and twenty-two months imprisonment for the other, when the Court thought a fine of £500, and an imprisonment of ten months, was the proper and adequate punishment for one offence, and a fine of £500, and an imprisonment of twelve months for the other, would have been twisting the two offences and their punishments together, and a departure from the first principle of distributive justice, which commands all Judges to inflict that punishment, and that punishment only, which they think commensurate to the specific crime before them; and it might have been productive of the same injustice I have already mentioned, viz. the judgment in one might be reversed or pardoned; and the delinquent would then be subject to a larger fine or a longer imprisonment, than the Court intended to subject him to for one of the offences only.

We cannot explore any mode of sentencing a man to imprisonment, who is imprisoned already, but by tacking one imprisonment to the other, as is done in the present case.

It is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other; but only provid-[337]-ing, from the situation of the delinquent, to effectuate the punishment the Court thought his crime deserved. It is shaping the judgment to the peculiar circumstances of the case; and the necessity of postponing the commencement of the imprisonment, under the second judgment, arises from the party's own guilt, which had subjected him to a present imprisonment; and therefore the question really is, whether a man, under a sentence of imprisonment for one offence, can be sentenced to be imprisoned again for another offence? If he can, this is the only form by which it can be done consistent with justice. If it cannot be done, then, in all offences which are punishable only by fine and imprisonment, if a man has committed twenty, and has been sentenced to imprisonment for one of them, he must be fined for all the rest, which will amount to perpetual imprisonment with nine parts in ten of the people most likely to commit such offences: or an imprisonment must be directed for every offence after the first, inadequate and disproportionate to it.

For suppose twenty offences of the same malignity, and meriting exactly the same punishments—if six months imprisonment were the punishment directed for the first offence; the second must be twelve months; and, proceeding progressively, the twentieth must be ten years: and thus six months and ten years will be the punishment for offences which ought to have been punished exactly alike. Or, if it be an offence where whipping or pillory might be inflicted, the alternative of a moderate imprisonment will not be in the power of the Court to inflict; but they will be under the necessity of laying a large fine, or directing one of the other severe corporal punishments.

In *Dr. Bonham's case*, 8 Co. 107. The charter granted by King Henry VIII. confirmed by an Act of 14 Hen. VIII. c. 5, gives the [338] censors of the College of Physicians a power to punish physicians for a mal and insufficient administration of physic, by amercement, imprisonment, &c.

Dr. Bonham was convened, examined, and found insufficient by the censors. He was amerced £5, to be paid at their next meeting; and “deinceps abstineret, &c. quousque inventus fuerit sufficiens sub pœna conjiendi in carcerem, si in premissis delinqueret.”

He persevered to practise, and they summoned him again—he made default. The censors ordered him to be arrested, and afterwards he came before them, and being asked to submit to their authority, he refused; and they committed him, and awarded that he should continue in gaol till they released him.

It appears from this case, 1st. That he was under no prior sentence of imprisonment, as here.

2dly. That after the judgment of his insufficiency, he was dismissed, with a threat of imprisonment only; and was afterwards committed to prison for not submitting to their authority.

Whereas the delinquent here was never dismissed, nor out of custody, for a moment.

3dly. It was a special power and authority of a very singular and despotic nature, committed to private persons, and therefore to be executed strictly; and when they are empowered to imprison, if they find a person insufficient, the punishment must immediately follow the judgment; because, if suspended a day, it might be suspended



a year. If totally dismissed, and the party is at liberty, the power over him is determined.

So in the case of the 27th of Henry VII. Y. B. on the Statute of Westminster 2d, 13 Edward I. c. 11; if bailiffs, &c. are found in [339] arrear, "arrestentur corpora eorum, et per testimonium auditorum ejusdem compoti, mittantur et liberentur proximæ goalæ domini Regis in partibus illis."

No time was limited; they must commit immediately.—In that case, it was contended on the plea, that he had been at large; and then their power over him was determined, and so that what they did after, was "tortious." It was a special power and authority, to be exercised strictly; and therefore held that the commitment must be to the next gaol, whether in the county or not; and if false imprisonment was brought against auditors, they must shew that they pursued their power. And the same answer applies to the other cases upon the Statutes of Forcible Entries.

[He then cited various other precedents, particularly the case of *The King and Dalton*, 3 Geo. I. 1716, in which the first judgment was given in July preceding, upon an indictment for seditious words against the King; and the punishment was a fine of twenty-five marks and commitment for one year, and to find sureties for three years. There was a second conviction, in July, of a like offence, and judgment of a fine of twenty-five marks and commitment "pro spacio unius anni integri post expirationem prior: judic: imprisonment: versus eum nuper adjudicatum."]

In answer to the questions therefore proposed by your Lordships, our unanimous opinion is:

1st. That an information, filed by the King's Solicitor General, during the vacancy of the office of Attorney General, is good in law.

[340] 2dly. That in such a case, it is not necessary, in point of law, to aver upon the record that the Attorney General's office was vacant.

3dly. That a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law.

Whereupon it was ordered and adjudged, that the judgments of the Court of King's Bench be

Affirmed (a).

### [341] IN THE COMMON PLEAS.

GEORGE BALLY, Clerk, Rector of Monkton, Hants, Plaintiff; against JAMES WELLS, Assignee of James Whitmarsh, Defendant. Mich. 10 Geo. III. 1769.

[S. C. 3 Wils. 25; see *Williams v. Earle*, 1868, L. R. 3 Q. B. 750; *Woodall v. Clifton* [1905], 2 Ch. 269.]

This was an action brought by George Bally, clerk, rector of Monkton, in the county of Southampton, against James Wells, assignee of James Whitmarsh, for the breach of a covenant contained in a lease, made by the said George Bally to James Whitmarsh, dated 15th Nov. 1766. By this lease it was witnessed, that in consideration of the rent and covenants on the part of J. Whitmarsh, his executors, administrators, and assigns, the said George Bally demised to him all the tithes arising, &c. out of the farms and lands in the parish of Monkton, from the 10th of October last past, for the term of six years, at the yearly rent of £96, 4s.

This lease, besides other usual covenants, contained the following; viz. "And the said James Whitmarsh, for himself, his executors, administrators, and assigns, doth thereby covenant and agree, not to let any of the farmers, now occupying the estate at Monkton, have any part of the tithes aforesaid, without the consent of the said George Bally, in writing, first had and obtained."

[342] It contained also a covenant from James Whitmarsh, his executors, administrators, and assigns, to find and allow unto the said George Bally, sufficient wheat straw for thatching of any of the premises upon the parsonage then in his occupation.

In January, 1767, James Whitmarsh assigned his interest in this lease to the defendant, James Wells, who, notwithstanding the above covenant, did let divers farmers, occupiers, have part of the tithes, without the consent of the said G. Bally,

in writing, according to the lease, and contrary to the form and effect of the covenant of the said James Whitmarsh and his assigns.

To the declaration, stating these facts, the defendant, James Wells, answered, that there is not any thing contained in the declaration sufficient to maintain the action; and that he hath not occasion, nor is he bound by the law of this realm, to answer; and for plea in this behalf says, that he hath not broken the said covenant as complained of; and hereupon issue was joined.

A verdict being found for the plaintiff, it was moved in arrest of judgment, that an action does not lie against the assignee; for that it is a covenant merely personal and collateral, binding the lessee only; also that tithes are incorporeal, lying in grant, and therefore that such a covenant cannot run with them.

Lord Chief Justice Wilmut delivered the opinion of the Court:

An objection in arrest of judgment has been made, that the covenant in the lease, "not to let any of the farmers of the estate have any part of the tithes without the consent of the lessor," [343] is a mere collateral, personal covenant, confined in its operation to the lessee himself, and that the assignee of the lessee is not affected or bound by it: that tithe is an incorporeal inheritance lying in grant, which will not endure such an annexation of covenant to it, as will pass with the tithe into the hands of an assignee: but, upon consideration, we think the action may be supported, and that the intention of the parties may have its full effect, without breaking in upon any adjudged cases, or shaking any of the distinctions already established.

The intention of the lessor, in requiring this covenant, was to prevent an unity of possession of the land and the tithes; it was to keep them always in a state of actual perception, and thereby to guard against all the inconveniences which arise from the not receiving tithes in the usual and accustomed manner: and therefore this covenant is really no more, than that the lessee and his assigns shall take the tithes in kind, that there may be a continuing, visible, and notorious evidence, not only of the right to the tithes in kind, but of the manner of taking them; for though tithes are due "communi jure;" yet temporary compositions have laid the foundation of many moduses; and if there is any particular mode of tithing, the unity of possession in time wears out the traces of it; and therefore this covenant was a provision made for the maintaining and supporting the thing demised, and indeed for preserving the very existence of it.

There was another motive for compelling the lessee and his assigns to take the tithes in kind, which was to enable them to perform the covenant of allowing sufficient wheat straw for thatching any of the premises upon the parsonage. For though the lessee and his assigns might procure the straw elsewhere, and the covenant is not so worded [344] as to restrict the delivery of the straw arising from the tithe; yet the lessor's eye was certainly upon the tithe, as the natural fund for serving the parsonage; and this furnishes an additional reason for connecting the covenant with the tithe to which it relates, and cementing them in such a manner as to make them pass together: and the equity being clear, that the assignee, who must have come in with full notice of this covenant, should stand in the place of the assignor, and be bound by it. If the equity and the law can be mixed together, and made to flow in the same channel, it must be the inclination of every Court of Law to give a complete relief, without sending the parties to another Court to obtain it at a great expence. If the law be settled, we will not disturb it.

To see whether the equity of this case can be got at in a Court of Law, I will consider how the law stands, in respect of covenants following the thing demised into the hands of assignees; and if there is any difference between land and tithes.

*Spencer's case*, 5 Co. 16, states all the distinctions very clearly. Covenants in leases extending to a thing "in esse," parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, &c. And if they relate to a thing not "in esse," but yet the thing to be done is upon the land demised, as to build a new house or wall; the assignees, if named, are bound by the covenants: but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants: or if the lease is of sheep, or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound [345] in the two last cases are not the same. In the first case, it is because the thing, covenanted to be done,



has not the least reference to the thing demised ; it is a substantive, independent agreement, not "quodam modo," but "nullo modo," annexed or appurtenant to the thing leased. In the case of the mere personalty, the covenant doth concern and touch the thing demised ; for it is to restore it, or the value, at the end of the term : but it doth not bind the assignee, because there is no privity, as there is in the case of a realty, between the lessor and lessee and his assigns, in respect of the reversion : it is merely collateral in one case ; in the other, it is not collateral, but they are total strangers to one another, without any line or thread to unite and tie them together, and to constitute that privity, which must subsist between debtor and creditor, to support an action.

To carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, he must in all cases, where something is to be done "de novo," be expressly named ; and there must also be a privity between the assignee and the person to whom he becomes engaged ; and the covenant must respect "the thing leased," which I consider as the medium creating the privity between them. The "chose in action," which of itself is not assignable, loses that property under those circumstances, and, in a waiting dependent state, follows its principal ; and assignees of leases become liable to assignees of the reversion, and assignees of reversions become liable to assignees of leases ; as, where lessors covenant to repair, to renew, Moor. 159. Reversions are bound. Covenants between partners, to acquit of suit, run with the land ; to perform divine service, within a manor, with [346] the lord of that manor, and his heirs, follows the manor, into whose hands soever it comes, whether by descent or purchase. Covenants which run and rest with land, lie for or against assignee at the common law, though not named ; "terra transit cum onere ;" Cro. Eliz. 552, *Hyde v. Dean and Canons of Windsor*. The same doctrine, 1 Rolls Rep. 359. They stick so fast to the thing on which they wait, that they follow every particle of it ; Cro. Car. 221, *Congham v. King*, Sir W. Jones, 245 ; *Conan v. Kemise*. For if lessee assigns twenty parts to twenty persons, he may follow the assignee of every part. If a reversion is broken into parts, the assignee of each part may sue. So if a covenant relates to the improvement, melioration, and mode of cultivation of the estate, covenant binds an assignee, though not named, Cro. Ja. 125, *Cookson v. Cock*.

All these cases clearly prove, that "inherent" covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will.

Is there any difference between lands and tithes as to the annexation of covenants ? It is said tithes are an incorporeal inheritance, and lie in grant ; that a rent cannot be reserved, because not open to a distress ; that there is a privity of contract only between the lessor and lessee, which neither the lessor, nor the lessee, can transfer to any other person. As to their being incorporeal, unless we consider the covenant to be a material substance, and to require some solid body to stand upon, it may wait, and be dependent, upon an incorporeal as well as a corporeal estate. If we embody a covenant, and realize it in our minds, as we do a castle, it certainly cannot be built in the air, and we can have no idea of its existence, [347] independent of land, and detached from it ; but if we consider a dependent covenant, as it really is, an agreement to do, or to omit to do, something which respects the thing on which it depends, and to which it relates, and divest our minds of all ideas of matter, a covenant may be annexed and pass with an incorporeal inheritance as well as with a corporeal one ; and what is land, but the profits of it ? and what is tithe, but the tenth part of the profits renewing annually upon it ? The one is a right to take away the tenth part when it is severed ; the other is a right to take away the other nine : they are tangible, visible, and palpable, and partake of the same qualities, in every respect, as lands themselves ; Dyer, 85 b. They are so far realized by the Stat. 32 Hen. VIII. that they are to be sued for and recovered in the same manner as land, and an ejectment, or an assize, lies for them ; and however unreal or bodiless they might be at the common law, the Act has given them the qualities and property of lands themselves, in point of remedy against an unlawful possessor or disseisor of them ; and every reason which applies in justice to passing land "cum onere," applies to passing tithe in the same manner.

It has been argued and admitted, that a rent cannot be reserved out of tithe ; and Co. Lit. 47 a. 2 Saund. 302, *Dean and Chapter of Windsor v. Gover* ; and the Act of



5 Geo. III. c. 17, have been cited. But what is the true sense and meaning of that position? That it is not properly a rent, because there is nothing to distrain upon for it: [rent-seek could not be distrained for, and yet it is a rent;] for it is a rent where it may be distrained for, as rent reserved by the King, because he may distrain upon any lands the lessee has; it does not issue "out of" the tithes, but is a payment "for" them; Cro. Ja. 452, [348] *Dobitoste v. Curteene*. If a barn, worth £4 per ann. and tithe, are both let together at £100 per ann. reserving rent: "in point of remedy it does not issue out of tithes, but only out of the barn, where a distress may be taken; yet the rent reserved is greater, having respect to the tithes;" and, in case of eviction, there must be an apportionment; which proves that, in point of "render," rent does issue out of the tithes, though not in point of "remedy."

It is insisted, in Sir Thomas Raymond, 18, *Tippin and Grover*, that a rent out of tithes appertains to the reversion, for it is a rent, though not in point of remedy. It was argued, "e contra;" but counsel, perceiving the opinion of the Court to be against him, prayed a discontinuance, which was granted.

*Jewell's case*, 5 Co. 3, was a lease for life; and as there was no remedy by action of debt for such a rent, the lease was void. Indeed, it is said at the end of that case, that a lease for years would have been so; but that was extrajudicial; and in a subsequent case, Cro. Ja. 111, *Talentine v. Denton*, the law was held to be otherwise.

The case in 2 Saund. 302 was not determined; but as far as it goes, the Court seemed to incline that it was such a rent as would go with the reversion, and that the assignee should be obliged to pay it.

The 5th Geo. III. c. 17, recited it only as a doubt, and provides for it; but before, the law was clear that the rent would go with the reversion, and that an action of debt would lie for rent on a lease for years: it always went with the reversion to grantees or heirs at law, and the legal remedy goes along with it. The successor is the same as an heir.

[349] 2 Vern. 423, is only a saying of counsel: it was not said with reference to tithe, viz. "possibly the assignees might not be liable at law, if it was an incorporeal inheritance, for they had not privity of estate." 1 Salk. 198. Lord Raymond, 322. Grant of rent-charge and covenant for enjoyment, free from taxes; the question was, if it follow the land into the hands of assignee; Holt, in Salk. thought not, but there was no judgment; and Lord Raymond, with three Judges, were of a different opinion against Holt; and this is the better opinion, if notice of the covenant repel the right of deducting the taxes; and the case of the covenant to acquit of suit from one parcener to another, is in point in support of it. 5 Co. 24 b. *Dean and Chapter of Windsor's case*. If lessee covenant to discharge lessor, "de omnibus oneribus ordinariis & extraordinariis, and to repair," action lies against assignees.

If there is no difference between land and tithe, the only question in this case is, whether a covenant, expressly naming the assigns to receive the tithe in kind, will follow and accompany the lease into the hands of the assignee, and bind him to a performance of it. We are of opinion that it will; and if the covenant had not named assigns, it might be very plausibly argued that it would have bound him as effectually as a covenant to repair, or occupy the estate in any particular manner prescribed by the lessor. The covenant "to repair" clearly binds an assignee, though not named; and according to Moor. 159, even to build a wall, though assignees are not named, is an inherent covenant, and binds them; "by the acceptance of the possession, he makes himself subject to all covenants concerning the land, though not to collateral covenants; and covenants of repair, and of building walls or houses, are covenants 'in-[350]-herent' in the land, with which the assignees, without special words, shall be bound." But it is not necessary to discuss that question, (and *Spencer's case* is contrary,) because the assigns are expressly mentioned here; and therefore in a lease of land, they would clearly be bound by all covenants for the performance of what is to be done upon the land; and the case in Cro. Ja. is an authority in point, that covenants, prescribing how land shall be occupied, would bind the assignees, though not named: a mode of occupying the "thing let," is so interwoven with the original contract, as to become an essential part of it; it is as much a part of the consideration of the lease as the rent is; and therefore, whenever that contract is assigned, the assignee must take the whole contract together.

What is this covenant, but a mode of occupation prescribed by the lessor, for the reasons already mentioned? It is laying down a rule how and in what manner

the "thing demised" shall be managed. It shall be taken in kind, like a covenant from a tenant of land, not to sell straw or dung, or lop trees, or to make ditches or trenches, or do, or omit to do, any other Act respecting the cultivation of the thing demised; and it is both within the rule, and indeed the words, of Lord Coke, in the second branch of what he lays down in *Spencer's case*: it touches and concerns "the thing demised" most essentially; it extends to the supportation of it; for by commanding the tithes to be taken in kind, it averts and protects it against its most mortal enemy, a unity of possession. Assigns are expressly named; and here is a reversion in the lessor, and therefore a privity; and Lord Coke says, "the assigns are not bound in a lease of mere personality, because there is no privity, as there is in the case of land, in respect of the reversion."

[351] Land and tithe are the same. This covenant may be compared to covenants in leases not to assign.—Cases have been cited to shew these are collateral covenants; and they certainly are so: and we admit the authority of all those cases, viz. *Pennant's case*, 3 Coke, 64. Styles, 265. *Collins v. Sillye*,—collateral. Moor. 243. Godbolt, 120, *James v. Blunch*. The word "assigns" is not in the covenant. They do not concern or touch the "thing demised;" they are as collateral as to deliver a horse, or pay a sum in gross. Hardres, 88.—A mere personality, no privity.

But this is a covenant of a very different nature and import: a covenant "not to assign," has only for its object who shall occupy it; there is nothing to be done in the land, nor upon it. Lord Coke, *Pennant's case*; it may be contrived so secretly, that no body may know of it; it is collateral. But this covenant has for its object, not "who" shall occupy, but "how" it shall be occupied; it is to enforce the occupation as a tithe; let it go where it will, it shall be enjoyed in the same form, plight, and condition, as it is delivered to the lessee: the covenant leaves it quite open, and as a matter of total indifference "who" the occupier is, provided it is occupied as a tithe, and taken in kind: for the covenant, not to let the farmers have the tithe, is nothing more nor less than a covenant that they shall be taken in kind; for they must be taken in kind, if the farmers themselves are not to have them. In another respect it is totally different; the covenant, not to assign generally, must be quite personal and collateral; for it can only affect the lessee himself, and is so far from being meant to reach the assigns, that it is inserted to prevent there ever being any assigns at all: whereas this lease grants the tithes to the lessee, his executors, administrators, and assigns; [352] and the covenant is only to keep them in "esse," and in that separate state of existence, which they would lose by being blended and confounded with the other nine parts in the hands of the farmers; and though I admit a covenant "not to assign generally" is collateral, and collateral covenants, not relating to the thing demised, do not bind the assignee; yet no case has been cited, that a covenant for lessee and his assigns, not to assign to a "particular person," would not bind him; and I think it would, for it falls within every rule laid down by Lord Coke, in *Spencer's case*. A covenant to do any thing upon land, "de novo," as to build, though a collateral covenant, binds assignees, if named, and will not bind them, unless named; so here, it relates to the thing, assigns are named, and there is privity; but this covenant is more, because it is the guardian of the thing demised.

Suppose, in a lease of land, a covenant for assigns to set out the tithes in kind, without making any composition or agreement for them with the parson or impropror; this would be a proper covenant, where part is exempt and part not, to prevent an application of payment to the whole: would it not bind the assignee, as a regulation of the manner in which he would have his farm enjoyed? This is nothing more than that covenant inverted: the one is, "you shall not give money; this is, "you shall not take it." The case put is, "you shall pay it in kind;" the present case is, "you shall receive it in kind."

It was said, that by the assignment to a person, not within the restriction, it was totally vanished; and Cro. Jac. 398, *Whitchot v. Fox*, was cited to prove, that if there was a covenant not to alien, except to a brother, and an alienation was made to a brother, the brother might alien to any body else. This is rather a strong case, [353] and certainly repugnant to the intention of the parties, which was to keep the estate in the family of the lessee: but admitting that case to be law, yet it does not apply; for the brother being totally excepted, he takes the assignment exactly in the same manner as if there had been no covenant at all: whereas the covenant here does not restrain the assignment, with an exception of any particular person, but leaves it



open to an assignment by all, subject to such terms as affects the very vital principle of the "thing let" in the hands of the lessee himself.

In the case put, the covenant did not affect the right of assigning to a brother in the hands of the lessee: therefore it could not affect it in the hands of his assignee: but this covenant bound the lessee; and for the reasons and upon the distinctions mentioned, it binds the defendant, his assignee.

We do not think it a mere collateral covenant, unconnected with the tithe; but a covenant materially and essentially tending to preserve the "thing demised," and as such, obligatory on the assignee, and therefore there must be

Judgment for the plaintiff.

### [354] IN THE COMMON PLEAS.

FROGMORTON ON THE DEMISE OF ROBINSON *against* WHARREY. 1770.

[V. 2 Blackstone, 728.]

This was a special case in an action of trespass and ejectment, wherein the plaintiff declared for one messuage, one cottage, twenty acres of land, twenty acres of meadow, and twenty acres of pasture, with the appurtenances, in Hemingbrough otherwise Hembrough, in the county of York.

To this declaration the defendant pleaded the general issue, and thereupon issue was joined.

The cause came on to be tried at the assizes held for the county of York, before the Honourable Mr. Justice Gould; when it appeared in evidence, as follows; that

John Robinson being seised in fee, according to the custom of the manor of Hemingbrough, of the premises in question, which were copyhold, held of the said manor, on the 1st day of August 1720, surrendered the same, according to the custom of the said manor, to the use of Mary Arnall (whom he then intended to marry) and the heirs of their two bodies lawfully to be begotten; and for default of such issue, to the use of the right heirs of the said John Robinson.

The said marriage took effect; and afterwards, to wit, at a Court held for the said manor on the 21st day of October 1720, the said [355] Mary was admitted tenant to the said premises, according to the said surrender, to the use of the said Mary, and the heirs of their two bodies, lawfully to be begotten; and for default of such issue, to the use and behoof of the right heirs of the said John Robinson, according to the custom of the said manor.

The said Mary died in 1735, leaving John, her eldest son, begotten by the said John Robinson, her husband, which son was born in the year 1722.

That the said John Robinson, the son, died in 1745, leaving the lessor of the plaintiff, his only son and heir, born in that year, who was duly admitted tenant to the said premises in the year 1769.

By the custom of the said manor, husbands are entitled for life to the inheritance of their wives, in the nature of tenants by the courtesy, whether the wife is seised before the coverture or afterwards.

John Robinson, the surrenderor, survived his wife, and continued in possession till the year 1746, when he surrendered the estate to the defendant in fee, who was admitted, and had been in possession ever since; and the said John Robinson, the surrenderor, died in 1767.

The said John Robinson, the surrenderor, conceiving himself tenant in tail, under the surrender, and admittance in 1720, did the proper act to bar an estate tail, provided such estate was vested in him, according to the custom of the said manor, previous to the surrender to the defendant Wharrey.

Whereupon a verdict was given for the plaintiff, subject to the opinion of the Court on the following question:

Whether the plaintiff is entitled to recover or not?

[356] And after this case had been twice argued, by Nares and Burland, Serjeants, for the plaintiff, that this was an estate tail in the wife; and by Jephson and Foster, Serjeants, for the defendant, that this was an estate for life in the wife, with a contingent remainder to the heirs of the two bodies of her and her husband;

Lord Chief Justice Wilmut delivered the unanimous opinion of the Court:

It is impossible to read this case, without wishing to construe this limitation in such a manner as to give it an effect in favour of the lessor of the plaintiff.

The settlement was made before the marriage, when a provision for children is the object of both the parents care, but particularly the mother's; and most probably they both thought that the estate was effectually secured to the issue of the marriage, at all events; or at least that the issue could not be defeated but by their joint concurrence.

Unluckily for them, that could not be the consequence even if an estate tail had been vested by this limitation in the wife, 2 Syd. 73, *Harrington v. Smith*; for copyholds, not being within the protection of the 11 Hen. VII. the wife, surviving, might herself have defeated the issue, and carried the estate to the issue of a second husband; but if that legal right would have accompanied such a limitation, it would certainly have come nearer the intention of the settlement, to give the wife an estate tail, though attended with a power of barring, if she survived, than to give the limitation to [357] the issue, which would have had no effect at all in case she died before her husband; and therefore, we have most anxiously endeavoured to discover some solid ground to stand upon, for the giving an existence to this limitation, after the death of the wife, in favour of the issue; but the words and the authorities are too strong for us, and it seems to me to be one of those cases where we cannot do as we wish, without bending the law more than we ought.

And there is one decisive reason against straining the words to give an estate tail, arising from the frame of the surrender. For it must be considered as it stood originally, the instant after it was made; neither the marriage, nor any subsequent event, can vary the construction of it; and if the marriage had never taken place, the wife would have taken the same quantity of estate, as she had after the marriage; and, whatever might have been done in a Court of Equity, a Court of Law could not have controuled the legal operation of the surrender.

The common law, out of that tender regard which, in a variety of cases, it shews for the female sex, has provided a writ, "*causa matrimonii prælocuti*," to fetch back again an estate, made in contemplation of marriage, where it has not taken place; but no such redress is given to a man. Co. Lit. 204. And then see what would be the consequence of giving the wife an estate in special tail, by construing these words to relate only to the heirs of her body by John Robinson to be begotten; she might have barred the reversion in John Robinson, and acquired the whole inheritance of the estate, even in the life-time of the surrenderor; whereas, by considering these words not as words of limitation, but as descriptive of the person to take, and as words of purchase, she could not defeat [358] the surrenderor; but when she had died, the contingent remainder could not have taken place, and the reversion in fee would have fallen into possession: for we take the case in 1 Leo. 101, *Allen and Palmer*, not to be law; and that the reversion remains in the surrenderor, as in the case of a conveyance of a freehold estate, either at the common law, or upon the Statute of Uses. Co. Lit. 22, 6, *Fenwicke and Mitford's case*. Surrender of copyhold, and grant of freehold, must have the same legal operation.

This would certainly have been the consequence of giving the estate in special tail to the wife, on the event of her not having married the surrenderor; and though that was certainly not an event then in their contemplation, but a subsequent marriage; yet we must consider the surrender, and construe it in the same manner as if that event had happened, and the case now before us upon that event.

It has been very properly urged at the Bar, that the will of the donor is to be attended to in creating estates tail; and that the intention must be effectuated if possible: but this will and intention must be taken from the words of the deed.—What are the words? "To the heirs of their two bodies lawfully begotten, and for default of such issue, to the use of the right heir of the said John Robinson;" that is, that nobody shall take this estate, but who is the heir of the body of the husband as well as of the wife. Is the eldest son of the body of the wife, the heir of the body of the husband whilst he is living? Certainly not. And therefore, supposing it an estate tail, qualified and restrained, like the case put in *Page and Hayward*, 2 Salk. 570, of an estate limited to A. and the heirs of her body begotten by a "Searle," or by any particular person of the name of "Searle," the heir of [359] the body of the wife is not so qualified; unless the other part of the qualification meets, or is found in the heir of her body, viz. "heir also of the body of the husband," the qualification is not complete,



the description is not answered. He has only one part of the character which the donor has required; and though it is said, we may construe these words, "heirs of their bodies," to mean "heirs of the body of the wife by the husband begotten," and then the limitation in the event that hath happened will take place,—I say subsequent events are not to influence the construction of the words. What authority have we to controul the plain obvious signification and import of these words? We might be equally warranted to turn them the other way, and to say, "heirs of the body of the husband begotten on the body of the wife," as "heirs of the body of the wife begotten by the husband." When words are doubtful, we may decide the doubt in favour of apparent intention: but, when words are clear, plain, and express, and have a proper operation to check such a consequence as I have mentioned, in case the marriage had not taken effect at all, we can neither go on one side nor the other; but must consider them according to their obvious import, and as describing the "heirs of both their bodies, without inclining more to one than the other: and let the legal consequences of that construction be what they will, we cannot help it. The owner has said, "no child shall have this estate after my wife's death, if I am living, for no children can be heirs of my body, whilst I live." But whether he saw that legal consequence or not, we cannot controul the rule of law, "*nemo est heres viventis*," without shaking property to its foundations.

[360] It is not at all improbable, but he thought the limitation might wait, and not execute in any body till he died, as he was to be tenant of it by the courtesy; or he might think it as right to leave the issue in his power, if he survived, as to put them into his wife's power, if she survived: but whatever their intentions were (which is matter of conjecture) we must not reject one part of the description, and construe the words to mean "heirs of her body only," when the donor has said, he gives it to the "heirs of the bodies of both;" and they may be different persons. For suppose two sons at the death of the wife, the eldest dies without issue, in the life of the father; then the father dies, the youngest son is the heir of the body of the father, and the mother also; the eldest son, at the death of the mother, has one part of the description; the youngest, at the death of the father, has both. But we do not think it a "qualified estate tail," or that any estate tail is vested by these words in the wife, because no such estate, as is here described, can descend from her. Where an estate is limited to husband and wife, and the heirs of their two bodies, there is an estate tail vested in the husband, which descends. But when the estate is limited to the wife, and the heirs of the bodies of the husband and wife, the heirs of the body of the husband cannot be words of limitation; because there is no precedent estate given to be limited, and then these words, "heirs of the body of the husband," must be words of purchase: as if an estate was given to a woman and the heirs of the body of the husband, on the wife to be begotten, they must be words of purchase; because the words of entail do not apply to the wife. An estate tail cannot descend from her to the heirs of the [361] body of another person: and therefore no such estate can possibly be ingrafted upon her. They must be words of purchase, or can have no operation at all; and there is no difference made, as to the operation of these words, by mixing or joining them with "the heirs of the body of the wife," to whom an estate is limited; for the description of the persons to take being intire, both qualities are necessary to centre in one and the same person.

These words, which would be words of limitation, if applied solely to the wife, must be turned into words of purchase when applied to both, or they can have no effect at all: the company they keep necessitates such a construction, to give the intention of the grantor a chance of being effectuated.

The case in Littleton, sect. 352, as put by Littleton in the first editions, by which the common printed editions should be corrected, plays great light upon the question.

In the common editions, the case is put, that if a feoffment be made upon condition that the feoffee shall give the land to the feoffor and his wife, to have and to hold to them and to the heirs of their two bodies engendered, and for default of such issue, remainder to the heirs of the feoffor; if the husband die before any estate tail is made, living the wife, the estate shall be made by the feoffee, "*cy pres*;" that is, to the wife for life without impeachment of waste, remainder to the heirs of the body of her husband "on her" begotten, remainder to the right heirs of the husband. Now as stated here, it is limited to the heirs of the body of the husband, "on the wife begotten;" and as he was dead, it would be a vested remainder, and might

warrant the application of these words to one instead of both : but in the old editions of Lettou and Mack-[362]-linia, and the Roan edition (both of which my brother Blackstone is in possession of) it is limited to the heirs of the body of her husband "and her" engendered ; not a vested estate tail, but a contingent remainder to the heirs of both their bodies, as in this case.

And the cases in Dyer, 64, 99, in *Lane and Pannell*, 1 Rolles Rep. 238, 317, and 438, and in *Gossage and Taylor*, as stated by the manuscript and the record, are very material authorities to shew that where a limitation is to the heirs of the body of the husband and wife, and there is no estate limited to the husband, they do not give any estate tail to the wife to whom an estate is limited ; but are words of purchase (a) ; the only difference between those cases and this is, that the estate is there limited to the wife for life, in express words, and after her decease to the heirs of the body of the [363] husband and wife begotten : whereas the estate is limited here, to the wife and the heirs of their bodies begotten : at first view, it looks more like an intentional contingency in one case than the other ; but upon legal principles they must have the same effect ; for an estate limited to A. for life, and after his decease to the heirs of his body, have exactly the same legal operation as to A. and the heirs of his body ; and therefore, if they will not give an estate tail to the first taker in one case, they will not in the other ; and the reason applies equally to both,—no such entail can be created ; an estate cannot be made to descend to the heirs of the body of a person who takes nothing ; and therefore, when the husband can take nothing, as in the case put by Littleton, the wife's estate, which would here have been an estate tail, is turned into an estate for life, without impeachment of waste, with a contingent remainder to their issue. We are all therefore of opinion that

Judgment of nonsuit must be entered.

#### [364] IN THE EXCHEQUER CHAMBER.

CATHARINE LOW, Plaintiff ; NEWSOME PEERS, Defendant. In Error. 1770.

[S. C. 4 Burr. 2225. Referred to, *Hurst v. Hurst*, 1849, 4 Ex. 579 ; *Leigh v. Lillie*, 1860, 6 H. & N. 169 ; *Newton v. Marsden*, 1862, 2 J. & H. 364 ; *Soothill Upper Urban Council v. Wakefield Rural Council* [1905], 2 Ch. 534.]

Pleas in the Exchequer Chamber, at Westminster, before Sir John Eardley Wilmot, Knight, Chief Justice of the Common Bench ; Sir Thomas Parker, Knight, Chief Baron of the Exchequer ; Sir Edward Clive, Knight, the Honourable Henry Bathurst and Sir Henry Gould, Knight, the three other Justices of the Common Bench ; and also before Sir Sydney Stafford Smythe, Knight, Sir Richard Adams, Knight, and George Perrott, Esquire, the three other Barons of the Exchequer, on

(a) This case is in Styles's Reports, 325, which, from a manuscript of Lord Hale, in possession of Mr. Justice Bathurst, appears to have been first determined in Hil. 1651 ; and this accounts for some expressions of Chief Justice Rolle, in the case in Styles, which was in Pasch. 1652.

The case, in the manuscript, is :

That Sir Richard Frank levied a fine of the manor of Bottington, in Essex, to the use of himself during the joint lives of himself and his son Leventhorpe Frank ; and after the decease of either of them, to the use of Susan Cotell, for her life, and after her decease, to the use of the issue male of the said Susan and Leventhorpe, and in default of such issue, to the use of the heir to be begotten upon the body of Susan by the said Leventhorpe ; and in default of such issue, to the use of the right heir of the said Richard. The marriage was had ; Susan died, leaving five daughters and no son. Richard died, leaving Leventhorpe his son and heir, who is stated by the special verdict to be then living, and who entered and demised to the defendant. The plaintiff claims under a demise from the daughter. Resolved, 1st. If husband joint tenant, an estate tail in both, v. Litt. Sec. 28 (a). 2d. That neither husband nor wife, had an estate tail ; not husband, because nothing is given to him ; nor the wife, because though she take an estate for life, yet the heirs are not applied to her body.

3d. That it is a contingent remainder to the heirs of both their bodies.

(a) v. Har. Co. Litt. p. 26 a.



Monday the 14th day of November, in the ninth year of the reign of King George the Third, &c.

Our Sovereign Lord the King hath sent to his right trusty and well beloved William Lord Mansfield, His Majesty's Chief Justice appointed to hold pleas before the King himself, his writ closed in these words, (that is to say): George the Third, &c. To our right trusty and well-beloved William Lord Mansfield, our Chief Justice, appointed to hold pleas before us, greeting: whereas by a statute made, &c. the 23d November, in the 27th Elizabeth, late Queen of England, it was by the authority aforesaid (amongst other things) enacted, that when any judg-[365]-ment, at any time thereafter, should be given in the Court of King's Bench, in any suit or action of debt, detinue, covenant, account, action upon the case, ejectment, or trespass, first commenced or to be commenced there, other than such only where we should be a party, the plaintiff or the defendant against whom such judgment may be given, may at his election sue forth out of the Court of Chancery, a special writ of error, to be devised in the said Court of Chancery, directed to the Chief Justice of the said Court of King's Bench for the time being, commanding him to cause the record, and all things touching the said judgment, to be brought before the Justices of the Common Bench, and the Barons of the Exchequer, into the Exchequer Chamber; which said Justices of the Common Bench, and Barons of the Exchequer, or six of them at the least, by virtue of the said Act, shall thereupon have full power and authority to examine all such errors as shall be assigned or found in or upon such judgment, and thereupon to reverse or affirm the said judgment as the law shall require, other than for errors to be assigned for or concerning the jurisdiction of the said Court of King's Bench, or any want of any form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever; and that after the said judgment shall be affirmed or reversed, the said record and all things touching the same shall be removed and brought back into the said Court of King's Bench, that such further proceedings may be made thereupon, as well for execution as otherwise shall appertain, as in the said statute is more fully contained: and forasmuch as in the record and process, as also in giving of judgment, in a plaint which was before us by a bill, between Catherine Low and Newsome Peers, of a plea of breach of covenant, as it is said, [366] manifest error hath intervened, to the great damage of the said Catherine, as by her complaint we are informed, which said error no ways toucheth us or the jurisdiction of the said Court of King's Bench, or any want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever, as we are informed: we therefore willing that the said error (if any be) be duly amended, according to the form of the said statute, and full and speedy justice done to the said parties in this behalf, do command you, that if judgment be given thereupon, you cause the record and process aforesaid, with all things touching the same, to come before our said Justices of the Common Bench, and Barons of our said Exchequer, into our said Exchequer Chamber, on Monday, the 14th day of November next ensuing, that the said justices and Barons, viewing and examining the record and process aforesaid, may cause further to be done thereupon for amending the said error as of right, and according to the form of the said statute, shall be meet to be done. Witness ourself at Westminster, the 22d June, in the eighth year of our reign. BROWNE.

[The answer of William Lord Mansfield, Chief Justice within named:]

The record and process of the plaintiff within mentioned, with all things touching the same, to the justices and Barons within specified, at the day and place within contained, I certify, in a certain schedule to the writ annexed, as I am within commanded.

MANSFIELD.

[367] Pleas, &c.

Catherine Low, complains of Newsome Peers, of a plea of a breach of covenant, for that whereas, on the 25th July 1757, at London, in the parish of Saint Mary-le-Bow, &c. the plaintiff, at the defendant's request, agreed to marry him, and thereupon, and in consideration thereof, the defendant, by deed of the 25th July 1757, promised the plaintiff, that he would not marry with any person besides herself, and if he should marry with any other person, then he agreed to pay her one thousand pounds, within three months after his marriage with any other person; and that she hath

remained sole and unmarried, and was always willing to marry the said Newsome, whilst he continued sole and unmarried; and that the said Newsome did on the 30th April 1767, marry another person, namely, Elizabeth Gardiner, &c.; and that the said Newsome did not (though often requested) pay to the said Catherine the said one thousand pounds.

There was also another count to the following purport, viz.: and whereas also the said Newsome, on the said 25th July 1757, at London aforesaid, in the parish, &c. aforesaid, being then also single and unmarried, by his certain other deed, then and there made, and which said deed, sealed with the seal of the said Newsome, the said Catherine now brings here into Court, the date whereof is the same day and year aforesaid, did promise to the said Catherine, she being then sole and unmarried, that he would not marry with any other person besides herself, the said Catherine; and if he should marry with any other, then he by the said deed, did agree to pay to her the said Catherine £1000, within three months after such marriage with any other person: and the said Catherine in fact [368] saith, that from the time of making of the said deed, hitherto she hath remained and yet is sole and unmarried, and was always ready and willing to marry and take to husband the said Newsome, whilst he continued sole and unmarried, whereof the said Newsome during all that time had notice. And the said Catherine, further in fact saith, that the said Newsome died after the making the said last-mentioned deed (that is to say) on the 30th April 1767, marry another person than the said Catherine, namely, one Elizabeth Gardiner, yet the said Newsome (although often requested) did not within three months after such marriage, or at any other time, pay to the said Catherine £1000, or any part thereof, but therein wholly failed and made default, contrary to the form and effect of the said covenant of the said Newsome so made in that behalf as aforesaid; and so the said Catherine saith, that the said Newsome (although often requested) hath not kept with her the covenant so made between them as aforesaid, but hath broken the same, and to keep the same with the said Catherine, he the said Newsome hath hitherto altogether refused, and still doth refuse; whereupon the said Catherine saith, she is injured, and hath sustained damage to the value of £2000, and therefore she brings suit, &c.

To both which counts the defendant pleaded the general issue, and thereupon issue was joined.

This cause being tried before Lord Mansfield, the jury find that the said writing in the said first count of the said declaration mentioned, is "not the deed" of the said Newsome, mentioned in manner and form aforesaid, as the said Newsome hath in his said plea within alledged; and the jurors aforesaid, upon their oath aforesaid, further say, that as to the second issue within joined be-[369]-tween the parties, the said writing in the said second count of the said declaration mentioned, "is the deed" of him the said Newsome, as the said Catherine hath within alledged; and they assess the damages of the said Catherine by reason of the premises, besides her costs and charges by her laid out and expended about her suit in this behalf, to £1000, and for those costs and charges to 40s.

This judgment was afterwards arrested in the Court of King's Bench, from whence a writ of error was brought into the Exchequer Chamber; and after argument,

Lord Chief Justice Wilmot delivered the unanimous opinion of the Court.

After stating the proceedings, he said,

There are two questions:

The 1st question is, whether a covenant not to marry any person but the covenantee, under the penalty of £1000, without any consideration whatever to support it, is valid in point of law, and whether an action will lie to recover the penalty?

The counsel at the Bar, who argued this case for the plaintiff with great ability, admitted that the civil law had a violent aversion to all restraints upon marriage; and that the Court of Chancery followed the rule of the civil law, in cases where they exercised a concurrent jurisdiction with Civil Law Courts; but contended that the common law had not adopted that aversion, and reprobated all restraints upon matrimony, as the civil law did: and they mentioned the case of ecclesiastics, and Masters in Chancery formerly, and fellows of colleges; and that by particular modes and provi [370]-sions marriage may be checked; as by limiting estates while grantees remain sole and unmarried; or agreeing to pay a sum of money upon marriage, which will have the same effect as agreeing not to marry under a penalty; and this kind of



reasoning was very skilfully introduced, in order to divide this covenant : and, supposing the first part of the deed, not to marry, to be illegal, yet that the second part of it might operate as a promise to pay £1000 upon marriage, which is legal ; and many cases were cited to shew the difference between bonds void by statute and at the common law ; and that one part of a condition may be good and an action maintainable for a breach of it, though another part is bad. It is not necessary to state or consider those cases, for the fact does not warrant the application of them, because this deed contains an entire agreement which must be taken altogether ; and there is not the least pretence to divide and separate it into distinct and different parts. The penalty waits upon the contract, and is to secure the performance of it. The covenant is the law, and the penalty the sanction of it ; and therefore the question first put is the true question, viz. “whether a covenant not to marry any body except the covenantee under a penalty,” induces such a valid legal obligation, that the Courts of Common Law will sustain an action for the breach of it ; and as there are no cases directly in point, it may not be improper to mention the reasons particularly which determine us to think that this covenant is void, and that no Court of Justice ought to entertain an action for the violation of it.

Upon the first view of this question, the maxim, cited at the Bar, of “*volenti non fit injuria*,” seems to favour such a covenant : that every man has a right, “*disponere de suo jure* ;” and as the law [371] does not oblige any body to marry, but leaves a free agency in that respect to every member of this community, it is not an agreement to omit what the law commands ; but an agreement to omit, what the law leaves to every one’s own choice to omit if he pleases. And so far as respects obedience to the positive law of this kingdom, the argument is unanswerable : but, besides legal obligations, every member of civil society is under a variety of moral obligations, which municipal laws do not enforce, but which the law of Nature, which is the law of God, calls upon him to perform. It would be endless to enumerate the duties which are the objects of moral obligations, both in a state of society and out of it ; gratitude, charity, and all parental and filial duties, beyond mere maintenance ; friendship, beneficence in all its various branches, and many more, which might be named, are duties of perpetual obligation : and I cannot name a greater than matrimony, being one of the first commands given by God to mankind after the Creation, repeated again after the Deluge, and ever since echoed, by the voice of Nature, to all mankind. For the precept of multiplication has been always expounded, by the civilized part of the world, to mean multiplication by the medium of matrimony, and not by promiscuous copulation ; and there cannot be a duty of greater importance to society, because it not only strengthens, preserves, and perpetuates it, but the peace, order, and decency of society, depend upon protecting and encouraging it.

The point therefore to be considered, is, whether a covenant to omit such a duty, ought to be enforced “*in foro civili*.”

The writers upon the law of Nature, consider contracts, to omit such duties, as void ; nay, they consider an oath to perform them as not obligatory. Grotius, 2 lib. cap. 13, sect. 67. “*Ut valeat Jura-[372]-mentum, oportet obligatio sit licita ; quare nullas vires habebit jurata promissio de re illicita, aut naturaliter aut divina interdictione aut etiam humana ; \* \* \* imo etiam si res que promittitur, non sit illicita, sed majus bonum morale impediens : sic quoque non valebit Jus-jurandum ; quia, scilicet profectum in bono, Deo debemus, ita ut ejus libertatem eripere nobis ipsis non valeamus.*”

A covenant of this kind does not only hinder a greater moral and social good, it does not only interfere and check that “*profectum in bono*,” which we owe to God and our country, but it tends to evil and to the promoting of licentiousness ; it tends to depopulation, the greatest of all political sins : it is a contract, “*vergens ad publicam perniciem*,” and therefore has a moral turpitude in it.

Will the law of this country, the perfection of human reason, enforce such a contract ? Is a covenant to omit moral duties, which, for the exercise of our virtues, are left to our free choice, the proper subject-matter of an action ?

Laws are the will of the whole community, and one great part of their function is to enforce the performance of contracts ; but could it even be the will of any community to give an effect to agreements subversive of any moral or social duty ; and, instead of meliorating and perfecting human nature, countenance and sanctify a contract founded in the corruption and depravation of it ?

And it is much worse than a covenant of perpetual chastity, which extends to all unlawful as well as lawful intercourse: for this covenant only interdicts the innocent gratification of a natural appetite, and leaves the party at liberty to a criminal indulgence of it. To entertain an action for the breach of such contracts, would be setting the laws of God and man at variance with one another: it would be [373] making the common law counteract its own favourite dominant principle, "*Salus populi suprema lex.*"

The increase of the people in such a commercial state as ours, where our foreign dominions would take, often times, more than we have to send them, conduces most materially to the strength and prosperity, and consequently to the safety, of the people; and reason, history, and observation tell us, that such an increase is best secured by the medium of matrimony, which is therefore very truly called, the seminary of mankind.

Courts of Justice must execute the laws as they find them; but if there is no positive written law, nor any adjudged cases, compelling them to apply their power and authority in support of such a contract; as the law stands neuter in respect of matrimony, and many other moral duties, and leaves it optional to mankind whether they will perform them or not, we are for leaving the performance of contracts to omit them equally optional.

It is sufficient that the law leaves matrimony to every man's free choice, and does not punish celibacy; but to effectuate a contract for the continuing in such a state, is totally inconsistent with the ideas we have of the proper functions of a Court of Justice. Activity in such a case, seems to be a profanation of justice, and neutrality the purest and most refined exertion of it.

I have dwelt a little upon this argument, because reasons drawn from states, where marriage was a positive duty by the law of the State, do not apply to this case, where it is not so: with the Jews, Greeks, and Romans it was; and therefore contracts of this kind, with them, must be so far from being executed by them, that they must have been objects of punishment: but we disclaim all arguments from those [374] laws, and therefore we mean to bottom this judgment upon the law of God, the principles of reason, morality, and the common law, independent of any other municipal law whatever.

I will consider how the law of this country treats restraints upon marriage; and though no case can be found "*in specie*" upon this question, yet a principle is to be found, which directly applies to and governs it.

The case of ecclesiastics, whether secular or religious, was a weed of the canon law, erroneously tolerated by the common law, and totally extirpated at the Reformation.

The case of the Six Clerks in Chancery, is recited by the Act to have been a custom, not grounded upon any law at all.

The case of the fellows of colleges depends upon the will of the founder: there is a succession in colleges; it is only a temporary restraint on a few in seminaries of learning, which are not proper places for the reception of wives and children: and the loss which the public receives from the celibacy of a few, is most amply compensated to them by the better accommodating those seminaries to the purposes of education.

The case of customs of manors, and limitations of estates during celibacy, are modifications of property; and though they do invite the proprietors of such estates to abstain from matrimony, yet they do not profess and avow that intention: as an estate given upon condition, or an express agreement, not to marry under a forfeiture, does; where it figures in the shape of a penalty, and discloses a premeditated design to check it.

But whatsoever weight there may be in the distinction between a limitation and a condition, it has been long settled and so often judicially recognized, that it ought not now to be disturbed; and it is observable, that it is not a subtlety of our law only, for the civil law, in the passage mentioned at the Bar by Mr. Cust, out of Swinburn, makes the same distinction, and mentions the reason for it, which I have given. 4th part, ch. 12, sect. 6, 19.

"Moreover, if the testator do bequeath any legacy to a woman conditionally, if she do not marry, willing her to restore the same to another, if she do marry: albeit, in this case, the woman do marry, she may obtain the legacy, neither is she bound to restore the same: unless it were the meaning of the testator, not to forbid marriage, but to grant the use of the thing bequeathed until the legatary did marry."



"The ninth limitation is, when the prohibition of marriage is not made conditionally by this word 'if'; as 'I make thee my executor,' if 'thou dost not marry,' but by other words, or adverbs of time: as when the testator willeth that his daughter, or wife, shall be executrix, or shall have the use of his goods," so long "as she shall remain unmarried; agreeable hereunto are the laws of this realm of England, wherein there is a case that one of the Kings of this realm did grant to his sister the manor of D. so long as she should continue unmarried; and this was admitted to be a good limitation in the law, but not a condition." Edw. VI. to his sister Mary, according to Hen. VIII.th's will. (Dyer, 141.)

The common law, therefore, in allowing such limitations, does not discover any more favour to restraints upon matrimony than the civil law did; both allowed a modus as qualifying and limiting the duration of property, but rejected a condition.

[376] And it is called a "modus" by the writers upon that law, in contradistinction to a condition; and it was certainly considered, by both laws, like any collateral determination of the estate, or qualification of the donation: but a covenant, not to marry under a penalty, stands totally unconnected with any gift or estate at all; and it is not "lucrum cessans," as in the case of a limitation of an estate, but "damnum datum" and punishment. It is laying a mulct upon himself for doing what ancient policy mulcted him for not doing; the case put, of a note to pay a sum of money upon marriage, is, upon the face of the note, only a contingent time of payment. Some consideration must be proved, and if, under the pretence and mask of a fictitious consideration, it should appear to be given as a penalty to restrict the giver of the note from marrying, without any reasonable ground, foundation, or consideration for giving it; I should be apt to say as Papinian did, "quod in fraudem legis, ad impediendas nuptias adscriptum est, nullam vim habet." \*

A case was cited out of 1 Rolles Abridg. 418, that if a man leases for life, upon condition that if the lessee shall marry without licence he shall re-enter, it is a good condition. The case is taken out of the Year Book of 43 Edward III. 6 a. The case itself is upon a custom to pay a fine by the tenants of a manor, holding in villenage, on the marriage of their daughters, and an issue was taken on the custom: but the passage cited, and turned into Rolles, is only, in the Year Book, a dictum of Kirton, a Judge; and he adds, "yet it is a condition against the common law;" so that, as far as it goes, it is an authority in point, condemning such restraints. *Baker and White*, 2 Ver. 215. A bond from a widow, not to marry again, was [377] decreed to be delivered up, though there was a counter-bond to pay a sum of money to her executors, if she did not.

All the cases cited out of the books, where devises of either real or personal estate, made "upon condition of not marrying without consent, with a devise over on non-performance of the condition," are held to be good, are so far from being prohibitions of marriage, that they contemplate and have a marriage in their view, under a proper direction; and though the liberty of marriage is to be favoured, yet the liberty of disposing of property as the owner pleases, is likewise to be supported; and by considering these provisions in deeds or wills, not as prohibitions, but as wise regulations of marriage, parental authority, and a free exertion of the rights which property gives, are duly maintained, 1 Mod. 308; and the reason given by Hale, for supporting such conditional limitations, is, "because the party is not thereby bound from marriage." In the case of *Harvey and Aston*, Comyns Chief Baron, 729, lays it down, "if a portion be given, on consideration that a daughter should never marry, it should be rejected as repugnant to the original institution of the creation of mankind;" and a covenant, not to marry any body except a person who is not obliged to marry, is to every purpose the same as a general restraint; and then the principle of public utility interposes, and forbids the sustaining an action for the infraction of it; and what is said in 2 Shower, 351, *The Company of Taylors against Clarke*, seems to be the substance of every thing which can be said on this subject, viz.

"Whatsoever a man may lawfully forbear, that he may oblige himself against; except where a third person is wronged, or the public is prejudiced by it."

[378] But the principle of the judgments upon bonds to restrain trade generally, or in a particular place, without consideration, directly applies to the case and rules it; for every man is at liberty to follow his trade or let it alone. He cannot be compelled

\* D. xxxv. De Condit. & Demons. § 79.

to follow it: he may be obliged to maintain himself, if able, but quite at liberty as to the trade or employment, or kind of labour.

*Mitchell and Reynolds*, 1 Peere Will. 181, where the restraint is confined to a particular place, for a particular time, and upon consideration, the bond was held good, because the interest of the public is not at all concerned. The indignation of a Judge in Hen. V.th's time,<sup>(a)</sup> at such a bond, shewed it was criminal in his apprehension. And surely the interest of the country is more materially concerned, and more fatally affected by this covenant than by the other.

I see great temptations to contracts of this kind, and the danger of an abusive application of them. Many virtuous young ladies, from filial duty, from a regard to their parents, from their dependency upon them, and expectations of fortunes from them, may not choose to enter into contracts of marriage. Young gentlemen, in the hands of cunning artful women, may have firmness enough to resist promises of marriage; but both ladies and gentlemen, when pressed to marry, and apprehensions are expressed of their marrying some other, may, and frequently are, induced to promise, not to marry any other persons but the objects of their present passion; and if the law should not rescind such engagements, they would become prisoners for life, at the will of most inexorable jailors,—disappointed lovers.

It is the duty of all Courts of Justice to keep their eye steadily upon the interest of the public, even in the administration of commutative justice; and when they find an action is founded upon a [379] claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance in “*foro civili*.” Upon this principle, turning prosecutions for felony into civil actions for the things stolen, bonds and agreements not to prosecute felonies; and many other cases might be cited, which are all governed by that super-eminent and noble principle, the care and protection of the whole community. And upon that principle, we think this covenant, not to marry, unsupported by any consideration, is void.

The 2d question is, whether there is any consideration, appearing upon the face of the deed; or any foundation for presuming such a consideration, as will substantiate this covenant, and give a binding property to it?

It was contended, that a covenant to marry no other person but the plaintiff, was a covenant to marry the plaintiff, and that it was no more than what was implied in every marriage contract: and it is certain, that a covenant to marry the covenantee, doth carry along with it a covenant not to marry any one else, “*expressio unius est exclusio alterius* ;” but the converse of the proposition is not true; for a promise to marry no person but the covenantee, is not a promise to marry the covenantee. It is not as negative pregnant of an affirmative promise, but it is a mere exception out of a restraint, which would otherwise have been general; and if the person excepted had been a stranger, and not the covenantee, there could not have been a shadow of doubt upon the construction, and yet the exception must have the same effect in both; and though it was very properly argued, that deeds are to be construed according to the intention of the parties, yet that intention must not be the child of fancy and conjecture, but be collected from the deed itself.

[380] We are to construe contracts, which have been made, liberally, to reach the intention of the contracting parties; but we are not to twist and turn exceptions out of contracts into contracts, and make agreements for parties, which they have not made for themselves.

It has been said, that if it is not a promise to marry her, it is a delusive promise, and the plaintiff is cheated, because she must have considered it as a promise to marry her. I see no delusion at all in it: the words are plain and clear, and it is a decisive evidence to me, that the plaintiff did not mean to take, nor the defendant to give, a promise of marriage; because, if they had had any such meaning, they would explicitly have said so. Why take such a circuit to express what five words would have expressed? Why substitute the effect and consequence of a promise of marriage, in the place of the express promise itself?

Reciprocal promises of marriage were not their intention; but a most unequal agreement, by which the man is to be bound, and the woman to be left in a state of perfect liberty as she was before. I am now speaking of the agreement as meant and understood by the parties: for however the law may, for very wise purposes, controul

(a) Vide Mr. Cox's note, 1 Peere Will. p. 193.



such an agreement, yet, taking it as they understood it, the imposition is upon the defendant, and not upon the plaintiff; for she is left quite a free agent, and may marry whom she pleases with impunity; and at the same time, the defendant can marry nobody but her, without paying her £1000. She walks through life with him as a captive in her hand.

He could maintain no action against her on this deed, for not marrying him. In "assumpsit," mutual promises must be proved; if by deed, they must be contained in the deed.

[381] It was argued, that if the defendant Peers had tendered himself in marriage to the plaintiff, and she had refused, that it would have been a discharge, or at least sufficient to excuse the non-performance of the covenant; and two cases were cited, *Holcroft and Dickinson*, Carter, 233, and *Cross and Hunt*, Carthew, 99. In these cases there were mutual promises of marriage; but in this case there are no mutual promises of marriage, and therefore a tender and refusal in this case, where she was not obliged to marry him, and he was not obliged to marry her, could not operate in avoidance of his covenant, nor as an excuse for the non-performance of it; but if there were any doubt, the plaintiff herself hath resolved it; for in the count upon which she has recovered, she only says, she was ready and willing to have married the defendant, of which he had notice; but does not declare upon the deed, as containing any intrinsic promise of that kind, or as founded upon any extrinsic promise of marriage from her. She considers, and declares upon, the deed, according to its natural, obvious signification, that is, a covenant not to marry any other person but her, without an intimation of any other covenant whatsoever in the deed.

If there was no covenant to be found in the deed from the defendant to marry her, nor any covenant from the plaintiff to marry the defendant, or even not to marry any other person; the question then is, whether a consideration to support a void deed is to be presumed, or, if it is not to be averred and proved? It was argued, and Plowden, 308, cited, that the law, from the deliberation and solemnity which accompanies the execution of a deed, presumes the consideration, and delivers the obligee from the necessity of proving it, which must be done in actions upon simple contracts: that doctrine [382] is right, but it applies only to cases where the deed is good upon the face of it. There the will of the party, who makes the deed, is a sufficient consideration; as Plowden says, "because promises by words, and parole contracts, escape often from men lightly, easily, and without much attention and deliberation, the law has provided that they shall not bind, unless there is a consideration." The will of the maker of the deed shall be a decisive evidence of the will of the party who executes it; but if that will encounters the interest of the public, the deed is condemned, not because the deed doth not evidence the will of the maker, but because it evidences a will which the law controuls and condemns; and I know of no principle or case, where a consideration has been presumed to support a deed which is void upon the face of it. The apparent consideration must be taken to be the only consideration, till the contrary is proved. If a presumption of consideration, without proof, was admissible, no deed could be condemned for its apparent illegality.

But it was argued, that the defendant, to oust the presumption of a promise from the plaintiff to marry the defendant, should have pleaded there was no promise of marriage from the plaintiff, and tendered an issue upon it.

If the deed had been good upon the face of it, it would have been incumbent upon the defendant to have pleaded the fact which had avoided it; but it is contrary to all rules of pleading and common sense, for the defendant to introduce a fact to support the plaintiff's defective declaration.

If such a deed is to be propped and bolstered up by averments, it is incumbent upon the party, who would support the deed, to make them, and not upon the defendant who contends to avoid it: and [383] a plea offering an issue, that there was no such promise, would be bad, because it would be traversing a fact which is not alledged.

But it is objected there is a fact alledged in the declaration, which might have been traversed, and not being traversed, must be taken to be true, and that the deed is legitimated by it; viz. "that she was always ready and willing to marry and take the defendant to husband, whilst he continued unmarried;" but the plaintiff being ready and willing to marry the defendant, (supposing it to be a traversable matter,)

will not have a retrospective influence, and vary the nature of the covenant in its original creation.

If it were void when executed, no subsequent consideration can animate it, and give it a legal existence; for the plaintiff being ready and willing to marry the defendant, does not prove a promise to marry him anterior to the deed, or concomitant with it, which is the point and gist of this question; and therefore admitting that fact to be true, nay, admitting it was a subsequent promise to marry him, it cannot give a being to the original deed.

But it is said, the plaintiff's acceptance of the deed, is an evidence of a counter-promise; and that, in practice, out of regard to the modesty of the sex, a very little, perhaps silence alone, is sufficient to prove the woman's assent; but in those cases, a promise of marriage on the man's side is fully proved; and so is the case of *Cross and Hunt* in *Carthew*; there was an acknowledgment under his hand; whereas here is no promise of marriage on the man's side at all, and therefore it would be most absurd to presume a counter-promise, where there is no promise on the other side: and the acceptance is really nothing more than evidence of assent to the terms expressed in that deed; and if there had been any similar deed containing a covenant from the plaintiff, "eiusdem generis" with the covenant upon which this action is founded, it ought to have been averred and proved; and without such a mutual obligation, as Lord Hardwicke said in *Woodhouse and Shipley*, 2 Atk. 535, there is no colour to support it; and we are no more at liberty to presume a good consideration to support a deed, void upon the face of it, than to presume a bad consideration, to shew the nullity of the deed that is good upon the face of it; they must be equally introduced by averment, and proved in both. In the case of *Chesman and Nainby*, 2 Lord Raymond, 1456, 2 Strange, 739, the bond was held to be good, because being only to restrain trade in a particular place, and for a valuable consideration appearing upon the face of the bond; but if that had not appeared, and it had not been averred, it had been void; for a bond to restrain in a particular place, without consideration, is equally bad with a bond of general restraint; and if this were a case of presumption, which it is not, the record in this case absolutely forbids any presumption of a promise of marriage by the plaintiff; for upon the first count, which states the plaintiff's promise of marriage to the defendant, as the consideration of a deed, "in totidem verbis," the jury have found for the defendant; so that it appears judicially to us, that there was no such promise as we are now desired to presume; and therefore the verdict is so far from furnishing any presumption of such a proof, that it is decisive against such a presumption: but if the count, on which the verdict is taken, had been the only count in the declaration, there would have been no foundation, from the verdict, to presume that such a consideration was proved: for the extrinsic collateral consideration, not being alledged, could not have been given in evidence in this count, and [385] therefore the verdict, confining it to this count only, can furnish no such intendment.

The plaintiff was apprized of the defect, and therefore laid the promise of marriage in the first count, but was not able to prove it. But as the two counts are to be considered distinctly, and as if there had been two distinct deeds, we lay no great stress on the verdict upon the first count.

As the deed is void on the face of it, and there is no intrinsic consideration, nor any alledged in the second count; we are all unanimously of opinion, that the judgment is right, and must be affirmed, and therefore

Let it be affirmed.

#### [386] IN CHANCERY.

The Great Seal in Commission. Lords Commissioners, Lord Chief Justice Willes, Sir Sydney Stafford Smythe, Sir John Eardley Wilmot.

GEORGE SAYER, Doctor in Divinity, Plaintiff; WILLIAM MASTERMAN and ELIZABETH SAYER, an Infant, by her Guardian, Defendants. June 1757. Vide Ambler 344.

This (a) was a bill brought by the plaintiff to compel the defendant to complete

(a) This is the only case in this volume, which is not printed from Sir Eardley's own notes; but being a case of importance, and not fully reported in Ambler, it is inserted here.



a purchase pursuant to articles entered into for that purpose. The defendant submitted to perform this agreement, provided a good title could be made to the lands in question by the plaintiff; and it came before the Court on this case.

Exton Sayer, being seised in fee, by will, dated 26th of October 1730, all of his own hand-writing, devised, inter alia, as follows, viz. "In case I die not leaving issue, I do further give and de-[387]-vise, after the death of my wife, all my estates or farms at Tolby, Stapleton, and Pepperfield, in the county of York, to my brother Everard Sayer, during the term of his natural life, with a power for my said brother to make a jointure on any woman he shall marry: and after his decease, to such child or children as shall lawfully be begotten by him, the males however to be preferred before the females, and they to succeed according to their births: and in trust to preserve contingent remainders from being destroyed during the life of the said Everard Sayer, I do give the said estates and farms to my friend Dr. Thomas Rundle: and after the decease of my said brother, and on failure of issue as aforesaid, I do give the said several estates and farms to my brother George Sayer, and the heirs of his body, the males having preference as aforesaid, and succeeding according to their births; and to preserve the contingent remainders from being barred during the life of the said George, I give the same to the said Dr. Rundle: and on failure of issue of the said George Sayer, I give the said estates and farms to my niece Mary Crisp, and the heirs of her body; and on failure of issue of the said Mary Crisp, remainder to my own right heirs: and after, I devise to my brother George Sayer, all my estate, &c. at D. whether leasehold, copyhold, or freehold, not before devised, during the term of his natural life, and to the heirs of his body, the males having preference according to their respective births; and to preserve the contingent remainders from being defeated during the life of the said George, I give the same to Dr. Rundle in trust; and on failure of issue of the said George, I give to my brother Everard Sayer the same, and to the heirs of his body, [388] in order and preference aforesaid, with a power to make a jointure and leases for twenty-one years, at the usual rent, to George and Everard respectively; and to preserve the contingent remainders from being defeated, I likewise give the same to the said Dr. Rundle, during the life of my said brother Everard; and after his decease, without issue, the remainder to Mary Crisp, and the heirs of her body," remainder in fee to the right heirs of the testator.

There was this clause in the will, "my pictures to my said brother George the use of, during his life, and after his decease, in the manner as it is entailed above."

Everard Sayer died in 1731, without issue; Dr. Thomas Rundle was also deceased, and Mary Crisp was dead without issue; George Sayer articted for the sale of the estate included in the first devise; and the question was, whether by the words of this will, George Sayer took an estate for life or in tail.

Mr. Wilbraham and Mr. Clark argued for plaintiff, that this was an estate tail. That this devise was of a legal estate, and in proper technical words, "heirs of the body," which always carry an estate tail. That the testator's intention must be agreeable to the rules of law; and though he may design to give only an estate for life, yet if the words will carry an estate tail, the Court will put that construction upon them, as in the case of *Atkyns and Atkyns*, Cro. Eliz. 248, which was a devise to S. and the heirs of his body, and after his decease to B. the elder son of S. and the heirs of his body, remainder over. It was there argued that S. had an estate for life, remainder to B. as a purchaser; but it was held he had an estate tail, for by the first words an express estate tail was given [389] him, and there are no special words to correct or alter them, and this seems to be a case in point.

That there was a great difference between estates executory and executed; and that authorities drawn from devises of trust estates, ought to have no weight in the present case. That there was a great difference in wording the devises to Everard and George, for there was a power to make a jointure given to Everard, but not to George; and there was great reason to make the distinction, the one being an estate in possession, the other in remainder; and where an estate for life only was given, a power to make a jointure was properly given; where an estate tail was intended, there was no necessity for it; that the words being different, the testator must necessarily have had a different meaning; and this was the ground of Lord Hale's determination in *King and Melling*, 1st Vent. 214, 225. That the limitation being to Dr. Rundle for the life only of George, and he being dead, there was an end of his estate, which would be subject to occupancy, and could not go in succession: that the power to make a

jointure or leases, could not restrain this to an estate for life, according to *King and Melling*; nor the insertion of trustees to preserve contingent remainders. *Bale and Coleman*, 1 Peere Will. 142. That a devise to one for life, and after his decease to his children, if he has no children living at the time, is an estate tail. *Ellen and Alecol*, 2 Freeman's Reports, 186. *Sunday's case*, 9 Co. 127. That there being an express estate tail devised, it ought not to be controuled by doubtful subsequent words.

Mr. Attorney and Mr. Solicitor General argued, that this was only an estate for life in George Sayer; that the principal rule in the construction of wills, was to find out the testator's intention; that [390] if the testator's intention appear certain and manifest, the Court will give it effect, notwithstanding any inaccuracy of expression; and for this was cited the case of *Counden and Clark*, Hob. 29. *Cole and Rawlinson*, Salk. 234. As to the case of *Atkyns and Atkyns*, Cro. Eliz. 248, it does not prove the contrary; for there was no clear and certain intention appearing, and therefore where there was ambiguity and doubt, the law must take place. That if this stood merely upon the devise to George Sayer himself, there would be no difficulty, because it is expressed in proper technical words; but we are to consider whether there is not any thing in any other parts of the will to shew the testator intended him an estate for life only; for all the words must have a meaning, if they are capable of having a construction upon them. To give George Sayer an estate tail, you must entirely reject the devise to Dr. Rundle, to preserve contingent remainders, and these words must have no meaning at all, and this would be contrary to a principal rule of construction. In so serious an act as making a will, and where the same is all of the testator's writing, it cannot be supposed he would make use of any words without having an idea annexed to them. They rely on the words to George Sayer, and the heirs of his body; but these are not all the words; his intent can never be collected from part only, and the sentence is not completed till after the limitation to Dr. Rundle; and the rule of construction is, to take the whole of the instrument together, and not to collect the meaning from any particular part; that the Court would transpose the words to answer the testator's intent. Salk. 236, *Duncomb and Duncomb*. *Coulson and Coulson*, vol. ii. Eq. Cases Abr. 318.

[391] That this was a new question, and there were no authorities in point, though some came very near the present; and what was wanting in some authorities, was made up by other cases. If this had been the devise of a trust, then the case of *Bagshaw and Spencer* would have determined it, but the difficulty arises from considering it is a devise of a legal estate: if this is to be considered upon the foot of *Duncomb and Duncomb*, and *Coulson and Coulson*, in which cases the Court held that the estate for life subsisted in the first taker, with a remainder in tail after the estate to the trustees, to preserve, &c. and that the estate for life was not merged; if this should be thought the same case, then George Sayer will be as much enabled to bar his issue, as if he had an estate tail executed; for by a recovery he may bar the issue, because the vouchee comes in of all his right, as *Cuppledike's case*, 3 Co. Reports.

To consider this case, 1st, upon the reason of the cases and authorities in law, before the cases of *Duncomb and Duncomb*, and *Coulson and Coulson*. 2dly, how the case stands since those cases, and how this is distinguishable from them.

The case of *Luxford and Cheek*, 1 Eq. Ca. Abr. 179, is a clear case, and shews that the Court can transpose words to answer the intent of the parties; and so would place the limitation to trustees, to preserve, &c. before the limitation to the child and children of Everard Sayer. In the clause in this will relating to the family pictures, the word "entailed," plainly shews the testator intended a strict settlement. In the first part of the will, it is an express devise to Everard Sayer for life, with a limitation to his child and children, which in a legal sense would be only an estate for life. Then there is an estate for life to George, remainder to the heirs [392] of his body, remainder to Dr. Rundle, during the life of George, in trust to preserve contingent remainders; which words explain the testator's intention, as does also the clause that relates to the succession; and certainly the testator intended, when the estate came into possession, to do equal justice to both the brothers. As to the limitation in trust to preserve, &c. the testator clearly intended to give the trustee a power to enter for the forfeiture, and this should be a limitation to the trustee in fee: for otherwise his intention could not be answered. See the case of *Shaw and W'eigh*, 1 Eq. Ca. Abr. 184. The powers given in the will of making a jointure and leases, though not of themselves sufficient to convert an estate tail into an estate for life, yet they are material with



the other circumstances, and "juncti juvant." It has been a long doubt, whether the testator's intention, or the legal sense of the words, should prevail; some Judges have thought one way and some another: but it now seems settled, that the intention ought to prevail; indeed an intention manifestly against the rules of law shall not prevail, as when a fee is limited upon a fee, or a devise of a term for years, for a longer time than the law admits of; but the difficulty is, where there is an express estate for life, remainder to the heirs of the body. In a deed, these would be considered as words of limitation, but in a will are words of purchase.

That the words "issue, child and children, son," shall be words of limitation in a will, though otherwise in a deed. Where it is in equilibrio, what the testator intended, the legal sense shall prevail. In the case of *Papillon and Voice*, 2 P. Will. 471, Sir Joseph Jekyl was of opinion, that where there is a limitation to trustees to preserve, &c. and the next limitation is to the heirs of the body, they are to [393] be considered as words of purchase; and it is stronger in the present case, by reason of the limitation to the child and children of Everard Sayer. Shall the legal construction in respect to one devise follow the intent, and the intent follow the legal construction in the other? If Everard Sayer is to take in possession only an estate for life, remainder to his children by purchase, why should not George Sayer, the younger brother, do the same.

As to the question, since the cases of *Duncomb and Duncomb*, and *Coulson and Coulson*, this case is plainly distinguishable from those two cases: though this may not be the case of a trust executory, where the parties are to come into a Court of Equity for a conveyance, yet there are words in this case stronger than in the case of *Bagshaw and Spencer*.

Here are words of strict succession, "the males are to be preferred before the females," which words are not in the case of *Coulson and Coulson*; so the words "to the child and children" of Everard Sayer, are not in that case; and therefore this is clearly distinguished from that case: but the authority of *Coulson and Coulson* has been much doubted; and if the principles of that case are doubted, the Court will be astute in finding out a difference between that and the present. The case of *Bagshaw and Spencer* was determined upon the foot of its being an executory trust; and the limitation to the trustees to preserve, &c. in the present case, is a strong evidence of the testator's intention, that this should go in strict settlement: where the Court is to direct a conveyance, they will never direct it to trustees to preserve, &c. and insert no contingent remainder afterwards to be preserved. If the words "trustees to preserve, &c." are not inserted, the testator's intention is not com-[394]-plied with; and therefore Lord Hardwicke said, in the case of *Bagshaw and Spencer*, "If I must depart from the words of the will, I will depart from them to carry the intention of the testator into execution, and not to defeat it." The case of *Lisle and Gray*, Sir T. Jones, 114, reported also in Pollexfen, and Sir T. Raymond, is a very strong case, arising upon a deed.

Here is a succession pointed at, which makes it like the case of *Lisle and Gray*: and what the present case wants of being like *Lisle and Gray*, is supplied by the case of *Bagshaw and Spencer*, and these two cases taken together, ought to rule and govern the present.

Lord Commissioner Willes:—As I have not been able to look particularly into all the cases cited, if I had any doubt, I should have desired time to have considered of the case; but I take it to be a very clear one. The question is no more than this, whether the plaintiff Dr. Sayer can make a good title to this estate? and upon this arises another question, whether by this will he took an estate for life or in tail? In respect to all legal devises, Courts of Equity must determine in the same manner as Courts of Law would do, and are bound to do so; nor can Courts of Equity go so far, in the case of wills, as in the case of articles and executory trusts: for in respect of wills, they are bounded and limited to determine according to law; whereas in articles and trusts, conscience is to be the judge, and they may determine as they please.

The word "estate," in this will, must mean the lands themselves, and not the interest in the lands. I agree with the principles that [395] have been laid down, that in the construction of wills, all the words of the will are to be taken together, and that the intention of the testator shall take place, if not contrary to the rules of law.

Yet the determinations seem now to have gone something further; that if it was

manifest and plain the testator intended otherwise, his intention shall controul the legal sense: but if the words are clear and plain in the legal sense, though there are words that imply he might by possibility intend otherwise, yet these words shall not controul the legal sense. As to the estate to Everard Sayer, in the first part of the devise, I do not think this so clear, that the testator intended him only an estate for life; but however I think clearly the testator intended to give a different estate to George Sayer from what he did to Everard: and I think this is founded on good reason; for he might not design to give the first taker a power of barring his second brother in favour of remote heirs. If a man makes use of different words, he must certainly mean a different sense: and this is a rule in the construction of Acts of Parliament, deeds, and wills. As to the word, "entailed," in the clause relating to the pictures, the argument is so weak, I think nothing can be collected from it: it might mean an estate tail in George as well as his son, but I think nothing can be made of it; and as to the words of succession, "the males to be preferred, &c." these words will be answered as well by giving George an estate tail as an estate for life: and as to the limitation to Dr. Rundle, "in trust to preserve contingent remainders;" the testator could only mean an estate for life to him. But it is certain he did not understand these words, nor the use or effect of them; and therefore must I controul plain words, that have a legal sense and operation, from doubtful words of the testator, [396] which he did not understand himself. As to all the cases that have been cited, there was an express estate for life given, except in the case of *Lowe and Davies*, 2 Lord Raymond, 1561: and there the subsequent words were held to be explanations of the former, and to correct their legal sense. Where a man gives an estate for life (if he is not a lawyer) it is most probable his intention is not to give any greater estate, yet the law will give the first taker an estate tail, if the subsequent words will extend to enlarge his estate; therefore the testator's intention must be consistent with the rules of law.

Lord Commissioner Smythe:—As to the devise to Everard Sayer, I think it is to be laid out of the case now; though even there I think there are very strong words of implication to carry an estate tail: but in the devise to Dr. Sayer, there are strong technical words; and in all the cases where estates tail have been narrowed to estates for life, there was a clear and manifest intention of the testator. Where there is a limitation for life, with several intermediate limitations, remainder to the right heirs of the body of the first taker, these will be words of limitation, and not of purchase, and will carry an estate tail, though not executed: and as to the limitation to a trustee for life, "to preserve contingent remainders," it is the same thing as if there had been such limitation to any other person for life, for this would only have postponed the execution of the estate tail. As to the words, "the males having preference, &c." these are no more than the law would imply, and therefore, "expressio eorum quæ tacita insunt, nihil operatur;" and to this point, is the case of *Legate and Sewell*, 1 P. Will. 87, where there were strong words of succession, viz. "severally and successively as they should be in priority of birth, &c." and yet it was held to be an estate tail by three Judges, against Mr. J. Tracey. *Papillon and Foyce*, 2 P. Wms. 471, where A. devised lands to B. for life, without waste; and from and after the determination of that estate, to trustees and their heirs, during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B. remainder over; this was held to be an estate tail by Lord King, and this determination hath been greatly applauded; and yet here were strong circumstances of the testator's intention, that B. should have only an estate for life. In *King and Melling*, 1 Vent. 225, lands were devised to A. for life, and after his decease, to the issue of the body of A. by a second wife, with a power to A. to make a jointure. Lord Chief Justice Hale held this to be an estate tail in A. and his opinion was affirmed in the Exchequer Chamber, and yet here were strong circumstances to shew the testator intended only an estate for life; for there was not only an express estate for life given with a power to make a jointure, but the remainder was to the issue of the body of A. which was an estate tail by implication: and the same words in a deed would not have made an estate tail. *Show and Wigh*, 1 Eq. Ca. Abr. 184, which was also held an estate tail. *Lanaley and Baldwin*, ditto, 185. There was an express estate for life to J. S. without waste, with a power to limit a jointure, remainder to the first son, and so to the sixth; and then devised, that if J. S. the grandchild should die without issue male, remainder over; it was held that J. S. took an estate tail. The best use of cases is to draw



settled rules and principles from them : now these prove, that where there is an express estate [398] for life, it shall be enlarged by implication ; and where there is a limitation to the heirs of the body, after an estate of freehold, this will enlarge an estate for life to an estate tail, as well in the case of a will as a deed ; and therefore I am clearly of opinion in this case, that George Sayer took an estate tail.

Lord Commissioner Wilmot :—The question upon the construction of wills, whether a person takes an estate for life or in tail, has been very much agitated, and yet remains so much undetermined, that counsel must still find it very difficult to give an opinion that can be depended upon ; and I think it would have been of great service to the public, and tended to render property less precarious and uncertain, if the legal construction of words in a will had never been departed from ; for it must be much better, that every person's intent should be subservient to the rules of law, than that the law should be subservient to the parties intent.

There are two questions arise in this case, first, whether the inheritance vested in Dr. Rundle the trustee, to preserve contingent remainders ? 2dly, whether George Sayer took an estate for life, or an estate tail in remainder ? for if he took an estate tail in remainder, he, having now levied a fine, can make a good title to a purchaser, and we must decree the articles to be carried into execution.

As to the first point—upon the opening, I thought this a very material thing to be made out, for if it did, it would have been the case of *Bagshaw and Spencer* ; but I think it is very clear the inheritance was not vested in Dr. Rundle, for the testator never distinguished [399] the legal from the equitable interest in his mind through this whole will, and it is clear he did not know the meaning, or the use and effect of trustees to preserve contingent remainders : but I suppose he had heard that they were made use of to keep an estate in a family, and he might consider them as a receipt for that purpose, however thrown into a will. If the devise had been to Dr. Rundle and his heirs, during the life of George, to preserve, &c. I should have thought it a descendable freehold, and that the trust should have continued and been co-extensive with the legal estate. As to the word “estate,” giving a fee to Dr. Rundle, it is clear it was only descriptive of the lands ; for in the first part the testator says, “my estate and farms in B.” so it is clear he did not mean the interest in the lands, but the lands themselves.

The next question is, whether the limitation to trustees to preserve contingent remainder, will turn the words, “heirs of the body,” into words of purchase ? We are bound to determine this case by the rules of law, though sitting in a Court of Equity, this being a legal devise. In the case of an executory trust, this Court has power to form and mould estates, to answer the intention of parties ; but in the case of a legal devise, we are as much bound to determine by the rules of law, as if we were trying an ejectment at the assizes, or determining upon a special verdict in a Court of Law at Westminster Hall.

The rule certainly is, that the testator's intention shall prevail, if not contrary to the rules of law ; and I think we might in this case, upon the authority of *Luxford and Cheek*, 3 Lev. 125, transpose the words to answer the intent of the parties : but if we were to do so, it would leave this case under the same circumstances with *Coulson and Coulson*, or not so well.

[400] This is a much agitated question, and it were to be wished some certain rule was found out to judge by ; and I think a rule may be found out and adhered to inviolably, where there is a devise to the heirs of the body of a person in the plural number, without words of limitation superadded : and this rule is laid down in *Shelley's case*, Co. Rep. viz. “that wherever an estate is limited, mediately or immediately, to the heirs of the body of a person that takes an estate of freehold by the same instrument, the words, ‘the heirs of the body,’ shall be words of limitation and not of purchase.” The reason of this rule may now have ceased with the abolition of feudal tenures ; for it certainly was introduced to preserve the duties to the lord of the fee ; and I think if this rule had never been departed from, it would have been better for the public in general, though it might have proved prejudicial to some individuals. For it renders property very precarious, that Judges should exerce themselves to find out the testator's meaning and intention ; and though this has been done in some particular instances, I should not be for carrying it one step further. Now there is not one case, except *Lowe and Davies*, 2 Raym. 1561, which was a devise “to A. for life, remainder to the heirs of his body, that is to say, to his

first and other sons ;" (and this stands upon very particular circumstances, for here the testator revokes the devise in the same breath, and explains what estate he intended to give :)—but there is no one other case, where the words, "heirs of the body," in the plural number, without words of limitation superadded, have been construed words of purchase.

*Archer's case*, 1 Co. 66. A man devised to A. for life, and after to the "next heir male, and the heirs of the body of such heir male:" this was held an estate for life in A.; for the words of limitation are [401] grafted on the estate of the heir in the singular number, and therefore he shall take by purchase.

*Clerk and Day*, Cro. Eliz. 313, where one devised lands to his daughter for life, and if she married after the testator's decease, and had heirs of her body, then "I will, that the heir, after my daughter's death, shall have the land, and to the heirs of their body begotten; and if my daughter die without issue of her body begotten," remainder over: this was held an estate for life by two justices, against the opinion of Lord Chief Justice Popham; but this was also to the "heir" in the singular number, with words of limitation superadded. *Lisle and Gray*, Sir Thomas Raymond, 278. Lands were limited to A. for life, remainder to his first and every other son in tail male, and so severally and respectively to every of the heirs male of the body of A. and the heirs male of the body of such heirs male. Here the words "heirs male," were understood to signify "sons," and to be words of purchase. This is a limitation in effect in the singular number, and there are words of limitation superadded.

*Waker and Snow*, Palmer, 359. This was also in the singular number, and words of limitation were superadded. There are four cases where a devise to the heir male in the singular number, with words of limitation superadded, have been held an estate tail.

*Puisey and Lowdall*, 1 Roll. Abr. 626, and *Burleigh's case*, cited in *King and Melling*. *Dummer and Trollop*, Mich. 9 Geo. II. which was a devise to first son in tail male, then to second son for life, remainder to his heirs male; this was held an estate tail: also *Miller and Seagrave*, Mich. 10 Geo. I.; which cases clearly shew, that the words of limitation superadded have been construed as the operative words. In the case of *Papillon and Voyce*, there was an [402] express estate for life, and yet Lord King held this to be an estate tail. In *Legate and Sewell*, though words of limitation were superadded, it was held an estate tail in the first taker. *James and Richardson*, 1 Vent. 334. *Burchett and Durdant*, 2 Vent. 311. A man devises lands to A. and his heirs, during the life of B. and after the decease of B. to the heirs male of the body of B. now living, B. having one son then living; by the devise, a remainder was immediately vested in the son. It was also determined to be a trust not executed. This must be a mistake, for the statute mentions a trust as well as an use; but if they proceed on this, then the first taker took no legal estate. *Jones v. Lord Saye and Sele*, Eq. Ca. Abr. 383, c. 4. A legal estate and an equitable interest, will not consolidate and unite. As to the case at Bar, I think the cases of *Duncomb and Duncomb*, and *Coulson and Coulson*, rule and determine the present. And though the authority of this last case has been doubted, yet I think Lord Hardwicke, in the case of *Bagshaw and Spencer*, 1 Ves. 142, rather confirmed its authority than impeached it: and whilst these cases stand, they must determine the present; though I think the present a much stronger case than either of them, as there was, in both the others, an express estate for life given.

This is a legal question, and we must determine it according to the rules of law; we are bound to do it. The inserting a remainder to "trustees to preserve, &c." had a legal operation; for these words could prevent the wife from being endowed. In the present case, here is no express estate for life; it is not given to the heir in the singular number, and there are no words of limitation superadded.

If the words had been, "heirs male," there might have been some doubt: but what can be done with the words, "heirs of the [403] body?" Suppose there had been three daughters of George Sayer; if they are to take by purchase, they must be joint-tenants for life, with several inheritances and cross-remainders to each other. What a confusion would this introduce! We might do it indeed in an executory trust, but we cannot do it in the devise of a legal estate. Suppose trustees to preserve contingent remainders had been inserted in the proper place, I do not think it would be by any means clear that the testator did not intend that George Sayer should not have an estate tail: I do not believe he knew what he meant by inserting "trustees,



&c." how then is it possible for us to find it out? And if his intent had been ever so apparent, it must be agreeable to the rules of law. Suppose one devises to A. and the heirs of the body of A. and says, "I declare that the heirs of the body of A. shall take by purchase," can the intent be more manifest and express? And yet A. shall have an estate tail; for the testator shall not be permitted to controul the legal operation of the words.\*

Therefore, upon the whole, I entirely concur with my Lords Commissioners, "that George Sayer took an estate tail; and that, having levied a fine, he is enabled to make a good title to a purchaser; and that these articles ought to be carried into execution."

Their Lordships order and decree accordingly; but do not think fit to give costs on either side.

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\* Vide Mr. Hargrave's Law Tracts, 1 vol. p. 562, 572, 3, and Mr. Butler's Co. Litt. p. 376 b.

REPORTS of CASES ARGUED and ADJUDGED in the COURT of KING'S BENCH, during the Time LORD MANSFIELD Presided in that Court; from Michaelmas Term, 30 GEO. II. 1756, to Easter Term, 12 GEO. III. 1772. In Five Volumes. By SIR JAMES BURROW, Knight, late MASTER of the CROWN-OFFICE, and One of the BENCHERS of the HONOURABLE SOCIETY of the INNER TEMPLE. The Fifth Edition, with the Addition of Critical Notes and Observations, and References to other Reports and Authorities. Vol. I. From Michaelmas Term, 30 GEO. II. 1756, to Trinity Term, 31 GEO. II. 1758, inclusive. 1812.

[1] MICHAELMAS TERM, 30 GEO. II. 1756.

The Court of King's Bench, (when it became complete on the 3d day of the term, as below), was composed of (a) Lord Mansfield; (b) Sir Thomas Denison; (c) Sir Michael Foster; and (d) Sir John Eardley Wilmot.

(a) His Lordship was sworn in upon the 8th of November 1756; and took his seat upon the Bench on the 11th of the same month.

(b) Mr. Justice Denison was sworn in upon the 11th of February 1741; and took his seat the next day.

(c) Mr. Justice Foster was sworn in upon the 22d of April, 1745; and took his seat upon the 1st of May following (being the first day of Easter term 1745).

(d) Mr. Justice Wilmot was sworn in upon the 11th of February 1755; and took his seat upon the Bench the next day.

[2] MICHAELMAS TERM, 30 GEO. II. B. R. 1756. Monday, 8th November, 1756

His Majesty's Attorney General, the Honourable William Murray, was this morning called serjeant; and about eight in the evening, was sworn in Lord Chief Justice of this Court (in the room of the late Lord Chief Justice, Sir Dudley Ryder, who died on 25th May 1756), before the Lord Chancellor (the Earl of Hardwicke), at his house in Great Ormond-Street, in the presence of the three Judges and most of the officers of the Court of King's Bench.

His Lordship took the oaths of allegiance and supremacy on his knee; and the oath of office, standing. Immediately afterwards, the Great Seal was put to a patent,



which had before passed all the proper offices, creating his Lordship Baron of Mansfield in the county of Nottingham, to him and the heirs male of his body.

Thursday, 11th November 1756, Lord Mansfield took his place as Lord Chief Justice.

RAYNARD *versus* CHASE. Friday 12th Nov. 1756.

[See 2 Wils. 40. Bath. 180. Bul. N. P. 194, S. C. See also *Beach q. t. v. Turner*, 4 Burr. 2450. One not qualified to exercise trade, entering into partnership with a qualified person, without interfering in the trade personally, is not within stat. 5 Eliz. c. 4.]

This was an action of debt for a penalty on 5 Eliz. c. 4, for exercising the trade of a brewer, without having served an apprenticeship. (a) In the declaration there were two counts. To the former "nil debet" was pleaded: and there was a general verdict for the defendant; (viz. "that the defendant does not owe, &c."). But on the 2d count there was a special verdict: which was to the following effect, viz. that the defendant Chase and one Cox, were and have been, during all the time charged in this count, partners in the trade; and that the trade was carried on, and has been for four years carried on, in their joint names; that Cox did serve an apprenticeship, &c. but Chase never did; and that Cox is a working brewer, and was paid a salary for his labour; which salary was always deducted, and allowed to him, previous to a division of the profits; and the entries at the Excise-Office were in their joint names: but that the defendant John Chase never exercised the trade himself; (which was wholly managed and carried on by Cox); but only shared the profit, and stood the risks of the partnership. And they find it to be a trade within 5 Eliz. c. 4.

[3] Question, on 5 Eliz. c. 4, § 31, "Whether the defendant John Chase is within the Act, upon this special finding?"

Mr. Morton pro quer'.

This attempt to evade the force of the Act by the scheme of a partnership with a qualified trader, would entirely frustrate the intention, and is directly contrary to the words of the Act.

The short of this case is—Chase not being himself qualified, takes a partner who is qualified; which qualified partner is the only acting person in carrying on the trade; and Chase never interfered in it.

(a) Exercising a trade by servants or apprentices has been held to be within the stat. 5 Eliz. c. 4. *Willis q. t. v. Jephson*, Hil. 16 Geo. 2, B. R. 4 Mod. 2, vide also 1 Vent. 193. The judgment in the above case of *Raynard v. Chase*, therefore, appears to be against a positive precedent, and against law and justice; for one of the reasons for making the statute 5 Eliz. c. 4, was to prevent idleness in youth; and therefore the allowing one not entitled to trade, without serving as an apprentice, is injustice to all who have served an apprenticeship, and taking off part of the excitement to honest industry which it is the interest of all society to encourage.

The construction in favour of the exercise of trades, without being qualified, strictly as the Act directs, had, before this case of *Raynard v. Chase*, been carried far enough at the least, but never so far as by the determination here, which is not only further in favour of encouraging persons, to neglect serving apprenticeships, or putting their sons to serve them; and it is expressly against former determinations, in which the Courts have decided, 1. That the person who exercises a trade, is the trader, because he employs the rest, who work but as his servants, and the loss and gain is to be his. 2. That he that hath not served an apprenticeship, is by the statute restrained to work as a trader either by himself or others: for that the intent of this Act is to annex the benefit of trade to such as underwent the hardship of learning it, thereby to encourage learning in youth; and few would undergo the trouble of being apprentices if they might employ others to work for them. Salk. 610. Co. 54. See the same point reported accordingly in several other cases, and in one, notwithstanding the using the trade was only for dying cloths to be used by the defendant, who was indicted, in his own trade of a clothier; and it was upon that ground only that Dolben, J. was of a contrary opinion from the other justices, as appears by 1 Show. 241, 266, notwithstanding Carthew, in his report of the same case, only takes notice that Dolben was of a contrary opinion, without giving the reasons why he was so.

There was the like point before the Court in P. 13 G. 2, B. R. *Rex v. Driffield*.

But per Denison and Foster, Justices, that case was never determined: it went off upon an objection to the jurisdiction.

Morton:—But the Lord Ch. J. Lee then said, “that he had never known a person exempted from the statute, who had not served an apprenticeship.”

And as to his not interfering in the trade, the case of *Hobbs, qui tam, &c. vers. Young*, reported in 2 Salk. 610, and in Carthew, 162, and in 3 Mod. 313, is a determination in point, and not to be distinguished from the present case.

Therefore he prayed judgment for the plaintiff.

Mr. Bishop contra, pro defend', said, he would first consider how this matter stood before the statute, with regard to the free and unlimited right that every man naturally and legally had, of exercising whatever trade he pleased; [4] 2dly, the constructions that have been favourably made upon it, in extension of the qualifications to exercise trade; and 3dly, distinguish this case from the cases cited.

And first, the liberty of trade is a natural and common law right, and was long unrestrained. The statute of 37 E. 3, c. 5, which first restrained it, was very soon repealed by 38 Ed. 3, c. 2. And Lord Coke in 4 Inst. 31, says, “that such Acts of Parliament never live long.” He cited the case in 2 Bulstr. 186, *Dominus Rex and Allen, Plaintiffs*, against *Tooley, Defendant*, as an authority for him, though the Court did not indeed formally pronounce any final judgment therein: and he also cited 11 Co. 53, the case of *The Taylors of Ipswich*. Secondly, the before-mentioned case in 2 Bulstr. 186, *The King and Allen v. Tooley*, proves the constructions to have been favourable. Jenk. Cent. Case 15, pa. 284. “A private brewer is not within the statute.” Keilwey, 96, pl. 6, proves that the statute ought to be taken strictly; being penal, and in derogation of the common law. And Judges have dispensed with the rigour of it: as in *Froth's case*, 1 Salk. 67, where seven years apprenticeship beyond sea, though without binding, was holden sufficient. So *Queen v. Maddox*, 2 Salk. 613, S. P. accordingly: and the Court there call this Statute of the 5th of Eliz. a hard law. Comberb. 254, *Rex v. Goller*, per Eyre Justice: one brother living with another seven years (at the trade of a tallow-chandler) though not bound, may set up the trade. 1 Mod. 26, pl. 69, *Dominus Rex v. Taruth*, proves too that this statute ought not to be extended further than necessity requires.

Now it is not found by the present special verdict, in the affirmative, “that this man has occupied, used and exercised the trade:” but it is found (on the contrary), negatively, “that he has not interfered in it; but it was wholly carried on by Coxe.” And Hob. 298 says, the rule is, “that affirmatives in statutes that introduce new laws, imply a negative, &c.” However, here is an express negative.

Thirdly, with regard to the cases cited—

As to *Rex v. Driffield*, whatever was found in the affirmative in that case, is found in the negative here. And as to the case of *Hobbs v. Young*, there was no partner skilful in the trade; but only servants: whereas here is a skilful partner to conduct it; and the servants are employed and set to work by this partner, who is skilful; and are not employed and set on work by the defendant.

Then he added (4thly) some arguments ab inconvenienti.

First, this will affect all great undertakings: for it seldom happens, in such great undertakings, that all the [5] partners are duly qualified, in strictness. So, likewise, it would affect all cases where infants and trustees are entitled to shares of profitable trades. So where creditors have shares in them.

And apprenticeships in great breweries are not in fact usual or customary.

Mr. Morton, in reply, premised, that the rule of construction upon this Act must be uniform, with regard to all the trades within it: and breweries cannot be distinguished from the rest.

In answer to Mr. Bishop's argument, he observed,

1st, it is of no importance what was the right before the statute: the statute was made expressly, to restrain such right in future, for the good of the public.

2dly, he said, he did not want to extend this law: this case is fully and completely within it, without straining it at all. And the constructions that Mr. Bishop calls favourable, in the instances which he has cited, are no more than just and reasonable, upon the circumstances of the respective cases in which they were made.

3dly, as to the negative-finding in the present case, it amounts to no more than “that this man did not mind his business;” (which the other partner did).



And as to setting to work, it is plain that Coxe is set to work by Chase: and, virtually, he sets all the servants to work. Indeed, Coxe is here both a journeyman and a partner to Chase: for Chase pays him as a journeyman; and besides that, gives him a share of the profits. And my Lord Ch. J. Holt's opinion in the case of *Hobbs and Young* is quite applicable to the present case.

4thly, he endeavoured to shew that the construing this man to be within the penalty of the statute, could not be attended with any sort of inconvenience.

Therefore he prayed judgment for the plaintiff.

As this was the first argument, it was expected (as of course) that it would be argued again: but Lord Mansfield gave his opinion immediately, to the following effect:

Lord Mansfield. Where we have no doubt, we ought not to put the parties to the delay and expence of a farther argument; nor leave other persons who may be interested in the determination of a point so general, unnecessary[6]-rily under the anxiety of suspense.

The defendant is to share the profits with Coxe in moieties, and is liable to the debts of the partnership: but it is positively and expressly found, "that during all the time charged he never acted in or exercised the trade." He was not, by the terms of his agreement, to act in the trade: the other partner was to do the whole, and had a particular salary on that account. It is not found that either Coxe or any servant under him was set to work by Chase; nor that Chase did any act whatever of exercising the trade: he was only concerned in the profit.

Now though this may be to some purposes exercising a trade, in respect of third persons, who deal with the partnership as creditors, and within the meaning of the statutes concerning bankrupts; yet the present question is, "whether it be exercising a trade, contrary to this Act?"

I think Mr. Bishop has laid his foundations right against extending the penal prohibition beyond the express letter of the statute.

1st, this is a penal law;

2dly, it is restraint of natural right; (a)<sup>1</sup> and

3dly, it is contrary to the general right given by the common law of this kingdom: I will add,

4thly, the policy upon which the Act was made, is from experience become doubtful. (b)<sup>1</sup>—Bad and unskilful workmen are rarely prosecuted.

This Act was made early in the reign of Queen Elizabeth. Afterwards, when the great number of manufacturers who took refuge in England from the Duke d'Alva's persecution, had brought trade and commerce with them, (a)<sup>2</sup> and enlarged our notions, the restraint introduced by this law was thought so unfavourable, that in 33 Eliz. in the Exchequer (4 Leon. 9, pl. 39), it was construed away; for it was holden clearly by the Judges in that case (which construction, however, I take not to be law now), that "if one hath been an apprentice for seven years at any one trade mentioned within the said statute, he may exercise any trade named in it, though he hath not been an apprentice to it. (b)<sup>2</sup>"

(a)<sup>1</sup> Eyre, J. in *Show*. 266, said he took the statute to be a politic law for the accustoming men to labour and industry in their youth; and Gregory, J. in the same case said, that the design of this statute was to encourage them who had been apprentices.

(b)<sup>1</sup> The stat. 5 Eliz. c. 4, was not enacted, only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades. Per Cur. *Ipswich Taylor's case*, 11 Co. 54 a.

He that hath not served an apprenticeship is by the statute restrained to work as a trader, either by himself or others; for the intent of this Act is to annex the benefit of trade to such as underwent the hardship of learning it, thereby to encourage labour in youth, and few would undergo the trouble of being apprentices if they might employ others to work for them. Per Cur. *Hobbs q. t. v. Young*, Salk. 610.

(a)<sup>2</sup> The statute only extends to such trades as were then used or occupied within England or Wales: so that the makers of it, had then in contemplation, the bringing new trades into the kingdom, and cautiously guarded against restraint on such trades. See *Hob*. 211. *Ld. Raym.* 514, but *Palm.* 396, and 2 *Rol. Rep.* 392, contra.

(b)<sup>2</sup> That is, according to the custom of London, *Show*. 266. *Buls.* 190. But see



All these observations only shew "that this Act, as to what enforces the penalty of it, ought to be taken strict-[7]-ly." And accordingly the constructions made by former Judges have been favourable to the qualifications of the persons attacked for exercising the trade, even where they have not actually served apprenticeships. They have, by a liberal interpretation, extended the qualifications for exercising the trade, much beyond the letter of the Act; and have confined the penalty and prohibition to cases precisely within the express letter.

Let us consider whether the present case be within the letter, or even the meaning of this Act.

The general policy of the Act was to have trades carried on by persons who had skill in them.

Now here the personal skill of the defendant makes no real difference in the case. For the person who is skilful, acts every thing, and receives no directions from this man: he neither did, nor was to interfere.

The case of *Hobbs and Young* is not parallel. There the defendant, a single man, directed the whole trade: was the master; and directed all the servants. As between master and servant, no doubt, it is the master who carries on the trade, and not the servant. But in *Hobbs and Young* there was no partnership; nor (what is the distinguishing character of the present case) a mere naked sharing of the profits, and risking a proportion of the loss; without his acting or directing at all, in any manner whatsoever.(a)

In many considerable undertakings, it is absolutely necessary to take in persons as partners, to share the profits and risque the loss. And the general usage and practice of mankind ought to have weight in determinations of this sort, affecting trade and commerce, and the manner of carrying them on.

It is notorious that many partnerships are entered into, upon the foundation of one partner contributing industry and skill, and the other money.

Many great breweries and other trades have been carried on for the benefit of infants and residuary legatees, under the direction of the Court of Chancery.

Now if the plaintiff's construction was to hold, the whole direction and decree of the Court of Chancery was contrary to law and to an express Act of Parliament.

So it is likewise practised in other great trades. The late Mr. Child directed his business of a banker (b) to be carried on for the benefit of his children and other persons. Many other instances might be mentioned.

It would introduce the utmost confusion in affairs of trade and commerce, if this construction should prevail.

On the other hand, I see no inconvenience; it is exactly the same thing as to the trade, in every iöta, "whether this partner has or has not served an apprenticeship."

Therefore I think the defendant not liable to the penalty of 5 Eliz.

Cro. Car. 361, 517, 578, that the custom does not extend to manual trades, but only to trades of buying and selling. 1 Lev. 15. 7 Vin. 173, (O) 3240, pl. 12.

(a) Be this as it may, it does seem, that the allowing Chase to be exempt, from the penalty of the 5 Eliz. is contrary to one of the reasons for making that statute, as appears by the authorities cited in these notes; and none of the instances in favour of extending the qualification beyond the letter of the Act urged for the defendant (Barnard. Ch. Cas. 75, 77), were like that, in the present case, but were founded on some special reasons; whereas, according to this case of *Raynard and Chase*, any person whatever, hath it in his power to enter into partnership with any one who hath served an apprenticeship, and will take him in as partner, to share the profits which must be prejudicial to those entitled to the trade.

(b) Quere, whether this instance be any thing to the purpose; for the statute is confined to such trades as were then used or occupied in England or Wales; and it appears by Anderson on Commerce, 2 vol. 77, 127, that the rise of banking in England was about 1645: it was first carried on by the goldsmiths, as appears there, and is so recited in the Stat. Car. 2. The trade of a goldsmith is therefore within the statute, but when banking ceased to be carried on by them, and became a distinct branch of business, as in the instance of Child's house: it seems then clearly not to have been within the prohibition of the statute.

It seems also that bankers were not within the bankrupt laws till expressly made so by stat. 5 Geo. 2, c. 30, s. 39.

Mr. Just. Denison said, that this was a new case.

For though the cases of *Rex v. Driffield*,<sup>(a)</sup> and *Adcock v. [8] Gell*,<sup>(b)</sup> were indeed before the Court, yet no opinion was delivered in either of those cases.

He concurred that it was not an exercise of the trade within 5 Eliz.

The true intent of that Act was, that no man should exercise any of those trades, unless he had skill in them. It has never been extended, by any liberal construction of it, in point of enforcing the penalty.

And the present question is, "whether this man has exercised the trade, within the meaning of it, so as to be liable to the penalty?"

Now it is here found, "that he never did interfere in the trade himself." In the case of *Hobbs v. Young*, the defendant was the superintendent of the work, and did exercise the trade, without having any skill in it.—And this is the point in question, and the principal determination in that case of *Hobbs v. Young*; whatever else might drop from the Judges in giving their opinion. But here the defendant never meddles at all, but leaves all the management to a partner who had skill; he himself never acted in carrying on the trade.

It may be said, indeed, "that Chase is liable to the Statutes of Bankrupts."—True: but the construction of those Acts made for the benefit of the bankrupt's creditors, is very different from the construction of this prohibitory and penal Act; which ought to receive a strict construction in point of extending the penalty.

Therefore for these reasons, and those given by the Lord Ch. Just. he held, "that this was not an exercising the trade within the Act."

Mr. Just. Foster concurred; and said, he had prepared himself to give his reasons at large: but as the Lord Chief Justice had gone through them so fully, and enforced them in so clear and satisfactory a manner, he would only, in general, declare his concurrence.

Mr. Just. Wilmot was of the same opinion.

By the Court unanimously judgment was given for the defendant.<sup>(a)</sup><sup>2</sup>

**[9] REGULA GENERALIS.** Enlarged rules of a preceding term must be brought on before the last week of the ensuing one.

The Court declared, that all enlarged rules to shew cause, which were made in the last term, should be moved before the last week of the present term; unless leave for postponing them should be particularly applied for, and granted: and this rule to prevail hereafter, in all future terms, in the same manner.

<sup>(a)</sup><sup>1</sup> S. C. Bull. 193.

<sup>(b)</sup> S. C. Sayer's Rep. 60.

<sup>(a)</sup><sup>2</sup> The words of the Act 5 Eliz. c. 4, s. 31, are, "that it shall not be lawful for any person to set up, occupy, use, or exercise any craft, mystery, or occupation now used or occupied within the realm of England or Wales, except, &c." Now the defendant did set up the trade of a brewer, which is one of the trades mentioned in the statute, sec. 3, and therefore need not to be averred to be a trade used in England at the time of the Act; now it does appear that the defendant was guilty of a breach of the law, according to the express letter of it: for it is an established rule that in disjunctives, it is sufficient if either part be true.

The defendant was also an offender within the intention of the Act, which was as well to encourage putting out youth as apprentices, as that workmen should be skilful (11 Co. 54 a. Salk. 610); and the judgment in the case of *Hobbs v. Young*, that a person not qualified according to the law cannot carry it on, though he never works himself, but employs only those who were qualified, was founded on the first of those reasons, (Salk. 610), which holds equally strong at least in the present case; and the judgment in *Hobbs q. t. v. Young* may be easily eluded by the unqualified person allowing a small part of the profits, either instead of a salary, or, as in the present case, over and above the salary, to a qualified person for carrying on the same: and the defendant was admitted to be a tradesman for other purposes, though not within this Act: so that this judgment seems to have introduced a distinction not supported by any principle, and must facilitate the practice of introducing dormant partners: for a fortiori, such if discovered would not be liable to the penalty of the Act; and there is great danger to purchasers and mortgagors by dealing with such.

Monday, 15th November, 1756, Lord Mansfield took the oaths: he was (as is usual) sworn first and alone.

ROADES *versus* BARNES. [1 Black. 65, S. C. under the name of *Rolls v. Barnes*.] Tuesday, 16th November 1756. An account stated is no plea in bar to the demand of a debt of the same degree. A note of hand cannot be pleaded in bar to an action upon simple contract; though a bond may, but one bond cannot be pleaded to another.

This was a plea of a stated account, pleaded to an action upon simple contract; to which plea there was a bad replication, and a demurrer to that replication: consequently, the question was only upon the validity of the plea.

After a long argument for the defendant in support of the plea, the Court, without hearing the other side, held the plea bad in substance: and so, they said, it has been determined in this Court, last Hilary term, in a case of *Atherly v. Evans*. A promissory note cannot be pleaded in bar to an action upon simple contract: though a bond may, because it extinguishes the debt. One bond cannot be pleaded to an action brought upon another bond.

Judgment for the plaintiff.(a)

[10] REX *vers.* FONSECA.(b) Wed. 17th Nov. 1756. Recognizance to remove an indictment from a Court of Oyer and Terminer, is a recognizance at common law, not within 5 & 6 W. and M. c. 11, s. 2; and may be discharged without costs.

Mr. Norton, on behalf of the prosecutor, shewed cause against discharging the defendant's recognizance.

This was a recognizance entered into by the defendant and two other persons, upon his removing this indictment (which was for an assault with intent to ravish) from Hicks's Hall, where it was originally found.

The defendant had been tried, convicted, and fined in this Court; and had paid his fine.

After which Mr. Morton had moved to discharge the defendant's recognizance; it being a recognizance at common law, and all the terms of it having been complied with. For he insisted,

1st, that it is not within the statute of 5 & 6 W. & M. c. 11, § 2, being from the Court of Oyer and Terminer, not from the sessions: and this statute relates only to indictment found at the sessions.

2dly, that the principal is here bound, as well as the securities; therefore also, it is not within the said Act; which requires only two manucaptors, without the principal.

3dly, the sum is also different: for it is not a recognizance in 20l. but in 100l. himself, and each security 50l. Therefore, for this reason too, it is not within the said Act. In proof of which, he cited 2 Salk. 564, *Regina v. Ewer*; where a scire facias was brought on a recognizance taken before a Judge, upon granting a certiorari to remove an indictment from the sessions of the peace, in the sum of 40l. whereas the sum prescribed by the statute is 20l. And Lord Ch. J. Holt held this recognizance to be good at common law; but not to be a recognizance according to this statute.

M. 15 G. 2, B. R. *Rex v. Sidney*, [S. C. Strange, 1165] was also cited and relied upon by him, as in point to the present case.

In answer to which, Mr. Norton urged,

1st, that the Court at Hicks's Hall is both a Court of Oyer and Terminer, and also a Court of Quarter Sessions. And as to the

[11] 2d and 3d objections. The defendant has availed himself of this recognizance; and has, upon it, removed the record: and therefore he ought to be bound by it, as by a proper recognizance.

And *Sidney's case* was, he said, upon different circumstances.

Here, he is not to depart the Court without leave: therefore the Court will first

(a) See 2 Durn. 481. 5 Durn. 514.

(b) See Sayer's Law of Costs, 220. 2 Ed. 269.



oblige him to do us justice, and pay the costs, in the same manner as if the recognizance had been regularly taken under this Act.

N.B. The sessions at Hicks's Hall sit in both capacities, viz. of sessions of the peace, and also of oyer and terminer: and they draw up their orders with the one title, or with the other, according to the degree of the offence: (viz. common assaults, and offences of a low nature, under the title of the Court of Sessions; and assaults with intent to ravish, riots, &c. and offences of a high nature, under the title of a Court of Oyer and Terminer:) and the certioraris are directed accordingly. And the present certiorari was directed to them as a Court of Oyer and Terminer.

The Court looked upon the case of *Rex v. Sidney* to be in point.(a)

And accordingly Mr. Norton's rule for discharging the defendant's recognizance, was made absolute. Vide post, p. 1461, *Rex v. Lyon*.

MACROW *vers.* HULL. 13th Feb. 1764. Verdict though against evidence, if found for the defendant, and the action be vexatious, new trial refused.

The defendant's counsel shewed cause against the Court's granting a new trial upon payment of costs; which had been moved for, by the plaintiff's counsel, upon the foot of the verdict's being against evidence: (which verdict was for the defendant; and, consequently, the application to set it aside, had been made on the part of the plaintiff).

Mr. Just. Foster (who tried the cause) reported it to be an action of trespass, extremely frivolous; but sufficiently proved. He said that the defence was a very strong one indeed, in mitigation of damages; but yet was not a sufficient denial of the trespass: so that, in strictness, the verdict was undoubtedly against evidence. However, he thought the action so trifling, frivolous, and vexatious, that he should have thought sixpence damages to have been enough.

Whereupon the Court held, that notwithstanding its being a verdict against evidence (which in general is a good reason for setting aside a verdict and granting a new trial), yet the action appearing, in this case, to be frivolous, trifling, and vexatious, and the real damages little or none, they ought to refuse, and accordingly did refuse to set aside the verdict: and,

Lord Mansfield added, that it would even be a cruelty to the plaintiff, to grant his motion; as he must pay the costs of the former trial, if he should prevail in it; and yet could hope for such very small damages upon a new one.

Rule discharged. Vide post, pa. 54, *Farewell v. Chaffey*, S. P. accord'.

HARRISON, KNT. Chamberlain of London, *vers.* GODMAN. Thursday, 18th Novem. 1756. Bye-law to oblige a person who has a right to be free of the city, to take up his freedom in some particular company, is in restraint of trade, and bad. [See 3 Burr. 1322, also 7 Durn. 702, 3 Bos. & P. 60, and Calthorp 50.]

[Referred to, *Maxim Nordenfelt, &c. Company v. Nordenfelt* [1893], 1 Ch. 658; [1894], A. C. 535.]

Mr. Serjeant Poole and Mr. Eliab Harvey shewed cause against the issuing of a *procedendo* in this cause.

It came into this Court, upon the return of a habeas corpus cum causa, directed to the Mayor, Aldermen, and Sheriffs of London, commanding them to bring up the body of the defendant, together with the cause, &c.

The return was to the following effect, viz. that there is a custom in London, "that if any ancient custom hard and defective in any thing newly arising, wants amendment, the mayor and aldermen, with the consent of the commonalty, have always, &c. appointed fit remedy, for the common good of the citizens: so as such

(a) There is nothing new in this case, for the case of *Rex v. Sidney*, in Strange, 1165, is in point: of this case I have got a MS. note, whereby it appears the indictment there was found at Hicks's Hall, but whether it was an indictment at the Court of Sessions of the Justices of Peace, or at the Sessions of General Oyer and Terminer, does not appear by that note; but in Strange 1165, it is mentioned as an indictment from the Sessions of Oyer and Terminer.

their ordinances be consonant to faith and reason, and in no wise prejudicial to the King or his people, nor repugnant to the laws or statutes of England." And that the customs of London are confirmed by Act of Parliament, 7 R. 2.

They then certify, that there is within the City of London, a Company of Butchers; and that at a common council holden on the 27th of June, 20 G. 2, the lord mayor, aldermen, and common council, made an ordinance, "that whereas many persons who exercise the trade of butchers, have obtained freedoms of other companies, by redemption or otherwise; by reason whereof the Company of Butchers is much diminished and fallen into decay; for remedy thereof, it is ordained that every person, not being already free of the city, occupying, using, or exercising, or who shall occupy, use, or exercise the art, trade, or mystery of a butcher within the said city or its [13] liberties, shall take upon himself the freedom of the Company of Butchers; and that no person now using, or who shall hereafter use or exercise the trade of a butcher within the said city or liberties, shall be admitted into the freedom of the said city, by the chamberlain thereof, of or in any other company than the said Company of Butchers: provided always, that every person not being already free of the said city, who are or shall be entitled to freedom of any other company by patrimony or service, shall be admitted into this Company of Butchers, upon payment of a like fine and fees as are usually paid upon admission of a child or apprentice."

And that it was then and there further enacted, "that if any person or persons (except such as are already free, &c.) shall use the trade of a butcher, not being free of this Company of Butchers, he, &c. shall pay 5l." And directions are given how the penalty of 5l. shall be levied, and also concerning costs.

They then further certify, "that the defendant was taken, on an action brought against him in the Mayor's Court of London, for the penalty of this bye-law."

Upon this return, Mr. Williams, on behalf of the plaintiff in the Mayor's Court, had moved for a procedendo.

Mr. Serjeant Poole and Mr. Eliab Harvey, of counsel for the defendant, objected to this bye-law, as being a bad one: and they principally relied on the following objection to it; viz. "that it was a bye-law in restraint of trade; and therefore could not be good; without setting forth a special and particular custom to support it;" which is not done by the present return. And they argued that this bye-law is by no means supported by the authority which is set forth in the return as its foundation; viz. "a custom to apply fit remedy for the common good of the citizens, where any ancient custom, hard and defective in any thing newly arising, wants amendment:" for neither is here any such ancient custom set forth, and specified, which wanted amendment, nor any hardship or defect, stated: nor is there any pretence to say that this is "a matter newly arising;" nor does the return so much as even allege, either that there was any such ancient custom wanting amendment, or any hardship or defect, or that the subject of this bye-law was a matter newly arisen.

The cases adduced by each of them in proof of their positions, were as follow:

[14] That it is a bad bye-law, and void, as being in restraint of trade, appears by *Wagoner's case*, 8 Co. 125 a. b.

Therefore it is bad, without a custom to support it. *Ibid.* in point.

Yet no custom is here returned, for support of any restraint of trade at all: and therefore the Court cannot take notice that there is any such custom. 2 Strange 1187, *Sir John Hartop v. Hoare & Al.* The Court could not judicially take notice "that every shop in London is a market overt;" that custom not being found or stated. 1 Strange, 187, *Argyl v. Hunt* (there cited) is in point, to the same purport. 5 Mod. 108, *Robinson v. Grosvenor* is in point with the present case. Carthew 75, *Watson v. Clarke.* The Court cannot, ex officio, take notice of the customs of London. Salk. 125, *Hodges v. Steward*, the fourth resolution, is very strong to the same purport. And Co. Lit. 175 b. proves the same position.

Now here, though the general custom "to make bye-laws" is set out; yet, the particular custom "to make such a bye-law as this is, in restraint of trade," is not set out.

As to the case of *Wannel v. Cumerar' Civil London*, in 1 Strange, 675, there the particular custom was set forth, as appears upon searching the record of that case: (though it has been called as cited from J. S. a case in point). In Sir T. Raym. 289, *Phour v. Lere*, the bye-law made for the better and more regular ordering of cars and carts, was holden to be good: but in 1 Ro. Abr. 364, pl. 5 (enter *Payne v. Hawghton*) a bye-law for restraining the liberty of the trade of a carman, was holden bad.

Mr. Williams and Mr. Norton, on the other side, argued for the procedendo, and consequently for the validity of the bye-law.

This, they said, is not a bye-law in restraint of trade: it is only in regulation of it. And the Court will take notice of the custom of London, "that no man can exercise a trade in London, without being free of the city, and of some company of it." 2 Stowe, B. 4, c. 9.

We have returned a custom, "that we have power to alter and amend any ancient custom, and to appoint fit remedy for the common good of the citizens, where there is hardship or defect in it."

1 Strange 675, is this very case, in the Joiners Company: and there is no return then mentioned or hinted at, of any particular custom: though it is indeed returned, "that by the custom, no person can be free of the city, without being free of one of the companies."

In 5 Co. 62, *Chamberlain de Londres case*, the bye-law about bringing broad-cloths to Blackwell-Hall to be [15] searched, &c. was held a good bye-law: and yet there is no particular custom set forth on which to found the bye-law.

In 2 Rol. Abr. tit. Bye-Laws, pa. 365, pl. 9, "that none shall make or use a hot-press in London."—There is no particular custom, on which the bye-law is founded: yet it was holden a good bye-law.

8 Co. 126 a. *Wagoner's case*, and also Sir T. Raym. 288, *Player v. Vere*, prove that customs in London may partially restrain trade.

They admitted that a particular custom impowering them to make this particular bye-law, is not minutely set out: but at the same time they insisted, that they had set forth enough of a particular custom, to warrant this bye-law. For it is set forth, "that if any ancient custom, hard or defective, &c. wants amendment, the mayor and aldermen, with the consent of the commonalty, have by custom a power of appointing fit remedy for the common good of the citizens: so as, &c." Which is a general power of making bye-laws by custom: and this power, confirmed too by Act of Parliament.

Now the present bye-law falls within the provision of this general power.

The substance of this bye-law is, "that no butcher by trade, though free of the city, shall exercise this trade in the city, without being free of the Butchers Company." And it was both a hardship and defect, that they might do so previously to this bye-law.

Here is a custom shewn, "to restrain all grown or growing evils, within the city:" which is a custom to restrain trade. And there are hundreds of bye-laws in London, founded upon this general power.

And *Wannell's case* is, in substance, in point: it is a general return of an authority to make bye-laws under their general power; and the same sort of bye-law with the present one is established as a good one.<sup>(a)</sup><sup>1</sup>

[16] Lord Mansfield: I suppose it is a slip in the return.

I do not take the objection to be, "that it is necessary that it must be a particular custom to make a particular bye-law;" but, "that there is no general power here shewn, under the custom, to lay such a restraint upon trade."

This bye-law is a restraint of trade; and not a mere regulation of it: the preamble does not pretend it to be made to regulate the trade; but merely for the benefit of the Butchers Company. It is founded upon the general power of making bye-laws in the City of London.

Now under a general power to make bye-laws, it is certain, that a bye-law cannot be made "to restrain trade."

And by the general custom of London, every freeman may exercise any trade, without being free of a particular company: which this bye-law requires him to be.

The case in 1 Strange 675, *Wannell's case*, is not a full state of the pleadings.<sup>(a)</sup><sup>2</sup> But

(a)<sup>1</sup> Whether there be any particular custom or not shall be tried by twelve men, and not by the Judges, except the same custom be of record in the same Court. Dr. and St. c. 10, p. 34.

(a)<sup>2</sup> The bye-law in Strange 675, is, that no person shall use the trade of a joiner in London, who is not free of the company, under the penalty of 10l. After two arguments and time taken for consideration, to a subsequent term, the opinion of the Court, as delivered by Raymond, Ch.J. was, that "this is a good bye-law, being made



it appears that the return stated that no person could be a freeman of the city, till he was a member of one of the fraternities ;" then stated a power to make bye-laws ; (but how that power was set out, does not appear :) then the bye-law itself is there set out ; which professes to be a regulation of trade, and recites "that several persons not free of the Joiners Company had exercised the trade of a joiner in an unskilful and fraudulent manner, which could not be redressed whilst such persons were not under the orders and regulations of the company ;" and therefore it enacts that no person shall use that trade, who is not free of the company.

The bye-law for ordering and disposing of carts and cars, in Sir T. Raym. 288, 289, is a mere regulation of trade.

And as this power to make bye-laws to restrain trade, is not set out, in the present case, we cannot presume it, from any printed book, or any other way whatsoever. We cannot take judicial notice of any particular custom supporting such a bye-law as this ; when no such particular custom is set out ; and it certainly is not good under the general power which is set out. (a)

Mr. Just. Denison concurred, that the Court could not take judicial notice of any such particular custom to warrant this bye-law, without its being set out.

[17] And the custom here set out, of a power "to mend any hard or defective customs," is not sufficient : for here is no hard or defective custom particularly set out. And every man, free of the city, had a right to set up any trade : which original right is here taken away by this bye-law.

Indeed they may make bye-laws to regulate trade ; but not to restrain it, unless they have a particular custom to support such bye-laws. As to the case of the ordering and disposing of carts, cars, carters and carmen, in Raym. 288, *Player v. Vere*, that was a bye-law for regulation of trade, and prevention of nuisances in the streets and lanes : but this is a bye-law to restrain trade, not warranted by any particular custom. Therefore he held it bad.

Mr. Just. Foster concurred ; and spoke to the same effect.

Mr. Just. Wilmot expressed himself to the same purport.

in regulation of trade, and to prevent fraud and unskilfulness of which none but a company that exercise the same trade can be judges : this does not take away his right to his freedom, but only his election of what company he shall be free, it is only to direct him to go to the proper company." The reasons of that judgment held equally strong in support of the validity of the bye-law, in this as they did of the bye-law in that case ; there either is no difference, either in law or in reason, between the two bye-laws : or if there be any it consists in this, that the bye-law in this case, is less liable to exception than that ; for by that, all the joiners in London, whether already free of another company or not, were obliged to take up their freedom in the Joiners Company, under the penalty of 10l. : whereas in this case, only such as were not free of any company, were obliged to take their freedom in the Butchers' Company, under the penalty of 5l. It is true that in that case there was a return of the custom of London, that no person could be free of the city till he was a member of one of the companies : but the Court could not judicially take notice of that custom, as it was not returned in the present case ; yet that was no ground, as it should seem, for their holding the bye-law to be bad, for they ought rather to have adjourned the cause, and have given leave to amend the return on payment of costs.

It is also to be noted here that in *Strange*, 462, this bye-law was adjudged good, viz. "that the corn porters should be a company, called free porters, who should work at a particular settled rate ; and that none but the free porters should intermeddle in importing or exporting any corn, roots, &c. within the bounds mentioned in the custom, on penalty of 20s. for every offence, except in time of danger, or urgent necessity, or in the case of bona peritura ;" and the chief doubt there was with respect to the extent of the custom, or whether it was confined within proper bounds, being not limited to the walls of the city.

(a) If there be a custom in London, the Court ought to take notice of it, if a judgment given there, be brought before them ; otherwise the Court might reverse the judgment without cause, 1 Rol. Rep. 106. And quære, if it is not so in the case of a hab. corp. cum causa to the city Courts ? though it seems not, because the Court below hath an opportunity of informing the Superior Court of the custom by stating it in the return, and therefore they ought to return the custom.

By the Court unanimously, the bye-law was holden a bad one : and the rule for shewing cause "why a procedendo should not go," was discharged.(a)<sup>1</sup>

REX *versus* KILLINGHALL. 1756. Inquisition found by the grand jury at the General Sessions of Oyer and Terminer quashed. [S. C. Umfre. Lex. Cor. 481, 482, 483.]

Mr. Serjeant Poole and Mr. Clayton shewed cause against a rule which had been moved for by Mr. Norton, "to quash a presentment or inquisition found by the grand jury of the county of York, at the General Sessions of Oyer and Terminer for that county : " which Mr. Norton objected to, as being coram non judice ; for, he said, the grand jury had no authority to make such a presentment, or find such an inquisition under their general charge from the Judge of Assize ; whatever might be the case if the Judge had particularly directed and presided over an inquisition of this kind, upon the neglect of the coroner.

The fact found was, "that the mare of John Killinghall, Esq. was the cause of the death of one William Stelling, and was of the value of 10l."

It happened that the coroner had not taken any inquisition at all, upon his death : so that the lord of the manor, finding himself likely to lose his deodand, had made this application at the assizes ; where the grand jury found this inquisition or presentment ; which was afterwards removed hither by certiorari.

Mr. Serjeant Poole and Mr. Clayton endeavoured to support it.

[18] This inquisition, they said, before a grand jury is traversable, (which a coroner's inquisition is not ; ) and therefore does no body any injury. And as the coroner had taken none at all, upon the present occasion, this method was necessary to be taken, in order to come at the deodand.

1 H. H. P. C. 419, c. 32. Of deodands, shews most expressly that this may be done, before Commissioners of Gaol Delivery, Oyer and Terminer, or of the Peace, if omitted by the coroner. So does 1 H. P. C. 414, in treating of inquisitions ; where *Laughton's case*, H. 37 Eliz. is cited ; and it is said to be "inquisible before the Justices of Oyer and Terminer, yea, or of the Peace ; and that it had been adjudged accordingly, M. 1656, in *Greeve's case*."

3 Inst. 55, c. 8, note b. in margin, makes a difference between inquisitions taken before the coroners, and inquisitions taken before justices of the peace, as to having a traverse.

2 Ro. Abr. 96, pl. 3, proves that an indictment may be taken before Justices of Peace, and of Oyer and Terminer.

2 Lev. 140, *Rex v. Parker*, is in point, "that the coroner's omission may be supplied by commission of inquiry ; (a)<sup>2</sup> or the Justices of Peace, or of Assize, may inquire of it, without commission."

2 H. H. P. C. 58, cap. 8, concerning the coroner and his Court, and his authority in pleas of the Crown, proves that grand juries have this jurisdiction in case the coroner neglects it.

2 H. H. P. C. 59, ad idem. It is there said "that Justices of Peace, or Oyer and Terminer, or of the King's Bench, may inquire, if the coroner do not : but that that presentment is traversable ; which the presentment of the coroner of a felo de se is not."

Upon these authorities, they said, my Lord Falconbridge (the lord of the manor) was advised to take this method : but the Judge of Assize (Mr. Just. Birch) declined to meddle with it, or to have the inquisition taken before him particularly, or to give any particular direction about it.

They added these cases also, 1 Ventr. 352, in the note at bottom. Poph. 209, *Anon.* : and S. C. (apparently,) in Noy. 87. "It may be done before justices of peace." 1 Ventr. 181, 182, *Stanlack's case*. "If a coroner omits to enquire, this Court may do

(a)<sup>1</sup> It is somewhat remarkable that the very same bye-law in totidem verbis as that here holden to be a bad one, was afterwards, in 3 Burr. 1322, holden to be a good bye-law.

(a)<sup>2</sup> So also if the inquisition taken by the coroner be removed by certiorari, and quashed. 2 Lev. 152.

it, as supreme coroner of [19] England ; or may make commissioners to enquire : or Commissioners of Oyer and Terminer may inquire. But then it is not *super visum corporis* ; and therefore may be traversed."

Mr. Norton *contra*.

This is a presentment *ex parte* ; and a presentment of entitling, in order to found an odious and superstitious claim ; and all transacted in secret.

The cases cited only prove, "that, in default of the coroner's having inquired, the Justices of Oyer and Terminer, and of the Peace, may make the enquiry ; and that it is traversable."

They say "that we could not have traversed the coroner's inquisition ;" (which, however, I deny :) "but this we may traverse ; and therefore cannot be injured by it."

But will it be said "that the putting a man to a traverse is no injury ?"

4 Inst. 196, 197, 198, enters largely into the subject of traverses ; and condemns secret inquests and offices.

Now this is an office of entitling ; and therefore ought to be publicly and openly found.

Lord Mansfield. By express statutes.

And I remember a case of the late Duke of Buckingham's heirs ; where, upon application to the Court of Exchequer, notice was directed to be given : though in general, notice is not necessary.

Therefore I think this inquisition cannot be supported.

And inquisitions before the coroner are traversable [V. 2 H. H. P. C. 416, where that author declares his own opinion accordingly.]

Mr. Just. Denison : I think it cannot be supported.

Mr. Just. Foster : I am of the same opinion.

Rule to quash the presentment made absolute.(a)<sup>1</sup>

[20] Friday, 19th November, 1756. The Great Seal put into commission.

Memorandum. On this day, the Great Seal was put into commission ; being delivered by His Majesty (immediately upon the Earl of Hardwicke's resignation of it,) to Sir John Willes, Lord Ch. J. of the Common Pleas, Sir Sidney Stafford Smythe, third Baron of the Exchequer, and Sir John Eardley Wilmot, youngest Judge of this Court : which prevented Mr. Justice Wilmot from sitting much in this Court, the remainder of the present term and the whole of the two subsequent terms.

OPPENHEIM, QUI TAM, *vers.* HARRISON. Saturday, 20th November, 1756.

Attorney's name set on process without his authority, set aside.

The proceedings were set aside for irregularity in the want of an attorney's name, being duly set to them : it appearing that although they had the name of a regular attorney, in fact set to them ; yet it was so set, without any authority from him.

And the Court also granted an attachment against one Habin, who acted as attorney for the plaintiff, and had so put Mr. Granger's name (an attorney of this Court) without authority or leave from Mr. Granger.(a)<sup>2</sup>

COOPER, AND ANOTHER, Assignees of William Johns, a Bankrupt, *vers.* CHITTY AND BLACKISTON, ESQUIRES, Sheriffs of London. Hil. 27, Geo. 2, Rot. 869. Tuesday, 23d November 1756. The property of a bankrupt's goods is, after assignment, in the assignee, from act of bankruptcy. [1 Black. 65, S. C. Bull. 41, S. C. T. Jones, 196. 3 Wils. 314. Salk. 108.]

[Questioned, *Roche v. Dayrell*, 1791, 4 T. R. 412. Explained, *In re Barr's Trusts*, 1858, 4 K. & J. 223. Referred to, *Hollins v. Fowler*, 1875, L. R. 7 H. L. 765.

(a)<sup>1</sup> If deodands were to be abolished, the Parliament should do it ; but it should not be left to the coroner to find it or not as he chuses, without controul.

(a)<sup>2</sup> Vide 3 Jac. 1, c. 7, s. 2. 2 Geo. 2, c. 23, s. 10, 17, 27, and that an attorney may not, but in special cases, give leave to another attorney to practice in his name, see 1 East, 367. 4 East, 533. 5 East, 412.



Considered, *Gloucestershire Banking Company v. Edwards*, 1887, 20 Q. B. D. 113. Referred to, *Consolidated Company v. Curtis* [1892], 1 Q. B. 498.]

This cause was twice argued: it came first before the Court, on Monday 9th June 1755; and again, upon Tuesday the 16th instant. It was an action of trover brought by the assignees of William Johns, a bankrupt, against the Sheriffs of London, who had taken and sold the goods of Johns in execution under a fieri facias which had issued against Johns, at the suit of one William Godfrey.<sup>(b)<sup>1</sup></sup>

On the trial, a special case was settled:

Which case states, that Johns was regularly declared a bankrupt, on the 8th of Decemb. 1753. And as to the rest, the following times and facts were stated; viz. that on the 5th of December 1753, one Godfrey obtained judgment in the Common Pleas, against the said Johns, and on [21] the same day (5th December 1753) execution upon the said judgment was taken out against him by Godfrey, and the goods seized by the sheriffs, under it; that Johns committed the act of bankruptcy 4th December 1753, and on the 8th of the same December, a commission of bankruptcy was taken out against him; (a) and on the very same day, the commissioners of bankruptcy executed an assignment; and afterwards, viz. on the 28th December, a bill of sale of the goods was made by the sheriffs. The plaintiffs are the assignees under the commission: the defendants are the Sheriffs of London, who seized the goods under the execution.

The point was, whether the assignees under the commission of bankruptcy can maintain an action of trover against the sheriffs (who executed this process under a regular judgment and execution;) for seizing the goods under a fieri facias issued and executed after the act of bankruptcy was committed; and selling them after the assignment was executed?<sup>(b)<sup>2</sup></sup>

The counsel who argued for the plaintiffs, made two questions, viz.

1st, whose property the goods were, when seized by the sheriffs, by virtue of this fieri facias?

2dly, whose property they were, when sold by the sheriffs?

1st question. After the act of bankruptcy, they ceased to be the property of the bankrupt himself, (they said;) wheresoever else the property might be between the act of bankruptcy and the assignment.

This relation to the act of bankruptcy is like that of administrations to the time of the death: and they cited *Kiggil v. Player*, 1 Salk. 111 (c) as S. P. with the present case exactly.

The utmost that the bankrupt himself could be pretended to have was a special property, defeasible by the assignment. It is like the case of a distress for rent, where the seisor may sell the distress after five days; but, if the money be paid within the five days, he cannot sell: so that, in the interim, the right is defeasible.

Here the plaintiffs have declared as assignees under the commission of bankruptcy: therefore their interest vests as from the time of the act of bankruptcy.

If the bankrupt himself had delivered the goods to a stranger, it had been the same thing: the stranger would [22] be answerable to the assignees.

Sheriffs execute process at their peril: they are answerable civiliter, for what they do upon it. 11 H. 4, 90. 14 H. 4, 25.

A man may, without his own fault, be possessed of a horse which has been stolen: but nevertheless, he is answerable, civiliter, to the true owner for it.

The sheriff had no authority to take any goods, in execution, but the goods of the defendant: if he does take any other goods, he is a trespasser.

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(b)<sup>1</sup> See *Strange*, 981. 3 Mod. 236. 1 Durn. 158, 476, 478. See also *Powell v. Morrice*, 4 L. 261, n. 29, that this action does not lie against the sheriff without notice. 2 Durn. 754, and qu. 1 Comy. 533 (D.), 20, and 1 Lev. 173. 1 Sider. 271, there cited.

(a) Quære whether this was notice to the sheriff or not?

(b)<sup>2</sup> This action should have been brought against the plaintiffs without the officer, as in the case in *Strange*, 996.

(c) There is an adjournatur at the end of it. But Holt ther esaid "the assignee was in by relation from the time of bankruptcy, so as to avoid all mesne acts, but not so as to be actually invested with the property."

In writs of execution, it is at their peril if they take another man's goods. In *Carthew*, 381, *Hallett v. Byrt*, it is so laid down by Ch. J. Holt expressly.

Now these were goods of the assignees; and they may maintain an action either against the plaintiff in the cause, or the sheriff, or the vendee of the goods: and the sheriff is the properest person against whom to bring the action.

The gist of an action of trover is the conversion: the finding is not the material part.

And they cited several *Nisi Prius* cases of actions brought by assignees of bankrupts: viz.

M. 11 G. 1. *Trover by Vanderhagen & Al', Assignees of Daniel, a Bankrupt, v. Rewise, a Serjeant at Mace of the City of London*: S. P. with the present. Lord Ch. J. Pratt held the action maintainable.

The S. P. was also before Lord Ch. Just. Lee, in a case of *Bloxholm, Assignee of Mills, a Bankrupt, v. Oldham & Al'*, at the sittings after Tr. 1750, at Guildhall: in trover against a sheriff, and the former plaintiff, and the vendee, (all of them together). It was objected "that the sheriff ought to be acquitted:" but over-ruled; and verdict against all three.

The seizure there was before the commission, but after the act of bankruptcy.

The second question is, "whose the goods were at the time of the sale?" The writ only commands the sheriff "to sell the defendant's goods:" and if he sells the goods of another person, it is a conversion.

[23] It is beyond doubt, that the assignment has relation to the act of bankruptcy: and the assignees stand in the bankrupt's place from that time. 1 Ventr. 193, *Monk v. Morris and Clayton*, proves this.

Here then the assignees had all the property that the bankrupt had, at the time of his act of bankruptcy; consequently the absolute dominion was in them: and the sheriff could not after such assignment sell them, as the defendant's. Indeed sheriffs seldom do, in fact, sell the goods without indemnity. But the sheriff has here committed an error in selling them at all: for they were not the defendant's. He might, it is true, have summoned a jury "to inquire whose goods they were." But still, even their verdict cannot affect the right of the true owner of the goods.

The point about relation backwards, does not at all affect the question, as to the sale; for the assignment was prior to the sale, though not to the seizure.

And they affirmed that the sheriff not only might, but even ought, in this case, to have returned "nulla bona:" that would have been the proper and the true return; and if it had been disputed, he then might have brought the money into Court. There is a case of *Rev v. Brein, Bailiff of the Savoy*, 1 Keb. 901, where the goods were claimed under a bill of sale; the sheriff returned "nulla bona;" and the money was ordered to be brought into Court by the sheriff; and the return to be made agreeable to the event of a trial of the validity of the pretended bill of sale, after such validity should be tried in an action.

In the present case the defendants knew of the assignment before they sold the goods: whatever they might do when they seized them; and they could not possibly be obliged to sell them: it is contrary to an express Act of Parliament, which vests the property in the assignees. So that here the sheriff has sold the goods, not of the bankrupt, but of the assignees.

And supposing that the plaintiffs may bring an action against the plaintiff in the original action, or against the vendee of the goods; yet they seem, both of them, to have better excuses than the sheriff has, and are more innocent. Therefore why should the assignees be turned round to them, when they can undoubtedly maintain either trespass or trover against the sheriffs, who have sold the goods; which is a conversion, and will support an action of trover? That the plaintiffs have this election, to bring either [24] trespass or trover, appears from Cro. Eliz. 824, *Bishop v. Lady Montague*, and Cro. Jac. 50, S. C.

Therefore they concluded that the action was well brought.

The counsel who argued for the defendants, the sheriffs, agreed that the matter would turn upon the solution of the two questions made by the other side.

As to the first question, they said it would be very hard if this action should lie against the sheriffs, and they be put to controvert the act of bankruptcy, which is a matter not at all within their knowledge.

They argued that the sheriffs shall not be considered as wrong-doers: and to prove

it cited 1 Lev. 95, *Turner v. Felgate*. Raym. 73, S. C. 2 Siderf. 126, S. C. and 1 Keble, 82, S. C. 1 Lev. 173. *Bayley v. Bunning*, 1 Siderf. 271, S. C. and 2 Keble 32, 33, S. C.

The only acts of the sheriffs that can be considered as a conversion, are the acts of seizure and sale.

Now they were compellable by the writ of fieri facias to seize the goods and levy the debt.

For till the commission and assignment, the property was in the bankrupt: and it did not appear that a commission ever would be taken out.

1 Salk. 108, *Cary v. Crisp*, is express in point, "that the property is in the bankrupt, till assignment." It was there resolved that the property of the goods is not transferred out of the bankrupt till assignment. 2 Str. 981, *Brassey & Al' v. Dawson & Al'*, accord'.

1 Lev. 173, *Bayley v. Bunning*. Judgment was for the officer; he being obliged to execute the writ, and could not know of the act of bankruptcy, or that any commission would ever be sued: and the sheriff was holden not to be liable, although he had notice of the assignment.

1 Siderf. 272, S. C. The taking was holden lawful.

Comberb. 123, *Lechmere v. Thorowgood*. The officer shall not be made a trespasser, by relation. 3 Mod. 236, S. C. 1 Shower, 12, S. C.

[25] The commission of bankruptcy makes no alteration, till assignment: and after assignment, there shall be a relation, so far as to avoid all mesne acts of the bankrupt, and even to over-reach this judgment-creditor. Thus far they admitted.

But they insisted that the action ought not to have been brought against the sheriff.

The sheriff is to seize, sell, and return his writ. In proof of this, they cited 2 Ld. Raym. 1072, 1074. *Clerk v. Withers*, 1 Salk. 322, 323, S. C. (3d point). 6 Mod. 293, 299, S. C. 1 Siderf. 29. *Harrison v. Bowden*, Cro. Eliz. 235. *Mountney v. Andrews*, 1 Ro. Abr. Execution, 893. Letter B. pl. 2. Dyer, 98 b. and 99 a. § 57, and the two cases there cited in the margin; and Cro. Eliz. 597, *Charter v. Peeter*. From all which cases, it appears that the sheriff is not liable to be molested.

1 Salk. 321, *Kingsdale v. Mann*, proves that the seizure is the essential part of the execution: and an execution is an entire thing; and cannot be stopped, after it is once begun. 2 Show. 79, *Cockram v. Welbye*.

And after the sheriff had seized these goods, the original plaintiff (William Godfrey) could oblige the sheriff to return his writ: and yet upon the principles advanced the sheriff must be put under the greatest hardships. And he had no method to make the assignees of the bankruptcy to give him any assistance towards proving the act of bankruptcy.

Indeed the execution is good, though the writ be never returned. 5 Rep. 90 a. *Hoe's case*: (1st resolution.)

The only return the sheriff could make, must be "that he had levied the money:" (which could only be by sale). Therefore he was obliged to sell. Consequently the law will not make him a wrong-doer by selling.

The following cases they said were in point for them, viz. 1 Lev. 173. *Bayley v. Bunning*, 2 Keble, 32, 33, S. C. 1 Siderf. 271, S. C. 3 Lev. 191, *Philips v. Thompson*, 1 Show. 12. *Lechmere & Al' v. Thorowgood & Al'*, Comb. 123, S. C. 3 Mod. 236, S. C. and *Cole v. Davies & Al'*, 1 Ld. Raym. 724, per Holt, in point, as against the sheriff most expressly.

And the present plaintiffs may have an adequate and complete remedy against the plaintiff in the original action.

[26] As to the cases cited, the gentlemen who have argued on the other side, put it upon the question, "Who had the property of the goods?"

Now the property was in the bankrupt at the time of the execution: it was not in abeyance; as it is in the case of an administration. (Which is an answer to the case of *Kiggil v. Player*.)

The sheriff is not in the case of a stranger; for he was obliged to execute and return the writ.

Indeed the sheriff is to execute the writ at his peril; and Carthew 381, is so: the reason is, because the sheriff may impanel a jury to inquire "whose the goods are." But here there were no means for the sheriff to indemnify himself: the goods were



undoubtedly then the goods of William Johns; even though he had then committed an act of bankruptcy.

The assignees have not a right to recover the specific goods, but only damages.

Trespass will lie against the plaintiff in the original action, even before he receives the money; though trover indeed would not till after.

It is not certain that an action will lie against the vendee of the sheriff.

As to *Vanderhagen's case* it is not sufficiently clear how it was, or why it was determined.

But as to the case of *Bloxam v. Oldham*, Mr. Henley did not \* insist on the objection, "that the action would not lie against the sheriff;" because it would not help his client: for in that case the sheriff and the plaintiff in the original action were both of them defendants. And the case of 1 Lev. 173, was not indeed, by Lord Ch. J. Lee, thought apposite to that case: but it was not overruled by him. And the goods were certainly the goods of the bankrupt till assignment.

\* N. B. Mr. Hume, who was counsel for the defendant in that case of *Bloxam v. Oldham*, agreed, "that the objection against the sheriff's being a defendant" was not insisted upon; because the plaintiff in the original action (who was also a co-defendant with [27] the sheriff there) had indemnified the sheriff: so that it was really a point quite immaterial to the plaintiff; (who was at all events liable to the action).

They added, that this was a point of great consequence to all sheriffs and officers: on the other hand creditors cannot be injured, though sheriffs should be excusable, and the original plaintiff only should be liable to the action.

As to what has been said of security taken by the sheriff—the Court can take no notice of a sheriff's taking security; nor can they suppose him conscious of a private unknown act of bankruptcy: and it would be very hard if an innocent officer should be hurt by retrospection and relation.

They agreed that this execution may be avoided as against the original plaintiff: 2 Strange 981, *Brassey & Al' v. Dawson & Al'*, is a proof "that it may." But they denied it, as to rendering the officer liable to an action; for he is excusable, as appears from the cases before cited.

As to the second question.—The foundation of this action of trover, is property in the plaintiff, at the time of the seizure, and a tortious and illegal act of conversion; for without both these circumstances, this action will not lie.

Now the property is in the bankrupt, till assignment: and the subsequent sale cannot make the sheriff a wrong-doer by a fictitious relation. Raym. 161, *Bilton v. Johnson & Al'*. "The relation of a teste shall not justify a tort."

It is said that "this relation is given by Act of Parliament." But there are no words in the Act of Parliament that can make the sheriff a wrong-doer.

If the seizure was lawful, the sale was so too. 2 Ld. Raym. 1074, 1076, *Clerk v. Withers*. Cro. Jac. 575, *Sly v. Finch*. Cro. Eliz. 440, *Boucher v. Wiseman*. March 13. *Parkinson v. Colliford & Al', Executors of a Sheriff*. Cro. Car. 539, S. C. 1 Jones, 430, S. C. Hob. 206, *Speake v. Richards*. Cro. Eliz. 237, *Mounteney v. Andrews*. The law considers the whole execution as one entire act: the intermediate days are only allowed for the sake of the sheriff. Consequently he may execute the whole at once; he may seize and sell directly. The execution is an entire thing, and can not be stopped. Cro. Eliz. 597, *Charter v. Peeter*. 6 Mod. 293, *Clerk v. Withers*. Therefore the officer shall be protected.

Suppose an action should be brought against the she-[28]-riff for the money. He might avail himself perhaps by special pleading, provided he was able to make out the facts he should specially plead: but how could he be able to prove the act of bankruptcy, trading, or assignment? to all which he is an entire stranger. Therefore it would be hard to suffer such an action to be maintained against him. But all these matters are in the privity of the original plaintiff: against whom, therefore, the action ought to be brought.

It is said, "the sheriff acts at his peril."

But it is admitted that the method of impanelling a jury would be no protection to him.

The counsel for the plaintiffs replied, that it is stated "that the assignment by the commissioners of bankruptcy was previous to the bill of sale by the sheriffs."

The sheriff's being always a responsible person, and therefore most likely to be

made defendant, is the very reason why he ought to be liable to the party who has received the injury.

The finding, or even the taking possession of goods found is no wrong: but it is the conversion that makes the person a tort-feasor.

They admitted that the sheriff is not answerable for the irregularity of a judgment; (for he is bound to execute the command of the writ). But if he take the goods of another person, instead of the goods of the defendant, he is answerable for that.

It has been said, indeed, that "they were at that time the goods of the bankrupt himself."

But be the taking lawful, or not lawful, yet here is an actual conversion, an actual disposition of the goods; which makes him a trespasser ab initio.

It has likewise been said, that "the Court will protect the sheriff." But the relation goes back, quite up to the act of bankruptcy.

They denied that the execution is so entire that the sheriff can not stop in it, after seizure and before sale of the goods. Suppose the sheriff had confessedly seized another person's goods, should he be obliged to sell them? [29] Dalton's Office of Sheriff, says, "The sheriff may impanel a jury; and after that shall not be answerable." Now here he might either have impanelled a jury, or have kept the money in his hands, or brought it into Court, till the property of the goods had been determined.

They admitted the general principle of the cases cited on the head of executions; but denied the application of them to the present case. They also denied the principle, "that a sheriff shall never be a tort-feasor by relation;" for he shall in some cases be so, as where he take the goods with a bad original intention.

As to *Bayley v. Bunning*, they endeavoured to distinguish it. In order to which, they remarked that there is no finding of an actual conversion, or of what could be called so by the Court; it is only a demand and refusal, which is only evidence to a jury. And the opinion of the Court there went upon the taking, which they held to be legal; whereas here is an actual conversion stated. An action would lie, one would think, against the vendee of the sheriff in point of reason, and the practice does strongly support it; for nine in ten of these actions are brought against the vendees of the sheriff.

In the case of *Bloxam v. Oldham* there was a very material difference, whether the sheriff should have a verdict for him, or a verdict against him; for in the one case he would receive costs, in the other he must pay them.

The plaintiffs had no right to call upon the sheriffs till the return of the writ; and they might then have returned "nulla bona." Therefore this is not such a hard case upon the sheriffs as is suggested. And this is not the only case where the sheriff is to act at his peril; for in taking of bail, &c. he must do so, as well as here.

If the sheriff had returned "nulla bona," the onus probandi would have lain upon the original plaintiff.

In the case of *Turner v. Felgate*, the sheriff was certainly excusable by virtue of his writ.

In the case of *Cole v. Davies & Al'* in 1 Ld. Raym. 724, the goods were sold before the commission and assignment. For the case is there put of a commission and assignment, both of them subsequent to the sale of the goods. The words are, "If he seizes and sells," and then a "commission is granted, and the goods assigned; the assignee may maintain trover against the [30] vendee: but no action will lie against the sheriff, because he obeyed the writ." But our reasoning in the present case is founded upon the sale's being an unlawful act.

In the case of *Brassey & Al' v. Dawson & Al'*, there was no assignment previous to the seizure.

They did not deny that the bankrupt had in the present case a sort of property, a defeasible property in him, at the time of taking the goods. But in the case of *Clerk v. Withers* (reported in 6 Mod. 290 and in 1 Salk. 323, and in 2 Ld. Raym. 1702), the defendant in the action had the whole indefeasible property in him; and the sheriff ought to have gone on; but that case is not applicable to the present case, where the property was only defeasible.

As to the cases cited from Hob. 206, and March, 13, they agreed to them.

The time allowed to the sheriff makes no difference, (they said;) because he has done wrong.

And however entire a thing an execution in general may be; yet here it was irregularly executed.

The truth of the return of "nulla bona," in this case depends upon the present question.

It is very frequent for sheriffs to be entangled in difficulties about their returns. Here he might have taken a writ de proprietate probanda.

*Bayley v. Bunning* turned upon the taking.

*Lechmere & Al' v. Thorowgood* only proves "that the goods were in custodia legis." And so they were; but to the purposes of the law which in the present case is for the benefit of the creditors of the bankrupt.

*Curia advisare vult.*

And now (Tuesday, 23d Novemb. 1756) Lord Mansfield delivered the opinion of the Court, and said they were all agreed, as well his two brethren then present in Court, as his brother Wilmot, (who was at present engaged in another place,) in their opinion.

There are few facts essential to this case; and it lies in a narrow compass.

[31] He then stated the case, (which see in p. 20, ante;) and was very particular in specifying the dates of the several transactions.

The general question is, "whether or no the action is maintainable by the assignees, against the defendants, the sheriffs, who have taken and sold the goods?"

It is an action of trover.

The bare defining the nature of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution of the question in this particular case.

In form it is a fiction: in substance a remedy to recover the value of personal chattels wrongfully converted by another to his own use.

The form supposes the defendant may have come lawfully by the possession of the goods.

This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully.

Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waves the trespass, and admits the possession to have been lawfully gotten.

Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action, for having taken it.

This is an action of tort: and the whole tort consists in the wrongful conversion.

Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st, property in the plaintiff; and 2dly, a wrongful conversion by the defendant.

As to the first, it is admitted in the present case, that the property was in the plaintiffs, as on and from the 4th of December, (which was before the seizure,) by relation.

This relation the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed, (for the old statutes con-[32]-sider him as a criminal: they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy.)

Dispositions by process of law are put upon the same foot with dispositions by the party: to be valid, they must be completed before the act of bankruptcy.

Till the making of 19 G. 2, c. 32, if the bankrupt had, bona fide, bought goods, or negotiated a bill of exchange; and thereupon, or otherwise, in the course of trade, paid money to a fair creditor, after he himself had committed a secret act of bankruptcy; such bona fide creditor was liable to refund the money to the assignees, after a commission and assignment; and the payment, though really and bona fide made to the creditor, was avoided and defeated by the secret act of bankruptcy.

This is remedied by that Act, in case no notice was had by the creditor, (prior to his receiving the debt,) "that his debtor was become a bankrupt, or was in insolvent circumstances."

Therefore as to the first point, it is most clear that the property was in the plaintiffs, as on and from the 4th of December, when the act of bankruptcy was committed.

2dly. The only question then is, "whether the defendants are guilty of a wrongful conversion?"

That the conversion itself was wrongful is manifest.



The sheriffs had no authority to sell the goods of the plaintiffs, but of William Johns only; they ought to have delivered these goods to the plaintiffs the assignees. Upon the foundation of the legal right, the Chancellor, even in a summary way, would have ordered them to be delivered to the assignees.

It is admitted, on the part of the defendants,<sup>(a)</sup> that the innocent vendee of the goods so seized can have no title under the sale, but is liable to an action; and that Godfrey the plaintiff would have no title to the money arising from such sale, but if he received it would be liable to an action to refund.

If the thing be clearly wrong, the only question that remains is, "whether the defendants are excusable, though the act of conversion be wrongful."

[33] Though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees by relation, in order to an equal division <sup>(b)</sup> of his estate among his creditors, yet they do not make men trespassers or criminal by relation, who have innocently received goods from him, or executed legal process, not knowing of an act of bankruptcy; that was not necessary and would have been unjust.

The injury complained of by this action, for which damages are to be recovered, is not the seizure, but the wrongful conversion.<sup>(c)</sup>

The assignment was made upon the 8th of December; the sale not till the 28th of December; the return not till the octave of St. Hilary, (which is the 20th of January).

The sheriff acts at his peril, and is answerable for any mistake: infinite inconveniences would arise if it were not so.

At the time of the sale and return, it was more notorious "that these goods belonged to the plaintiffs," than it could probably have been in the case of any third person; because commissions of bankruptcy and the proceedings under them are public in the neighbourhood, and indeed all over the kingdom.

This conversion is 20 days after the assignment.

The defendants have here made a direct false return: they have returned "that they took the defendant's goods, &c." whereas they were (at the time of the return) notoriously the goods of the assignees when they were taken. They certainly might, and ought to have returned "nulla bona," which was the truth; for the goods taken were, beyond all manner of doubt, the goods of the assignees, at the time when the sheriffs took them; and the bankrupt could have no goods after the 4th of December, when he had committed an act of bankruptcy. They would have been justified by the truth of the fact, if they had made this return; for the bankrupt neither had nor could have any goods of his own, at that time. It is arguing in a circle to say, "that they could not return nulla bona, because they were obliged to sell; and they were obliged to sell, because they could not return nulla bona."

The seizure is here out of the case; for the point of this action turns upon the injurious conversion.

[34] Therefore we are all of opinion that the plaintiff is entitled to recover in this action.

But objections have been made by the gentlemen who have argued this case on behalf of the defendants.

It has been said "that the execution is entire; for the debt is discharged by a seizure in fi. fa. That being entire, if once lawfully begun it must be completed; for goods taken by a fi. fa. shall be sold by the representative of the sheriff."

"That they shall be sold, though the plaintiff dies; and the money arising by the sale shall not be recovered back by the defendant:" which is the case of *Clerk v. Withers*, 1 Salk. 323. 2 Ld. Raym. 1072, S. C. and 6 Mod. 290, S. C.

(a) This is not consistent with what is before reported, p. 26, though the same admission as here is repeated, *infra*, 34.

(b) Post, 35 ac. 36 ac. with a good reason for it.

(c) There is no difference with respect to the sheriff between trover and trespass: he may just as well be liable to the one action as the other: the measure of damages would be the same in both, and he must pay costs in both: and the Court of B. R. have since determined trover to be an action founded on a tort, and on that ground not maintainable against an executor for a conversion by his testator; and see *Cowp.* 371, and 1 Durn. 475.

In general a judgment in trespass to trover, and so vice versa with proper averments, 1 Show. 146. 2 Bl. Rep. 27.

"That a writ of error is no supersedeas."

"That the sale by the sheriff shall not be avoided against the vendee, by a subsequent writ of error and reversal:" which is the third point in *Matthew Manning's case* in 8 Co. 96.

Answer. All this is true, (and upon the plainest reason,) as between the plaintiff and defendant, parties to the judgment in consequence of which the execution issues; but no way applicable to the case of a third person.

None of these cases authorise the sheriff to sell the goods of a third person: and it is admitted that the vendee is not protected here; because, at the time of the sale, the sheriff had no authority to sell.

[He then went minutely through the cases; shewing the grounds upon which the determinations proceeded, as against the parties to the judgment, who are bound by it, and everything done in consequence of it.]

But the argument from these principles to the present case is this: "here the taking was lawful, and therefore the sheriff was bound to complete the execution by a sale." Answer. The premises are not true; and if they were, the conclusion would not follow.

The taking was not lawful; because they were then the goods of a third person.

[35] But if the taking were lawful, the sheriff ought not to go on to a sale, after a full discovery that the goods then belonged to a third person.

To prove the taking lawful, and that therefore the sheriffs shall not be liable to an action, were cited the cases of *Bayley v. Bunning* (a)<sup>1</sup>, reported in 1 Leon. 173, 174. 1 Siderf. 272, and 2 Keble 32, 33. [V. ante 24, 25.] *Lechmere v. Thorowgood*, in Comb. 123. 1 Shower, 12, and 3 Mod. 236. [V. ante 24, 25,] and *Cole v. Davies & Al'*, 1 Ld. Raym. 724. [V. ante 25.]

The fallacy of the argument from the authority of these cases, turns upon using the word "lawful" equivocally in two senses.

To support the act, it is not lawful: but to excuse the mistake of the sheriff through unavoidable ignorance, it is lawful. Or, in other words, the relation introduced by the statutes binds the property: but men who act innocently (a)<sup>2</sup>, at the time, are not made criminals by relation; and therefore they are excusable from being punishable by action or indictment as trespassers. What they did was innocent, and in that sense lawful: but as a ground to support a wrongful conversion by sale, after a commission publicly taken out and an actual assignment made, it was not lawful.

In the case of *Bayley v. Bunning*, the goods were clearly bound by the teste. It is best reported in Levinz. The question referred by the special verdict was upon the taking, viz. "whether the party was guilty in the taking?" and the Court excuse the bailiff for his innocent executing his writ. The case of *Philips v. Thompson*, in 3 Levinz, 192, expressly says, "that this resolution in the case of *Bayley and Bunning* was only in excuse (b) of the bailiff for executing the writ."

(a)<sup>1</sup> The only distinction between the principal case, and that of *Bayley v. Bunning*, is, that this was an action of trover, and that an action of trespass; that the former is founded on a tort, and that no man ought to be made criminal by relation that the other is not founded on tort; but that distinction is not only trifling, for the reasons mentioned in the notes, ante; but seems also inconsistent with the judgment in the case in Cowp. 371, where it was adjudged that trover doth not lie against an executor for a conversion in the life of the testator, because it is an action founded on tort, and therefore *moritur cum personâ*: it seems also not consistent with the reasons given by Ld. Mansfield in p. 377, of the same case, in delivering the opinion of the Court, "there are express authorities, that trover and conversion does not lie against the executor where the commission is by the testator: the form of the plea was decisive, viz. that the testator was not guilty; and the issue is to try the guilt of the testator;" after which Ld. Mansfield adds, "that no mischief is done, for an action for money had and received may be brought." But quare? for no such action was ever brought, the allowing it would be contrary to 5 Burr. 2592.

(a)<sup>2</sup> This excuse is nothing, for that being subject to trover is much the same in its effects.

(b) The excuse was not confined to its being an excuse in trespass and not in trover; and his excuse would be of no use to him, at least not after the judgment in



Siderfin does not seem to know what the Court was going upon ; for the Court tied it up to the taking ; whereas he does not seem to distinguish between the trover and the trespass. [V. 1 Siderf. 272.]

The case of *Lechmere v. Thorowgood* is best reported in 1 Show. 12. And this report (which is the only clear state of it in any of the reports) puts it singly upon the making the officers, who had good authority and took the goods lawfully, trespassers by relation.

[36] Comberbach, in giving the judgment of the Court, which is the only sensible part of his whole report, (for it is plain to me, that he did not understand the former argument on the former day, which is the first part of his report of the case,) agrees with Shower ; and says that "the Court were of opinion that a construction should not be made, to make the officer a trespasser by relation : (a) for the taking was lawful, at the time." But he must be mistaken in the first part of this report : for Lord Ch. Just. Holt could never say "that the property of the goods is vested by the delivery of the fieri facias ; and the extent for the King afterwards comes too late." No inception of an execution can bar the Crown. This matter was lately fully discussed in the Court of Exchequer in the case of *The King and Cotton*.

As to the case of *Cole v. Davies & Al'*, reported in 1 Ld. Raym. 724, "that no action will lie against the sheriff, who, after the bankruptcy seizes and sells the goods, under a fieri facias to him directed ;" (which is there said to be ruled by Lord Ch. Just. Holt, at Nisi Prius, in Hil. 10 Will. 3). These notes were taken in 10 W. 3, when Lord Raymond was young, as short hints for his own use : but they are too incorrect and inaccurate, to be relied on as authorities. The note states four general resolutions upon evidence, in a trial at Nisi Prius ; but does not state the case or question to which the resolutions were applied : (though, by the particularity of the fourth resolution, I conjecture that to have been most immediately adapted to the case then in judgment). The first resolution is an obiter reference to the determination in *Bayley and Bunning* ; and it might not be at all material, to attend to the distinction between trover and trespass. Besides, the case there put is of a sale by

this case ; for then the action would always be trover, in which the same damages would be recovered precisely as if it was trespass, except the attorney should blunder and bring the wrong action : and that is a further reason against the judgment, as it induces distinctions, that tend only to vexation ; but the true reason is, that the sheriff ought to be protected in paying obedience to the writ, and ought not to be exposed to the danger of being injured by facts out of his knowledge ; and the old cases were so, and the money in the sheriff's hands was by the Courts declared to be in custodia legis, for which none could give a discharge, but he who was a party to the record. Cro. Car. 166, 176. Therefore the assignees or the creditors under the commission ought to move the Court, and not bring an action against the sheriff, if he paid the money into Court : for that at all events to be his indemnity, and so ought payment to the plaintiff. If before notice of the property, the effect of such notice ought to be nothing more than to oblige them to pay it into Court : and this judgment hath had very mischievous effects, not only against sheriffs and their officers ; but by exciting creditors to take out commissions, and bring actions founded on acts of bankruptcy, often pretended probably, or if not unknown at the time of the execution, and which would have continued unknown, had there been no execution ; for the reasoning in this case goes that length, and hath had that effect, according to the maxim, in relatione juris semper est æquitas, under pretence that all creditors ought to be paid equally : which is true in general, but not when applied against such particular creditors as have used due diligence and been at the expence of recovering their debts, in favour of others, who are allowed by this fiction to defeat the legal proceeding, and recover upon their own oaths before commissioners, equally with those who have taken a legal course, and ought to be reimbursed their costs, by the others who have acquiesced, and ought to do equity, if they will have equity : this holds where there is no direct fraud in the others, which no one can doubt frequently is the case ; and to which this judgment gives great encouragement, and even in this case the act of bankruptcy found by the jury, was but one day before the execution was taken out and the goods seized.

(a) See 4 Durn. 407, and vide 412, contra. Qu, 2 Black. 1296. Parker, 125, and 4 Durn. 402.



the sheriff, before the commission; and the conversion might be as excusable as the taking, because he obeyed the writ: whereas here, the goods were not sold till after both commission and assignment. It is a loose note for what was said obiter: it manifestly refers to the case of *Bayley and Bunning*; but is no authority applicable to the present case.

There are, in the course of trade, numberless acts of bankruptcy in fact committed, where no commission is ever taken out. Therefore it would be very hard, to make the sheriff a trespasser for taking the goods of a person who might privately and secretly have committed an act of bankruptcy, and perhaps many years before too, and on which no commission might ever afterwards issue; and which the sheriff could not possibly know. But none of these reasons hold, to justify the making a false return, and selling the goods after a commission and an assignment.

[37] Arguments have been urged from inconvenience, if the sheriff should be made liable, because he is obliged to sell (a)<sup>1</sup>.

But the sheriff may take an indemnity (b) from the plaintiff, in case there be a doubt concerning the property of the goods. Possibly, this Court might interfere, if the sheriff was reasonably doubtful about the property; at least, they would have given him time to make his return: or he might have put it on the parties concerned in interest to litigate their right, by filing a bill in Chancery against them, to oblige them to interplead, in order to ascertain to whom the property belonged. Or he might oblige the assignees, to prove the act of bankruptcy, and the assignment.

And notwithstanding what has been urged as to the hardships that sheriffs will be under, there can hardly a case exist where there will be any hardships upon the sheriff, where the taking and sale, or even the sale only, are subsequent to the assignment; but in the present case, the sheriffs knew of the bankruptcy before they sold the goods.

There are much greater hardships upon other third persons (a)<sup>2</sup> concerned in pecuniary transactions with bankrupts; which hardships they are nevertheless left subject to, because it was necessary that they should be so, in order to secure the end and intention of the Acts relating to bankrupts; namely, the securing their effects for the equal satisfaction of their creditors.

The commission and assignment are both notorious transactions; so that a sheriff cannot well be hurt by being left liable to this action: whereas there would be danger, if it were otherwise, of great collusion being practised by sheriffs, on these occasions; which might be encouraged by a contrary resolution. The seizure here is after the act of bankruptcy committed, and therefore after the property by relation is vested in the assignees: but that was innocent and excusable; and the sheriff shall not be liable by relation as a wrong-doer. The gist of this action is the wrongful conversion by the sale and false return, long after the commission and assignment.

Therefore, per Cur. unanimously. The action is maintainable, in this case, against the defendants; and there must be judgment for the plaintiffs.

Judgment for the plaintiffs. (a)<sup>3</sup>

(a)<sup>1</sup> The Court cannot command the sheriff to take an issue with any person. 21 H. 7, fol. 9 a. pl. 9.

(b) Ld. Raym. 278, 279. Lutw. 686, 687.—And quære whether he, (or, which is the same his bailiff,) being shewn the goods and informed by the plaintiff that they were the defendant's, could have refused to levy thereon the execution: it seems reasonable if there was a doubt about the property that he should have an indemnity. And quære, if the plaintiff would not give it, whether he might not shew it for cause for not returning the writ? For as he was shewn the goods, it seems he could not lawfully return nulla bona, but he might sue out a writ de proprietate probanda, and take an inquisition thereon and act accordingly; and that seems to be the proper way for him to avoid the dilemma of being subject to an action for a false return by the plaintiff, in case he should return nulla bona, and the goods should appear to be the defendant's; or an action by the owner of the goods, in case he should levy them, and they should not prove to be the defendant's goods.

(a)<sup>2</sup> Though voluntary payments are not protected, yet payments enforced by coercion of law are valid against the assignees in case any commission should afterwards be taken out. 2 Durn. 479, n.

(a)<sup>3</sup> This judgment is against a former solemn determination in 1 Lev. 173, and is in other respects new; and many suits have followed therefrom. See Doug. 244.

[38] ROBINSON *versus* ROBINSON. 1756. Devise of all the testator's real estate (except that at E.) and of the perpetuity of his presentations to L. H. for his life, and no longer, provided he take the name of the testator, and live at his house at B.; and after his decease, to such son as he shall have lawfully begotten, taking the name of R., and for default of such issue, then to W. R. in fee; is, an estate in tail male in L. H. (he and the heirs of his body taking the name of R.) in order to effectuate the general intent of the testator, notwithstanding the express estate devised to L. H. for life and no longer. [S. C. 17 vol. of Cas. in Dom. Proc. p. 139. 3 Atk. 736. 2 Ves. 225, 231. Qu. Cases in the Time of Lord Talbot, 262. Comyns, 289. Viner, Devise Y. (a) p. 233, 234. 1 Atk. 432. 1 Bos. 217.]

[S. C. 3 Atk. 736; 2 Ves. sen. 225; 3 Bro. P. C. 180. Referred to, *Thong v. Bedford*, 1783, 1 Bro. C. C. 315. Distinguished, *Hay v. Coventry*, 1789, 3 T. R. 87. Discussed, *Doe d. Blandford v. Applin*, 1790, 4 T. R. 87; *Doe d. Phipps v. Mulgrave*, 1793, 5 T. R. 323; *Seale v. Barter*, 1801, 2 Bos. & P. 493; *Seaward v. Willock*, 1804, 5 East, 206; 1 Smith, 394; *Malcolm v. Taylor*, 1832, 2 Russ. & M. 445. Distinguished, *Beavan v. White*, 1844, 7 Ir. Eq. R. 475. Referred to, *Montgomery v. Montgomery*, 1845, 3 Jo. & Lat. 52; 8 Ir. Eq. R. 746. Applied, *East v. Twyford*, 1849-53, 9 Hare, 731 n. 733; 4 H. L. C. 517; *Key v. Key*, 1853, 4 De G. M. & G. 82. Referred to, *Head v. Godlee*, 1859, Johns. 581; *Barrow v. Total*, 1862-65, 7 H. & N. 967; 11 H. L. C. 143. Applied, *Bell v. Bell*, 1864, 15 Ir. Ch. R. 523. Referred to, *Bowen v. Lewis*, 1884, 9 App. Cas. 898. Applied, *Studdert v. Von Steiglitz*, 1889, 23 L. R. Ir. 574. Referred to, *Saville v. Saville* [1896], 1 Ir. R. 263. Not applied, *In re Bishop and Richardson's Contract* [1899], 1 Ir. R. 77.]

This was a case out of Chancery, on a will.(b)<sup>1</sup>

On the 27th of July 1723, George Robinson, of Bochym, in the county of Cornwall, Esq. duly made his will, and, after giving his wife one guinea, and his father-in-law a groat, he devised as follows:—"I bequeath all my real estate (excepting my estate in the parish of Endellyon, late Mr. Newman's, and all my presentations in the said county), to Lancelot Hicks, of Plymouth, in the county of Devon, gentleman, for and during the term of his natural life, and no longer; provided (c) that he alter his name, and take that of Robinson, and live at my house of Bochym; and after his decease, to such son as he shall have, lawfully to be begotten, taking the name of Robinson: and for default of such issue,(a) then I bequeath the same to my cousin [the defendant] William Robinson, Rector of Landewedneck, and his heirs for ever."(b)<sup>2</sup>

"Item. My will and desire is, that he [meaning William R. Rector of Landewedneck] have liberty to present whom he pleases to any vacancy that shall happen in any of my presentations, during his life; and in case any of his children shall take or

(b)<sup>1</sup> This case has been often recognized, and very strongly in 1 East, 235. 2 Wils. 324; see also 5 Durn. 303, 323. 6 Durn. 513. 8 Durn. 7. 7 Durn. 533. 2 Ves. jun. 708. 4 Durn. 87, ac. 3 East, 550. 5 East, 202, 551. 1 East, 235. 2 Brown, 573. 4 Vez. 304. Doug. 415. 4 Durn. 49. 2 Bos. and Pul. 489. 3 Brown, 414. 1 Brown, 249. 3 Burr. 1633, S. C. also cited in the appellant's second reason in his printed case, *Chapman, Lessee of Oliver, and Others v. Brown and Others*, Feb. 1767, in Dom. Proc. 2 Wils. 88, 322. See also 3 Bosan. 623. The principle is this, that where there are two intents, one general, and the other particular, if both cannot take effect, the general intent shall prevail. Wilmot, 272.

(c) Lucas 402, 10 MS. 344. Vin. Devise, p. 233. 3 Burr. 1574, 1580, 1633. 1 Vent. 231, non aliter. See also 1 Vent. 232. 2 Harg. Arg. 371.

Qu. Et vide 8 Vin. 184. Ambler 355, 3. And as to general and particular intents, see Park. 31, and 2 Vez. 195.

(a) Blackstone, when of counsel, said the determination in this case went clearly upon the words default of such issue, which overpowered the words and no longer, in the devise to Lancelot Hicks, 1 Black. 505; but qu. ? as observed, post, 47, if one son only could take, it does not follow of course, that the words, and for default of such issue, are restrained to such one son only.

(b)<sup>2</sup> No difference between this and 3 Lev. 442.



be designed for holy orders, then it is my desire that in case of any vacancy in either of my presentations, that bonds of resignation be taken, to such child or children, if the vacancy happen before he or they attain such orders: and after the same shall be disposed of as aforesaid, then I give the perpetuity of the said presentations, to the said Mr. Lancelot Hicks, in the same manner, and to the same uses as I have given my estate."

And after bequeathing some legacies, he gave all the rest of his goods and chattels together with his estate at Endellyon, to his said kinsman William Robinson, and made him sole executor.

This William Robinson was heir at law to the testator.

On the 30th September 1728, the testator died without issue; leaving the said William Robinson his heir at law.

Lancelot Hicks was then living, and took the name of Robinson; and after the testator's death had two sons; [39] George, his eldest; and the plaintiff Edmund (both of them born after the testator's death). Lancelot Hicks entered upon the estate, and lived at the testator's house at Bochym: and his eldest son George was called by the name of Robinson, and died in March 1738, an infant; in the life-time of the said Lancelot Hicks, his father, and of the plaintiff, his younger brother.

Lancelot Hicks, alias Robinson, died in July 1745, leaving the plaintiff Edmund Hicks, alias Robinson, his only surviving son, an infant; who brought his bill in Chancery to have a conveyance.

Short state of the case.—The title of the plaintiff appears to be stated thus—That Lancelot Hicks took the estate and complied with the condition; and then had two sons born; the eldest son died an infant, in his life-time. Then Lancelot himself died; on whose death William Robinson claims the estate; the first devise "to the son of the body of Lancelot," being already satisfied by the birth and death of George Lancelot's eldest son, as the claimant supposes.

Question. "Whether any, and what estate or interest is vested in the plaintiff Edmund Robinson, the infant, (Lancelot's second son,) by virtue of the said will?"

This case was thrice argued: 1st, in P. 26 G. 2, on 15th May 1753, by Mr. Pratt for the plaintiff, and Mr. Yorke for the defendant; again, in P. 29 G. 2, on 14th May 1756, by Mr. Norton for the plaintiff, and Sir Antony Abdy for the defendant; and lastly, in M. 30 G. 2, on 23d November 1756, by Sir Richard Lloyd for the plaintiff, and Mr. Perrot for the defendant.

For the plaintiff (Edmund Robinson) it was urged that the testator certainly meant to give an estate-tail to Mr. Lancelot Hicks and all his issue: and the intention shall prevail where it may. *Ow. 29, Cosen's case. Cro. Jac. 448, King v. Rumball. Doe ex dimiss. Barnard v. Reuson, Tr. 28 G. 2, B. R.* That the estate to Lancelot Hicks was intended to be an estate tail; but, at least, here is either an estate in fee, or for life, in his son, the plaintiff.

As to the condition, "to take the name of Robinson," the estate must first vest, before the condition can be performed.

This is a condition subsequent: as appear by *Plowd. 23, Colthirst v. Beiushin*: and therefore has nothing to do with the vesting of the estate. Cases in Chancery in Lord Talbot's time, 166, *Sir John Robinson v. Comyns*. "No particular technical words are requisite to make either precedent or subsequent condition." And it was holden by the Lord Chancellor, in the case of *Trafford & Ur' v. Sir Ralph Ashton & Al'*, 2 Vern. 661, that this clause in a will, "taking on him the name and arms of Vavasor," was a condition subsequent to defeat the estate; and not precedent. Therefore they should lay this condition out of the case.

And then the simple limitation will stand thus: it will be to Lancelot Hicks for life; remainder to such son as he shall have, lawfully, &c.; remainder (for default of such issue) to the testator's cousin William Robinson in fee. This is the simple limitation, putting the condition subsequent out of the case.

And this is intended to be an estate tail in Lancelot Hicks.

It may be objected, that this cannot be an estate tail in Lancelot, because here are no words of limitation; for that the word "son" is a word of purchase not of limitation, even if it was in the plural; and that here "son" is in the singular number, ("and to such son as he shall have lawfully begotten;") which, it may be urged, cannot be considered otherwise than as a word of purchase.

Another objection may be raised, because it is limited to Lancelot Hicks himself



for his life, "and no longer:" and therefore it may be urged that the Court cannot raise an estate tail by implication, contrary to these negative words.

But 1st, the word "son" must here be taken as a word of limitation: because otherwise it would not be agreeable to the testator's manifest intention, "that the issue of such son should have it afterwards, and that William Robinson should not take, till the issue of Lancelot Hicks should be all of them extinct."

The change of name shews that the intention of the testator extended to the whole family of the Hicks's. So do the words "lawfully to be begotten:" which words properly belong to estates tail. So "for default of such issue."

The words will bear this construction. They are, "To such son as he shall have, lawfully to be begotten;" i.e. lawfully issuing from his body.

"Son" is here nomen collectivum. *King v. Melling* is in point; (a) and so is *Byfield's case* there cited (1 Ventr. 231), and many other cases there cited. (b)

So that William Robinson was not to have it, till Lancelot Hicks should be dead without any issue. (c)

[41] 2dly, as to the words "for life, and no longer:" there had been no difficulty or impediment, if the latter words "and no longer," had not been added. 1 Ld. Raym. 203, *Luddington v. Kime*. 1 Peere Wms. 605, *Blackborn v. Hewer Edgely*. 9 Co. 127 b. *Sunday's case*.

And yet they have really no force at all in them, beyond the former words: they are certainly tautologous, and have no additional effect. An estate for life was given by the former words: and such an estate can last no longer than that life lasts.

In *Archer's case*, 1 Rep. 66 b. it was ruled to be an estate for life in Robert Archer; because it was an express estate for life, devised to him. But tautology does not make it more express.

1 Ro. Abr. \* 837, is in point, contrary to what my Lord Ch. J. Hale is reported in 1 Ventris 231, in the case of *King v. Melling*, to have said. He there cites from Rolle 839, (as that report says) the case of a devise "to the testator's eldest son for life, & non aliter;" (for so, says he, were the words, though not printed in the book;) "and after his decease, to the sons of his body." This, says my Ld. Ch. J. Hale, was but an estate for life, by reason of the words "non aliter."

But the true reason of the determination of that case in Rolle's Abridgement, appears from what Levinz says in his own argument of *King v. Melling*. [V. 2 Lev. 58, 59.] For Coleman, who argued "that Bernard took only for life," had cited that case from Rolle as an authority on his side. Levinz, contra, argued that Barnard took an estate tail. And in answering the cases cited against him, he says, "And as to the case 1 Rol. it there appeared, the devisor's intent was, that the father should be only tenant for life, the estate tail to the son: for that the clause to restrain alienation is added only to the estate of the son." So that if this was not a mistake of the reporter, it is, at the most, but an extrajudicial opinion of a single Judge, and not the point of the case then under consideration. Therefore that could not be the principle of law upon which that case was determined: it must have been a regard to the intention of the testator; and the particular words must have been considered as a key to that intention. And the same observation will hold with regard to the cases of *Loddington v. Kime*, *Backhouse v. Wells*, *Lomax v. Homeden*, *Plunket v. Holmes*, and *Shaw v. Weigh*; and will serve to reconcile them.

The true rule is, that where the issue cannot take an estate tail, without taking it through the father, the father [42] shall have an estate tail: otherwise not. *Archer's case*, 1 Rep. 66. Where the estate is given over. Cro. Eliz. 313, *Clerk v. Day*. 1 Ro. Abr. 139, letter U. pl. 4, S. C.

*Backhouse v. Wells*, in Equity Cases Abr. 184, pl. 27, in Trin. 11 Ann. B. R. "devise to J. B. for his life only, without impeachment of waste." J. B. was not meant to be tenant in tail. [See Fortescue's Reports 133, and Lucas 181, S. C.]

(a) Not so exactly; but very like in 1 Vent. 233.

(b) It appears that this case of *King v. Melling* was much relied on in the argument of this case; but Ld. Raym. 2 Str. 804, in delivering the opinion of the Court, said, that case appears to have been ruled with great difficulty; and Hale himself was of two opinions, but that it must now be taken to be law.

(c) It should be "son."

\* Note; this case is cited in 1 Ventr. 231, as from Rolle, 839, but that is a mistake of the page; for it is really in 1 Ro. Abr. title Estate, letter P. page 837, pl. 13.

*Langley v. Baldwin*, is, in Equity Cases Abr. 185, pl. 29, said to have been certified to be an estate for life only.<sup>(a)</sup> But this is a mistake: for it was certified [and so it appears, as Lord Mansfield said, by the register's book,] to be an estate tail.

However, the principle of that determination was, to pursue the testator's intention: which was "that it should go to all the children of his grandson."

*Loddington v. Kime*, 3 Lev. 432. 1 Ld. Raym. 203, was an estate devised to the issue of the issue male. So no violence done to the intention, by construing the first estate to be an estate for life.

*Shaw v. Weigh*, P. 1 G. 2, B. R. reversed in Dom' Proc.: and determined to be an estate tail. [See Modern Cases in Law and Equity, 252, 389. Fitz-Gibbons, 7, and Parliament Cases of April 1720, and Fortescue's Reports, 58.]

Be the circumstances as they may, yet the testator plainly means, not merely an estate for life to Lancelot Hicks; but he also means to give an estate tail to the Hicks family. Therefore let the intention of a life-estate be ever so strong, yet the Court will construe his plain and clear intention for the benefit of the family, to prevail.

2dly, but if it be not construed an estate tail, but "son" be considered as a word of purchase; then these questions will arise; 1st, who shall be the taker? 2dly, at what time? 3dly, what estate?

1st, the present case was indeed uncertain at the creation; though rendered certain, by the event. And perhaps it was not a vested remainder; from the uncertainty who should take.

2dly, but supposing it to be a contingent remainder, yet the original uncertainty was removed within sufficient [43] time. The limitation over seems to confine it to the time of the father's death: and then the plaintiff Edmund was the only son. And the contingent remainder vests time enough, if it vest then.

3dly, it is a devise of all his real estate, except that at Endellyon; which alone will pass the fee-simple. 6 Mod. 109, *Countess of Bridgewater v. Duke of Bolton*. 1 Salk. 236, S. C. *Scott v. Alberry*, Comyns 337, 340. *Ibbetson v. Beckwith*, reported by Mr. Forrester, in his Cases in Equity, pa. 157.

And the exception shews that he did not mean the rest to go to his heir at law.

The testator plainly meant it to be a fee: he would never oblige the devisee to part with his family name, and take his name, only for an estate for life.

Then he gives the perpetuity of all presentations in the same manner as he had given his estate: which must mean a perpetuity in both; and consequently proves him to have meant a fee in the land.

And the limitation over proves the same, viz. "that William Robinson was never to take, but on L. Hicks's dying without issue."<sup>(a)</sup> However, if this was not a devise of a fee, it must then be an estate tail. 1 Ventr. 225 to 232, *King v. Melling*. Moore, 397, pl. 15. 1 Anderson, 43. No. 110, S. C. *Bendloe*, 30, pl. 124, S. C.

But it is at least an estate for life: otherwise, all this part of the will must be rejected.

The counsel for the defendant William Robinson made two questions—First, what estate is devised to Lancelot Hicks, the father of the plaintiff; viz. whether for life, or in tail?

Secondly, if for life; then whether the contingent remainder is to vest upon the birth of a son, during the life of Lancelot Hicks the father; (which, if it be so, has been satisfied by the birth of George Hicks the son;) or whether it vested on the death of the father, in his then eldest son? (which then eldest son is the now plaintiff).

<sup>(a)</sup> It is not so said in either of Hill's editions, which are the 3d and 4th of Eq. C. Ab. but on the contrary it is said to have been certified, and also decreed an estate-tail; and there is a reason added there (as said by Lord Raymond, C.J.) because the devise was not to all the sons, but only to the sixth son, and then a devise over if the father should die without issue male.

<sup>(a)</sup> The words are, "and for default of such issue;" and therefore there is no ground in reason or authority to raise a larger estate by implication in L. H. than was before expressly and in negative terms devised to him: the word such refers to the precedent devise to the son; and the words for default of such issue, are used only to connect the subsequent devises with those that are precedent; and for authorities hereon, see Forrester. 262, 267. 1 Bulst. 163. 1 Wms. 605. So that this case though adjudged in B. R. and affirmed in Dom. Proc. seems not consistent with former cases.



They laid out of the case—

1st, the words of condition annexed to the estate of the father; conceding that they were conditions subsequent, to defeat the estate, and not precedent, to hinder it from vesting.

[44] 2dly, the son's taking the name: for they allowed that the construction of the words, as to the son, must be the same as of those relating to the father.

But they considered as material—

1st, whether the estate to Lancelot Hicks be an estate for life or in tail? Which they subdivided into two other questions; viz.

First, "whether the Court can raise an estate tail by implication, at all, in this case; this being an express estate for life, and even confirmed by negative words?"

Secondly, "whether the Court can raise an estate tail by implication, upon either of these expressions; viz. after his decease, to such son as he shall have;" or, and for default of such issue?"

First.—In the case of *King v. Melling*, Lord Ch. Just. Hale was the first great Judge who put the cases together to raise an estate tail by implication. But succeeding Judges differed from him: and in the case of *Luddington v. Kime*, in 1 Ld. Raym. 204, Mr. Just. Powell argued against Lord Hale's opinion; Ch. Just. Treby agreeing with Lord Ch. Just. Hale.

In 1 Peere Wms. 605, *Blackborn v. Hewer Edgely*, et c contra, Lord Chancellor Parker explodes that opinion, "that words of implication should not turn an express estate for life into an estate tail:" and says "that a devise to A. for life; and after his death without issue; then to B., will give an estate tail to A." Yet this construction would be directly contrary to the words of the testator.

But the present case is within Lord Ch. Just. Hale's distinctions. He says that "non aliter" is sufficient to make it an estate for life only; viz. where the devise is, "to A. for life, & non aliter." 1 Ventr. 231.

In *Backhouse v. Wells*, Fortescue differs from Lord Raymond in the account of it; and lays stress upon the word "only," as being explanatory and restrictive in a doubtful case, [see *Backhouse v. Wells* reported by Lucas, fo. 181, and Fortescue 181, and cited in 2 Ld. Raym. 1439, 40]. And in *Bagshaw v. Spencer*, Lord Chancellor said it was determined upon the word "only," in that case of *Backhouse v. Wells*.

[45] In *Bamfield v. Popham*, 1 Peere Wms. 54, 55, Lord Ch. Just. Trevor reasons against Lord Ch. Just. Hale. So also does Mr. Just. Powell, in the same case, fo. 57. And surely nothing can be stronger than express words, with negative ones added to them. And they shall not be rejected; according to 2 Bulstr. 176, *Mirrill v. Nicholls*, and 2 Peere Wms. 282. *Barker v. Giles*, Plowden, 523.

In the case of *Humphry v. Taylor*, 5th February 1752, the Court of Chancery held resulting trusts to be rebutted by negative words.

*Goodtitle ex dimiss. Cross v. Wadhold*, Mich. 19 G. 2, C. B. was a devise to the testator's eldest son, only for life, and in the case of failure of issue, &c. it shall descend and come to his (the testator's) male children, &c. And they held this to be an estate for life only; because, being expressed to be given for life only, with negative words, it could not be enlarged by implication: and Lord Hale's opinion, in the case of *King v. Melling*, and the determination in *Backhouse v. Wells*, were there relied on by the Court of Common Pleas.

2d subdivision of the first point, viz. whether the Court can raise an estate tail by implication, upon either of these expressions, viz. "after his decease, to such son as he shall have," or, "and for default of such issue?"

And they argued that they could not. For,

First the word "son" must be taken as a word of purchase: "and from and after his decease, to such son as he shall have, lawfully to be begotten." "Son" is here a word of purchase; whether it be taken singularly or collectively.

If one son only be meant, then the words "for default of such issue," refer to such son, taking an estate for life. And the word "son" is singular; not collective, here. He might have used the terms "heir," "heir male," &c. 1 Ventr. 230, *Burley's case*, there cited; where the remainder is limited to the next heir male. *Miller v. Segrave*, M. 10 G. 1, B. R. cited in Robinson's Treatise of Gavelkind, 96. The remainder was "to the next heir male:" (which case was cited to shew the construction of the word "heir," in the singular number.)

In *Trollop v. Trollop*, in C. B. (V. Robinson on Gavelkind, 96), Eyre argued



against the opinion of Lord Coke in the case of *Clerk v. Day*, Moore, 593 (the best report of that case).

[46] They cited 2 Ventr. 311, *Burchet v. Durdant*, only to shew that no application can be made of those cases to the present.

2d branch of this 2d subdivision, viz. as to the word "issue."

This word, taken technically, is indeed a word of purchase.

*King v. Melling* was the first case where it was holden to operate as a word of limitation in a will.

The word "children" is less operative than the word "issue." Each of these is a nomen collectivum; but "son" is designatio personæ; unless other words explain it. 1 Ro. Abr. 837, letter P. pl. 12, 13.

As to *Byfield's case*, mentioned only in Lord Ch. Just. Hale's argument in 1 Ventr. 231, and in no other book—it comes the nearest to the present case, of any other cited on the part of the plaintiff. The word "son" was there holden to be nomen collectivum. But there was no express devise to the son: it is a devise to A.: "and if he dies, not having a son, then to remain, &c." Whereas here the words are, "to such son as he shall have, lawfully issuing from his body."

But if "son" be taken as a word of purchase—it is asked what son is meant? And what estate?

Answer. It can mean but one son: the sons of Lancelot Hicks could not all take as tenants in tail, or as joint-tenants. In the case of *Luddington v. Kime*, 1 Ld. Raym. 206, Lord Ch. Just. Treby is very express on this head, "that if it had been the word son, it had been without controversy."

2 Leon. 35, *Leonard Lovelace's case*, [Cro. Eliz. 40, S. C. Savile, 75, S. C.] and Moore, 371, S. C. cited, is very strong to the same effect. Devise to A. and to his eldest issue male de corpore suo exeunti; (or "seniori exitui masculino suo," according to Moore:) it is only an estate for life in A. remainder to his eldest son, &c. for life.

In *Cane'*: In another part of this very (present) case, on this very will, 17th April 1733, Sir Joseph Jekyll held Lancelot Hicks to be entitled to an estate for life; remainder to his eldest (and but one) son for life; remainder to William Robinson, the devisee over. This cause was between the widow of the devisor, and Lancelot, [47] the first devisee. And the deeds were brought into Court: whereas they must have been delivered to Lancelot, if he had been tenant in tail. In 1734, Lord Talbot, on a rehearing, was of the same opinion. And we cite it for their opinions only: we do not say that the present plaintiff is bound by this decree.

Then if one son only could take, it follows, of course, that the words "and for default of such issue," are restrained to such one son only.

And as to the estate, it is only an estate for life, in that one son: for here are no words of limitation, at all.

As to the arguments drawn from the advowsons, and the obligation to take the name of the testator.—The advowsons are given for the benefit of any of Lancelot's children that should go into orders: and then the testator gives the perpetuity of them to Lancelot Hicks for his life; and afterwards, to such son as he shall have lawfully issuing from his body. Now it can never be supposed that the testator meant to give Lancelot a fee in the land; because he gives him the perpetuity of the livings. And the latter devise shall be construed by and agreeable to the former: consequently, neither did he mean to give Lancelot's son a fee, because he gave him the perpetuity of the livings.

As to taking the name—no case has been determined, on that point. And Lancelot Hicks is here enjoined to take the name of Robinson; though the estate is expressly given to him "for life, and no longer."

By Mr. Shephard of Cambridgeshire's will, the name of Shephard is to be taken by the tenant for life. The case of *Ibbetson v. Beckwith*, reported in Mr. Forrester's Cases, p. 157, was a devise to testator's mother for life; after which to his nephew Tho. Dodson, if he will take his name of Beckwith; if not, only 20l. Lord Talbot thought that alone to be too slight a ground for a construction "that it should be a fee to Tho. Dodson."

In order to make it an estate tail, the expression ought to be such as will put it beyond all possibility of doubt: according to the cases of *Langley v. Baldwin*, *Shaw v. Weigh*, and *Bamfield v. Popham*.

The case of *Coulson v. Coulson*, 2 Stra. 1125, was by way of remainder; not by giving the father an estate tail; and is distinguishable from all those that have been mentioned.

[48] The next question is, "when the remainder shall vest?" viz. whether this contingent remainder in the son is to vest upon the birth of a son, during the life of Lancelot Hicks; or not till upon or after the death of Lancelot Hicks, (the father). [V. ante, p. 43.]

"After the decease of Lancelot Hicks," (the father) are the words of the will. Which can suspend it no longer than till the birth of his first son: for, here are no words to lead to a contrary determination.

It must vest, either before the immediate estate ceases, or eo instante that it does cease. Hutton, 119, *Napper v. Sanders*. Chancery Cases, 33, *Sackville v. Lockwood*.

Swinburn, part 7, c. 11, proves, "that the words shall not relate to the time of the testator's death; but to the time of making the will." And at that time Lancelot Hicks had no son; nay, nor even at the time of the testator's death. A contingent remainder must take effect as soon as any person is born, who comes within the description: it can remain no longer contingent. Therefore it here vested by the birth of a son; and was then and thereby satisfied: the estate for life vested in him, on his birth; and ceased with him, on his death; and then went over to the defendant William Robinson, the devisee over.

Indeed the son might have been born between the making the will and the death of the testator: and have died before the testator, *Thrustout v. Peake & Al'*, 1 Strange 12. And so, in the case of *Lomax v. Holmden*, 2 July 1749, in Canc'. A son was born and died in the life-time of the testator. But here, the testator died before either of Lancelot Hicks's sons was born. Here the elder brother (George) was the first who could take, after the death of the testator.

And as to the intention of the testator—it is out of the present case: for the intention of the testator cannot be pursued by any construction upon this will, without straining the rules of law.

Therefore the plaintiff can take nothing by it.

The plaintiff's counsel replied, that the word "son" is here a word of limitation.

Some words are words of purchase: and may, by circumstances, be turned into words of limitation: others are, [49] *prima facie*, words of limitation; and may, by circumstances, be turned into words of purchase. The words "son, children, issue, and heir," in a will, where no son is in being at the time of the devise, are nomina collectivæ, and sufficient (in a will) to create an estate of inheritance.

Now, here are such circumstances as shall determine the word "son" to be, here in this will, a word of limitation.

The case of *Taylor v. Sayer*, 41 Eliz. is not law: Lord Ch. Justice Hale says, "it is too rank." [1 Vent. 229.]

They agreed to the case of *Trollop v. Trollop*; as the words stand singly there: but alledged the rule to be, "that the intention of the testator shall fix the construction of such words, as may be construed either as words of limitation, or of purchase."

And if this word "son" be a word of limitation, then what hinders this from being an estate tail? And they insisted that this was so. And they said that though here was a necessary implication, yet they needed not to rely singly on its being an estate-tail by implication: for here is even an express estate tail devised.

In the case of *Shaw v. Weigh*, the intention was plain. But the apparent intention "to give an estate tail to the issue," over-ruled it. And this is the last case, in point of time.

In the case of *Backhouse v. Wells* it is not agreed, which of the two expressions the Court went upon: viz. "without impeachment of waste;" or "for his natural life only."

Therefore they concluded that the plaintiff is entitled to an estate tail in the present case.

2dly. The son must be such a son as could take.

They said, they never contended, that the sons should take as joint-tenants, or tenants in common: they were to take in succession.

The word "son" may be here enlarged into "issue." It does not at all appear that the testator meant Lancelot's eldest son, and his eldest son only: on the contrary, his intention appears to be the issue male of Lancelot, generally.

And the cases cited by the other side do not prove [50] their point. For, in 2 Leon. 35, *Leonard Lovelace's case*, the word "eldest" was expressly added to the words "issue male;" (the devise being to the father, and to his "eldest issue male:") so that it was the same as "eldest son;" and it better answered the testator's purpose, that the children of this devisee should take as purchasers.

As to the determination said to have been made in 1733 and 1734, of this point, upon this same will, by Sir Joseph Jekyll, and Lord Chancellor Talbot; the widow of the testator there claimed paramount the will; she brought a bill to establish her jointure: and there was indeed a cross cause. But non constat, what Lancelot claimed; nor does it appear how it was defended. However, it is plain, that the present Lord Chancellor does not rest satisfied with these opinions: because he has sent it hither for the opinion of this Court.

The words, "such son" must let in all sons; and cannot exclude all sons but the eldest. It was a contingent remainder, that the Court will keep open, till there is a necessity to determine it. And there is no need to determine it, (for there is no need that the remainder should vest), till the death of the tenant for life: then indeed it must vest, eo instante.

In Hutton, 119, and in Chancery cases, 33, it was an eldest son: whereas here it is not necessarily an originally eldest son; but may be any other son, who becomes eldest before the contingent remainder vests.

All the sons of Lancelot could not take, unless the father took first: a posthumous son certainly could not.

As to the contingent remainder vesting—it is enough if it vested eo instante that the particular estate determined.

And as to the devise of the perpetuity of the advowsons, the latter devise is not to be construed by the former: but both the former and the latter words are to be taken together, and a reasonable construction make upon them, agreeable to the general intention of the testator.

Upon the whole, this is an estate either in fee, or in tail; or at lowest, for life.

The Judges of this Court, on the 1st of December 1756, unanimously certified to the Court of Chancery, in the words following:

"We are of opinion, that, upon the true construction of the said will of the testator George Robinson, the said Lancelot Hicks must, by necessary implication, to effectuate the manifest general intent of the said testator, construed to take an estate in tail male, he and the heirs of his body taking the name of Robinson; notwithstanding the express estate devised to the said Lancelot Hicks 'for his life and no longer.'"

[51] Note; the course has always been, for the Judges not to give any reasons in Court, upon a case sent out of Chancery for their opinion. But the above certificate seems carefully penned, to mark the grounds upon which it was founded.

The estate tail is said to vest in Lancelot Hicks, the father. The manifest intent of the testator, expressed by his will, was, that the estate should not go over to his heir at law, till failure of issue male of Lancelot Hicks.

The difficulty was, how to mould an estate agreeable to the rules of law, to effectuate the testator's intent; and to construe his sense and meaning into apt words of limitation.

If the father could have taken an estate for life, and the sons successively an estate in tail male, the whole intention of the testator would have been better answered: for, by such construction, all the words in the will would have received their natural sense and meaning, without rejecting any words, and none should be rejected, unless the testator's intent cannot be otherwise attained. But that could not be, by law. An estate to the heirs male of the body of Lancelot Hicks, is implied, though an estate for life only is given to him; because the testator's heir was not to take, till failure of such heirs male. But by law the testator could, by no words, have made the father tenant for life, and the heirs male of his body purchasers.

If he had devised "to the father for life, remainder to the son for life, remainder to the heirs male of the body of the father;" or, "to the father for life, remainder to the son, and the heirs male of the body of the father." In either of these cases, the father must have taken an estate in tail male. The case put in Lit. sect. 30, and the determination mentioned in Lord Coke's comment upon that section, (in pa. 26 b.)



on the gift "to Roberge and to the heirs of John de Mandevile, her late husband, on her body begotten," are no exception to this rule: for, in both cases, the father was dead at the time of creating the entail.

It is said too, "that he must, by necessary implication, to effectuate the manifest general intent of the tes-[52]-tator, be construed to take an estate in tail male; notwithstanding the express estate devised to him, for his life, and no longer."

Those words seem intended to express the governing reason in this case, to have been the manifest main intent of the testator, collected from all the parts of his will taken together; without shaking the authority of *Backhouse v. Wells*, and other cases which have laid a stress upon the words "only," "not otherwise," or like expressions, after an estate for life together with other clauses and circumstances in favour of the manifest intent of a testator, to make the issue or heir take as a purchaser designed by a personal description.(a)

This certificate was confirmed in Chancery; and a decree made accordingly.

On appeal to the House of Lords from that decree, the opinion of all the Judges was asked. It was delivered by Lord Ch. Baron Parker, with the reasons at large; and they unanimously agreed with the above certificate, upon the above grounds suggested thereby.

Whereupon the decree was affirmed, by the Lords, on the 14th of February 1758.(b)

(a) This seems to be the true reason: in other cases, the main intention, as sometimes called, or the general or principal intention, hath been preferred to an intent of an inferior nature. 1 Vent. 379. 3 Lev. 371. 1 Vez. 22.

(b) The construction of the Court in this case does appear to be the worst that could be put on the will, and in itself absurd; for under pretence of supporting an implied general intention, it defeated the whole will, by enabling the first devisee, contrary to the most determined intention of a testator, and declared in the strongest terms, by recovery to dispose of the estate: this surely was sufficient to stigmatize this case, as there was no technical term that would have been violated by a contrary construction. Where that is the case, there may be good reason, for the sake of certainty in property, to determine according to the settled legal operation of technical terms, notwithstanding such determination be contrary to the intention. The determination in this case was against the legal operation as well as the most express declaration of the testator. If the principle on which the determination was founded, viz. that a particular intention, though declared ever so strongly, shall not prevail against a general intention to be inferred from the will, be right, and applicable to this case, then the son of the present devisee ought to have taken an estate to him and his heirs male of the body of his father. But besides this a rule of law and reason was violated by this determination, which is, that "the testator's heir at law shall not be disinherited without express words, or a necessary implication." There have been opinions, that an implication, though not strictly necessary, if strong will be sufficient: and doubts have been, in particular cases, whether the implication was or was not sufficiently strong to disinherit the heir; and it has always been agreed that a slight implication is not sufficient: but in the present case, there is no implication at all; but express words to prevent any such being raised to disinherit the heir of the reversion in fee, in case the devisee should never have a son; and yet the Court disinherited the heir by their judgment.

If it be objected that Lancelot Hicks might have sons by different wives; the answer is, that it was a remote event, which probably never occurred to the testator, and therefore was no objection to the construction. There is also another ground, on which a fee might have been construed to have passed to the son, which is the same as one of the reasons given by Lord Talbot for passing a fee: for there the testator devised to his mother, all his estate at N. for her life, and to his nephew after her death, if he would change his name to Beckwith. And Lord Talbot in *Forrest*. 162, held that the word "estate" carried a fee; and held that the limitation to the mother for life, in the first instance, "where the second limitation is general, could make no difference." See also 2 Saund. 388.

There may be cases where a testator had two intentions, viz. "a general, and a particular intent in a will; and that the latter must give way when the former

REGULA GENERALIS. Friday, 26th November 1756. Causes in special paper for argument to come on in regular course.

The Court declared a new order concerning special causes in the paper; which was, in substance, that all causes should come on to be argued, in the same order that they were entered; and that they should continue to stand in the paper, in the same order, till they should be argued, (without being entered anew:) and that no cause should be put off, without a special application to the Court, upon some sufficient ground, before the day upon which it stood in the paper for argument.

Note;—It may not be amiss, to mention a general rule for entitling all cases arising upon orders of removal: the want of knowing, or the want of attending to which general rule, has been the occasion of infinite confusion in tabling and citing cases of this sort.

The constant method of entering them in the rule-book, is to name the King as prosecutor; and the parish last charged with the paupers, and consequently appealing to this Court, as defendants. For instance—Two justices [53] remove a pauper from A. to B. and B. appeals to the sessions. If the sessions confirm the order, and B. brings the certiorari, the rule thereupon is entitled "*Rex versus Inhabitantes de B.*:" but if the sessions discharge the original order, and consequently A. remains charged with the pauper, and brings a certiorari to remove the orders, then the rule bears for its title, "*Rex versus Inhabitantes de A.*"

REX versus INHAB. DE AYTHROP ROODING. Monday, 29th Nov. 1756.

[Mr. Justice Wilmot was absent; sitting in Chancery as one of the Commissioners of the Great Seal.]

See this case at large in the quarto edition of my Settlement Cases, No. 131, p. 412.

cannot otherwise be carried into execution," as observed by Ld. Kenyon, in 1 East's Rep. 234.

This case of *Robinson v. Robinson* hath been undeservedly mentioned as one of those cases often, and in particular in the case above mentioned in East's Rep.; yet there are several others mentioned, 8 Lev. 371, 372, and also in 2 Wils. 22, 23, 75. In that in 3 Lev. it was argued by counsel, that a deed shall not operate by way of use, when by the scope of the deed, the intent appears to have it operate by the common law. Now certainly where, by the deed, it appears that the intent was that the party should have the estate, it is a more worthy consideration how to make his intent good, by passing the estate, if by any manner it may be done, than by considering the manner of passing it to defeat his intent, in the principal, viz. the passing the estate, than in the manner how it shall pass: and so has the law been often taken, as 3 Leon.; and so, 2 Rol. Abr. 786, 787, by which cases it appears, that the Judges in these later times, have had more consideration of the substance, viz. the passing of the estate, than the shadow, viz. the manner of passing it, and was afterwards adjudged accordingly.

This case of *Robinson v. Robinson* was determined contrary to two principles.—1st. That no implication shall be raised against express words (though this principle was long exploded before this case)—2dly. The power of suffering a recovery has been considered as affording an argument against estates tail, where it would plainly destroy the whole of the intention, except where technical words are used, which necessarily compel the Court to take them in the technical sense.

But to make the principle apply, the power of a recovery by the first taker is not to be presumed: and it is so mentioned in *Roe v. Grew*, Wilmot, 278, 279, and the same is mentioned in several other cases; and yet in some the contrary is mentioned by the Court. As to the above principle, vide 2 Fonb. 58, 59.

N.B. This case has been often approved by Lord Kenyon, and very strongly, as above mentioned, so late as in 1 East's Rep. 235; and there too, he seems to have fully settled the case as far as possible. *Doe ex dem. of Cocks alias Hopkins v. Cooper*, Hil. T. 41 Geo. 3, East's Rep. 229.

[54] FAREWELL, ESQ. *versus* CHAFFEY AND OTHERS. 1756. A new trial not to be granted to gratify litigious passions.

This cause was tried upon the Western Circuit, the last Summer Assizes, before Mr. Serjeant Willes, who certified "that the weight of the evidence was against the verdict." But a new trial was denied, upon the nature of the action, the value of the matter in dispute, and other circumstances of the case.†

Lord Mansfield said, a new trial ought to be granted, to attain real justice; but not, to gratify litigious passions, upon every point of summum jus; and cited *Smith v. Bramston*, and *Smith v. Frampton* in 2 Salk. 644; and an *Anonymous case* there also mentioned, of P. 8 W. 3, B. R. and likewise *Smith v. Page*, M. 8 W. 3, B. R. ibidem; also *Deerly v. The Duchess of Mazarine*, H. 8 W. 3, B. R. 2 Salk. 646, and *Sparks v. Spicer*, H. 10 W. 3, B. R. in the same book, pa. 648. To which may be added, what is said by the Court, in the case of *Dunkly v. Wade*, P. 5 Ann. 2 Salk. 653.

In these cases, the verdicts were against evidence and the strict rule of law, or obtained through surprise: but the Court would not give a second chance of success to a hard action, or an unconscionable defence.

Therefore the Court, upon the same principles, refused to grant a new trial in the present case, and discharged the rule to shew cause why there should not be one.

REX *versus* JOSEPH SMITH. 1756. Recognizance to remove indictment from sessions, not discharged before payment of costs to prosecute after conviction. [S. C. Sayer's Law of Costs, 218, 267, 2d ed. See 2 Durn. 47.]

An indictment for a nuisance had been removed, by certiorari, from the Quarter-Sessions in Devonshire, into this Court, by the defendant: which indictment was afterwards tried, and the defendant was found guilty. He then moved in arrest of judgment: but his objections were over-ruled. After which, the prosecutor moved for his costs; and obtained a rule to shew cause. And now Mr. Serjeant Hewitt, on behalf of the defendant, shewed cause, "why the prosecutor should not have his costs, before the recognizance should be discharged; and why it should not be referred to me, to tax such costs."

His cause was this, that no name of any person as being either the party grieved or injured, or a public civil officer, is indorsed upon the indictment, according to [55] the directions of 5 & 6 W. & M. c. 11, § 2 & 3. And he argued that without such indorsement, no costs were payable to the prosecutors.

Mr. Hussey contra, for the prosecutor, acknowledged that there was no name indorsed: but, at the same time, insisted that an indorsement of the name of the prosecutor, as being the party grieved or injured, or a civil officer, is not at all necessary, in order to the Court's giving him costs; though the second section does indeed direct the recognizance to be certified into this Court, with the certiorari and indictment, and the name of the prosecutor (if he be the party grieved or injured) or some public officer to be indorsed on the back of the indictment.

He said he had an affidavit "that the prosecutor was a civil officer, &c." And the words of the 3d section of the Act "are that if he be so, the recognizance shall not be discharged, till the costs shall be paid." But the Act does not say "that the prosecutor shall not have his costs, unless his name be indorsed."

Lord Mansfield: It is enough if it be proved "that the prosecutor was a civil officer, &c." And here it is proved, by affidavit: which is sufficient.

Rule made absolute for the prosecutor's having his costs, (to be taxed by me ut supra) before the recognizance should be discharged.

SHADWELL, ESQ. *vers.* ANGEL, ESQ. 1756. Declaration de bene esse may be delivered at the return of the process.

This was a long litigation concerning the regularity of a judgment; which on Mr. Nares's motion (*ex parte def'*) had been referred to the Master, who thought it

† V. ante, p. 11, 12. *Macrow v. Hull*, S. P. and post pa. 664. *Dr. Burton v. Thompson*, M. 1758, S. P. [2 Vez. 664. 1 Bos. 339, n.]



irregular: and now Mr. Norton (*ex parte quer'*.) appealed to the Court from the Master's opinion.

The question depended upon the meaning of a rule of this Court, made M. 10 Geo. 2, 1736, and upon the practice of the Court, pursuant to that rule.

The import of this rule was, that upon process returnable, the first or second return of a term, a plaintiff may (in certain cases) deliver a declaration *de bene esse*, at the return of the process; with notice "for the defendant to plead within eight days after delivery of the declarat[56]-tion:" and if the defendant shall not file common bail, and plead within such eight days after, &c. the plaintiff (having first filed common bail for such defendant according to the then late Act for preventing frivolous and vexatious arrests,) may sign judgment for want of a plea, a rule to plead being duly entered.

The present fact was, that the process was returnable on Saturday, 15th November (the second return of the term). The declaration "to plead in eight days," was left in the office on Monday, the 24th of November: and upon the defendant's not pleading within the eight days, nor even before the time of signing the judgment; the plaintiff on the 3d of January, (six weeks afterwards,) filed common bail for the defendant, and (a rule to plead having been duly entered) signed judgment upon the same day.

The Master, Mr. Clarke, thought this to be irregular; for that when the defendant was once in Court, the plaintiff ought to proceed against him as being in Court: by which expression he seemed to mean, either that the plaintiff should deliver a declaration afresh: or that he should give a fresh rule to plead.

And Mr. Nares (in support of the Master's opinion) urged that when the eight days (the time for pleading) are out, the *de bene esse* declaration is at an end: and he mentioned a case of *Llewellyn v. Skyrn*, as in point.

But Mr. Norton denied this; and said that the eight days were not out; but the declaration *de bene esse* was delivered within time (though not indeed till the 9th day; because there were two Sundays included, viz. 16th and 23d of Nov. And that the plaintiff might have signed his judgment on Tuesday the 25th.

Master Clarke was, at first, inclined to think that the Sunday was no excuse; and that this was not a sufficient reason to allow the plaintiff time till the 9th day, for delivering the declaration *de bene esse*. But all the officers thought otherwise; and the Court seemed to think so too: whereupon Master Clarke seemed to give that point up.

The Court were of opinion that the judgment was regular.

Lord Mansfield was clear, that no further notice (besides that given on delivering the declaration *de bene esse*) was necessary.

Mr. Just. Denison said the defendant had eight days after the delivery of the declaration *de bene esse*, whenever it may be delivered (either sooner or later).

[57] And this was left in the office, (which he held to be a good delivery,) on the 24th, which was within time; and the defendant did not plead within eight days; whereupon, the plaintiff files common bail for him, upon the 3d of January; and signs judgment the same day: which is regular; for the rule is complied with, and the defendant is not at all hurt; on the contrary, he has had longer time than he was entitled to.

Mr. Just. Foster. The whole objection is "that the plaintiff has not proceeded with so much speed as he might have done;" for he might have signed his judgment on the 25th of November. The defendant might have filed common bail for himself, if he had thought proper: and then he might have had a fresh rule to plead.

By the Court unanimously, the rule of reference to Master Clarke, for irregularity in this judgment, was discharged.(a)

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(a) By rule of Court, Trin. 1 Geo. 2, where process is served upon, and common bail filed for, the defendant, pursuant to 12 Geo. 1, c. 29, the plaintiff's attorney shall leave a copy of the declaration in the office, and likewise deliver notice thereof to the defendant, or leave the same at his house: in which notice shall be expressed the nature of the action, and at whose suit, and the time limited by the rules of the Court for pleading; and if the defendant do not plead by the time, judgment shall be entered without any other or further calling for a plea; and from the time of such notice, the declaration shall be deemed well delivered and not otherwise.

## MEMORANDUM. [Remanet motions.]

The new Lord Chief Justice, at his first setting out, instituted a different method of going through the motions at the Bar, from that which had been usually (and indeed almost universally) practised heretofore: which new method was not only advantageous to the younger part of the barristers, but also exceedingly convenient to the suitors, as it took away that delay to business which arose from the unreasonable preference hitherto given to gentlemen within the Bar. For, the repeated pre-audience, hitherto allowed them, had thrown almost the whole business into their hands: which, as the barristers were entitled to move only once in a day, could not always be sufficiently dispatched in one day.

The course had been, ever since I remember, and was in Lord Ch. Just. Holt's time, (as the late Mr. Justice Page has often told me,) "to begin every day, with the senior counsel within the Bar, and then to call to the next senior, in order, and so on, as long as it was convenient to the Court to sit; and to proceed again in the same manner, upon the next, and every subsequent day; although the Bar had not been half, or perhaps a quarter gone through, upon any one of the former days: so that the juniors were very often obliged to attend in vain, without being able to bring on their motions, for many successive days."

This was the settled and general rule: though perhaps the Judges, out of mere compassion to the juniors, would, [58] two or three times in a term, give them leave to move, upon the next day, such motions as were real remanets of the former day.

Whereas Lord Mansfield professed and most punctually practised the going quite through the Bar, even to the youngest counsel, before he would begin again with the seniors, even though it should happen to take up two or three or more days, before all the motions which were ready at the Bar upon the first day, could be heard.

The end of Michaelmas term, 30 Geo. 2, 1756.

## [59] HILARY TERM, 30 GEO. II. B. R. 1757.

(Lord Commissioner Wilmot absent, in Chancery.)

KILWICK *vers.* MAIDMAN. Monday, 24th Jan. 1757. A plea of tender is an issuable plea. [See 1 Hen. Black. 370.]

Time was given by a Judge's order to plead: (viz. until two days before the essoign day of this present term;) on the usual terms, "of pleading issuably, &c." This order was not obtained till after the four-days rule for pleading was expired. Before the term, and within the time allowed by the Judge's order, the defendant pleaded a plea of tender; which plea was entitled (as it was agreed that it regularly might,) as of the preceding term.

Mr. Aspinall moved, *ex parte quer'*, to set aside this plea, with costs, as irregular; and for leave to sign judgment: and he cited 1 Barnes, 246, *Daevenhill v. Barrit*, in point.

Mr. Winn pro def. shewed cause: viz. that it was a fair honest plea, in its own

By another rule, Trin. 5 & 6 Geo. 2, if the process be returnable the first or second return of any term where the plaintiff declares in London or Middlesex, and the defendant lives within twenty miles of London, the declaration shall be delivered with notice to plead within four days; and in case the plaintiff declares in any other county, or the defendant lives above twenty miles from London, with notice to plead within eight days, and in default of pleading, the plaintiff may sign his judgment.

By another rule, Mic. 10 Geo. 2, on all process returnable the first or second return of any term where no affidavit shall be made and filed, pursuant to the Act for Preventing Frivolous and Vexatious Arrests, the plaintiff may deliver the declaration *de bene esse* at the return of such process, with notice to plead in eight days; and if the defendant doth not file common bail and plead within the said eight days, the plaintiff having filed common bail, according to the statute, may sign judgment for want of a plea, a rule to plead being duly entered.

*Quære*, therefore if this case ought not to have been governed by the first of the above rules! and if so, the judgment was irregular for want of notice.

nature ; and that it was within time, not being after imparlance, but as of the last term ; and also that it was an issuable plea, within the meaning of the Judge's order : though he acknowledged that a plea in abatement, (though in strictness indeed issuable,) would not be so ; because it tended to delay the plaintiff.

The Court concurred entirely in what Mr. Winn had urged in support of the regularity of the plea : and the motion was denied.(a)

[60] TAYLOR, EX DIMISS. ATKYNS, ESQ. *vers.* HORDE, ESQ. & AL'. Tuesday 25 Jan. 1757. The limitation of estates by virtue of powers must be strictly pursued. [See 7 Ves. 113. 8 Ves. 112. Cowp. 689. Herne's Pl. 480, cited in Talb. 174.] [Vide 9 Vin. 84 (C.). 1 Durn. 707, and Butler's notes on Co. Lit. 330 b., n. 1.]

[S. C. 2 Sm. L. C. (11th ed.), 575. Referred to, *Simpson v. Bathurst*, 1869, L. R. 5 Ch. 199 ; *Des Barres v. Shey*, 1873, 29 L. T. 595 ; *Weller v. Stone*, 1885, 54 L. J. Ch. 501 ; *Boyce v. Edbrooke* [1903], 1 Ch. 845.]

In ejectment brought in Michaelmas term, 1752 by John Atkyns, Esq. (in the name of Cyprian Taylor) against Robert Atkyns, Esq. the heir at law, and others ; upon the general issue pleaded, and issue joined thereon and tried at the Bar of this Court, the jury find a special verdict : which was, in substance, as follows.

That Sir Robert Atkyns the Elder, Knight of the Bath, on 8th June 1669, was (amongst divers other messuages, lands, tenements, &c. in Gloucestershire,) seised in fee of the manor of Lower Swell and the other premises in question ; and, being so seised, made and executed three several indentures, (which are set out in the special verdict :) one of which is dated on the 11th and the two others on the 12th of June 1669.

By one of these indentures, which was dated on the 12th of June 1669, (which the counsel on both sides, for distinction's sake, called the lesser deed,) made between Sir Edward Atkins, Knt. one of the Barons of the Exchequer, Sir Robert Atkyns, Knight of the Bath, Solicitor General to the Queen, and son and heir apparent of the said Sir Edward, and Dame Mary (wife of the said Sir Robert Atkyns, of the one part ; and Sir Edward Carteret, Knt. and John Lowe, gentleman, of the other part ; it is witnessed that in consideration of a marriage thentofore had and solemnized between the said Sir Robert Atkyns and Dame Mary his wife, and of her releasing and acquitting a former jointure to her made before marriage, and of a new provision to be had and made for her the said Dame Mary, for and in the nature of a jointure, in bar and recompence of her dower and thirds at the common law, in case she should happen to survive and over-live the said Sir Robert Atkins her husband, and he the said Sir Robert Atkyns did thereby covenant and grant to and with the said Sir Edward Carteret and John Lowe, that he the said Sir Edward Atkyns, the said Sir Robert Atkyns and Dame Mary his wife, should and would, before the end of Michaelmas term, then next ensuing, levy and acknowledge before the Justices of the Court of Common Pleas at Westminster, one or more fine or fines sur conusance de droit come ceo, &c. unto the said Sir Edward Carteret and John Lowe, with proclamations, of the said manor of Lower Swell and the other premises in question : which said fine or

(a) It does not appear what the action was : if it was assumpsit it seems that tender ought to have been pleaded, with *touts temps prist*, which is inconsistent with the order for time ; and according to *Strange*, 638, the money ought to be paid into Court, or else it is no plea ; and the plaintiff may sign judgment on a certificate that no money was paid in ; but the authority of that case appears by the N.B. there to be doubtful : but without relying on that, the law seems to have been generally holden that a plea of tender after an imparlance is bad, 5 Comyns, 227. And though 2 Mod. 62, is there referred to for an admission that it was good to a bond though in no other case, yet the reason of it there is because it is to save the penalty ; which reason does not now subsist, since by the statute a Court of Law will relieve the defendant on payment of principal and interest ; and therefore if that were law before, yet *cessante ratione*, &c. it is not so now ; and if a tender is not pleadable after imparlance, there is the same reason why it should not, after an order for time : which was the reason given by the Court for not allowing it in 1 Barnes, 246, cited by Mr. Aspinall, especially after so long time given as in this case.



finer so as aforesaid or in any other sort to be had, levied, and executed of the said manor and premises alone, or together with any other lands, tenements or hereditaments, by or between the parties to the said indenture or any of them, alone or [61] together with any other person or persons, were to be and enure, and were thereby declared to be and enure, as to the said manor and all other the premises, to the use of the said Sir Robert Atkyns for life, without impeachment of waste; and from and after his decease, to the use of the said Dame Mary for life, for her jointure and in bar of her dower; and from and after the decease of the said Sir Robert and Dame Mary, to the use of Sir Robert Atkyns, Knt. son and heir apparent of the said Sir Robert, and the heirs male of the body of the said Sir Robert the son, on the body of Lovis Carteret his intended wife lawfully to be begotten; and for default of such issue, to the use of the right heirs of the said Sir Robert the father for ever.

And the said Sir Edward Atkyns and Sir Robert the father did by this deed covenant with the said Sir Edward Carteret and John Lowe and their heirs, that in case any defect should happen in the said fine and that assurance, or in case there should not be some good conveyance in the law made according to the intent of that indenture, so that by reason of such defect or failure of such conveyance and assurance in law, the said manor and premises or any part or parcel of them should not, before the thirtieth day of November then next ensuing, be sufficiently conveyed according to the intent of the said indenture, then they the said Sir Edward Carteret and John Lowe and their heirs, and all and every other person and persons and their heirs, standing or being seised, or which should stand or be seised of and in the said manor and premises, should and would from time to time and at all times from thenceforth for ever stand and be seised of and in the said manor and premises, or so much and such part and parts thereof whereof or concerning which any such defect should happen to be, to the uses, behoofs, intents and purposes therein before declared, limited and contained, according to the true intent and meaning of the said indenture, and to none other use, intent or purpose whatsoever.

One other of these three indentures was a lease, dated 11th June 1669: and the remaining one was a release, dated 12th June 1669. This release bore the very same date with the deed already recited (called the lesser deed:) and the counsel on both sides agreed in calling this deed of release (for distinction's sake) the greater deed, as this contained the settlement of the whole estate.

By these indentures of lease and release, dated 11th and 12th June 1669, the release being tripartite, and made between the said Sir Edward Atkyns, the said Sir Robert the father and Dame Mary his wife, Philip Sheppard, Esq. Sir Clement Farnham, Knt. and Edward Atkyns, Esq. [62] (second son of the said Sir Edward Atkyns,) of the first part; the Right Honourable Sir George Carteret, Knt. and Bart. Vice-Chamberlain of His Majesty's household, and one of His Majesty's most honourable Privy Council, the said Sir Edward Carteret and the said John Lowe, the Right Honourable Edward Montagu, commonly called Lord Hinchinbrooke (son and heir apparent of the Right Honourable the Earl of Sandwich,) Sir Philip Carteret, Knt. (son and heir apparent of the said Sir George Carteret,) and Edward Swift, Esq. of the second part; and the said Sir Robert Atkyns, Knt. (the son and heir apparent of the said Sir Robert Atkyns,) and Lovis Carteret (one of the daughters of the said Sir George Carteret and of Dame Elizabeth his wife,) of the third part; it is witnessed that in consideration of a marriage thentofore had and solemnized between the said Sir Robert Atkyns the father and Dame Mary his wife, and also of a marriage then shortly to be had and solemnized between the said Sir Robert Atkyns the son and the said Lovis Carteret, and of the sum of 6500l. paid to Sir Robert the father by the said Sir George Carteret, for the marriage portion of the said Lovis Carteret, and of 5s. a-piece to the said Sir Edward Atkyns, Sir Robert Atkyns the father, Philip Sheppard, Sir Clement Farnham, and Edward Atkyns, paid by the said Sir Edward Carteret and John Lowe, and for a provision to be had and made to and for the said Dame Mary (wife of the said Sir Robert Atkyns the father,) for and in the nature of a jointure in bar and recompence of her dower and thirds at the common law; and also for a provision for the said Lovis Carteret, for and in nature of a jointure, in bar and recompence of her dower and thirds at the common law; and for settling all the manors, lands, tenements, and hereditaments therein after mentioned, to the several and respective uses, upon the trusts, to the intents and purposes, and with, under and subject to the provisoes, declarations, limitations and agreements therein

after declared ; the said Sir Edward Atkyns and Sir Robert the father did grant, release and confirm unto the said Sir Edward Carteret and John Lowe and their heirs, the said manor of Swell and other the premises in question (as described in the lesser deed,) and several other manors, lands, and hereditaments therein mentioned, to hold the said manor of Swell and other the premises in question, to the said Sir Edward Carteret and John Lowe and their heirs, to the several uses therein mentioned ; which uses, (as to the said manor of Swell and other the premises in question,) are the same as those before set forth in the lesser deed ; viz.

To the use of Sir Robert the father, for life, without impeachment of waste ;

[63] Remainder, as to the said premises (except timber-trees,) to Dame Mary for life, for her jointure, and in bar of dower ;

Remainder to Sir Robert the son, and the heirs male of his body by the said Lovis Carteret ;

Remainder to the right heirs of Sir Robert the father.

And several other parts of the estates were limited thereby, to Sir Robert the son, for life ; remainder to the trustees, to preserve contingent remainders ; remainder to the said Lovis Carteret for life, for her jointure and in bar of dower : and upon the issue of the said intended marriage, in strict settlement.

In which indenture of release is contained a proviso, in the following words—

“ Provided always that it shall and may be lawful to and for the said Sir Robert Atkyns the father, the said Sir Robert Atkyns the son, and the said Lovis Carteret, respectively, when they are or shall be respectively seised in possession of the freehold of such of the premises as by virtue of and according to the limitations aforesaid are respectively limited to them for their respective lives by their respective deed or deeds in writing sealed and delivered in the presence of two or more credible witnesses, to make any lease or demise, leases or demises, of all or any [part] of the said premises whereof they shall be so respectively seised in possession for life as aforesaid, (except of the capital messuage of Sapperton aforesaid, and the said lodge in Pinbury Park aforesaid,) unto any person or persons, for one, two or three lives in possession, reversion or remainder, [*or for any term or terms of years in possession, reversion, or remainder*] (a) to end or determine upon the death of one, two or three persons, or for the term of 21 years absolute ; so as there be not, in the respective premises or any part thereof, any estate exceeding the term or time of three lives or twenty-one years, in being at the same time ; and so as such respective leases be not made without impeachment of waste ; and so as the usual rents of such of the premises respectively as shall be so leased or demised upon fines, and the best rents that can be reasonably gotten for such of the premises respectively as shall be so leased or demised without fines, be respectively reserved upon every such respective lease or leases, demise or demises, to be payable during the respective terms in the said respective leases or demises to be contained ; any thing herein before contained to the contrary notwithstanding.”

[64] And another proviso is therein also contained, in the following words, viz.

“ Provided also that it shall and may be lawful to and for the said Sir Robert Atkyns the father, at any time or times during his natural life, after the decease of the said Dame Mary his wife, by any writing or writings indented, under his hand and seal, testified by two or more witnesses, to grant, assign, limit or appoint the said manor of Swell Inferior, alias Nether Swell, and the lands, tenements and premises in Swell Inferior, otherwise Nether Swell, Upper Swell and Stow in the Woud, and in either or any of them, or such parts and parcels thereof as he shall think fit, unto or to the use of such woman or women as he the said Sir Robert Atkyns the father shall marry or take to wife, after the decease of the said Dame Mary his now wife ; for and during the term of the natural life or lives of such wife or wives only, for her or their jointure or jointures ; any thing herein contained to the contrary thereof in any wise notwithstanding.”

And by another proviso in this deed, the like power is given to Sir Robert the

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(a) These words introduced within brackets, and distinguished by italics, are copied from the printed case sent to the House of Lords : and at the time this case was determined, and until the judgment in 2 Burr. 1147, were generally taken to be material.



son, "to make a jointure of all or any of the lands thereby limited to Lovis Carteret for her jointure, on any future wife or wives whom he should marry, after the death of the said Lovis Carteret without issue."

And by the same deed, Sir Robert the father covenants with Sir George Carteret, that Sir Edward Atkyns, he, and Dame Mary his wife, would, before the end of Michaelmas term then next, levy one or more fine or fines sur conusance de droit, &c. with proclamations, of the premises contained in this indenture, unto the said Sir Edward Carteret and John Lowe: which, it was thereby declared, should be and enure to the several and respective uses, upon the trusts, and to the intents and purposes, and with, under and subject to the provisoes, declarations and agreements therein before declared, limited, and expressed concerning the same. And reciting "that Sir Clement Farnham and Edward Atkyns were possessed of the premises in question, or several parts thereof, for several terms of years then in being, in trust for Sir Robert the father," it was thereby declared and agreed by Sir Robert the father, that Sir Charles Farnham and Edward Atkyns should stand possessed of the premises comprised in the said terms, during the residue thereof, upon trust and to the use and benefit of the person and persons to whom the premises (by virtue of the limitations therein) should belong.

[65] The jury found that the first of the said indentures was executed by Sir Edward Atkyns, Sir Robert Atkyns the father and Dame Mary his wife, and John Lowe; the second of the said indentures was executed by Sir Edward Atkyns, Sir Robert the father, Philip Sheppard, Sir Clement Farnham, and Edward Atkyns, Esq. and the said indenture of release, by Sir Edward Atkyns, Sir Robert the father, Dame Mary his wife; Sir Clement Farnham, Edward Atkyns, Esq. Sir George Carteret, Sir Philip Carteret, Edward Swift, Sir Robert Atkyns the son, and Lovis Carteret; and that the lease for a year was executed before the release.

That in Trinity term 1669, a fine was levied; wherein the said Sir Edward Carteret and John Lowe were plaintiffs, and the said Sir Edward Atkyns, Sir Robert the father and Dame Mary his wife deforciant, of the premises in question, (amongst the said other lands contained in the greater deed;) but no fine was ever levied of the lands contained in the little deed only.

Afterwards, on the 6th of July 1669, Sir Robert the son was married to the said Lovis Carteret.

Dame Mary (the wife of Sir Robert the father,) died on 2d March 1680.

After which, viz. on 26th April 1681, Sir Robert the father, being seised of the premises in question, as of freehold, for the term of his natural life, without impeachment of waste, (and being then on the point of marrying a second wife, Mrs. Ann Dacres,) duly executed an indenture under his hand and seal attested by three witnesses, bearing date the same 26th of April 1681, and made between himself of the one part, and Sir Robert Dacres, Knt. John Dacres and Ann Dacres spinster (sister of Sir Robert Dacres and John Dacres) of the other part: by which indenture, (after reciting the above mentioned indenture of release tripartite of the 12th of June 1669, and the power thereby reserved "for the said Sir Robert Atkyns the father, after the death of Dame Mary, to limit all or any part of the manor and premises in question, to any future wife or wives he should happen to marry, for the term of the natural life or lives of such wife or wives only; for her or their jointure or jointures,") it is witnessed that in consideration of the then intended marriage between the said Sir Robert Atkyns the father and the said Ann Dacres, and of her marriage-portion, the said Sir Robert Atkyns the father, in pursuance of the said power to him reserved, and of all and every power and authority whatsoever, did grant, assign, [66] limit and appoint the said manor of Swell and other the premises in question unto the said Ann Dacres, for and during the term of her natural life, for her jointure, and in bar and recompence of her dower and thirds at the common law.

On 28th April 1681, the said Sir Robert Atkyns the father married the said Ann Dacres.

On 31st May 1698, Sir Robert Atkyns the father, being seised of the premises in question, as of freehold for life without impeachment of waste, executed an indenture of lease, under his hand and seal, attested by three witnesses, dated on the same 31st day of May 1698, and made between himself of the one part, and Thomas Dacres, Esq. Robert Dacres, gent. and John Dacres, gent. (the three sons of the before named



Sir Robert Dacres, Knt. and nephews \* of Dame Ann Atkyns then wife of Sir Robert Atkyns the father) of the other part. This indenture of lease recites the indenture tripartite of release of the 12th of June 1669; whereby Sir Edward Atkyns and Sir Robert Atkyns the father did (amongst other lands) grant, release and confirm to the said Sir Edward Carteret and John Lowe and their heirs, the said manor of Swell Inferior otherwise Nether Swell, with the appurtenances, and all those rents of assize of the free tenants of the said manor extending to one half-penny and one pound of pepper; and all the rents of customary tenants of the said manor; and the capital messuage and farm of the Bold; and the park called Swell Park otherwise Abbot's Wood; and all and all manner of tenths or tithes of the said park; and the barcary or sheep-house called Gannow, and the grounds or closes of meadow or pasture adjoining or belonging thereto; and the water-mill called Bold Mill, with the dams, streams, waters, attachment, fenders, soak, suit, mulcture, grist and appurtenances thereunto belonging; all the tolns of the customary tenants of the said manor, and all and all manner of tenths and tithes of all the premises whatsoever, which unto the late dissolved monastery of Hales did belong; all that common of pasture for 400 sheep and twenty beasts, upon the hills and fields of Nether Swell, at all times in the year except in the open time, and in the open time common of pasture within the said fields for all manner of beasts without number, rate or stint; and the several pastures called Murden Leasows; all that barcary or sheep-house within the said pasture; all that pasture or feeding for 600 sheep, or for more or less at the will and pleasure of the tenant of the said pastures called Murden Leasows for the time being, in and upon the demesne lands, waste lands and other lands belonging to the said farm of the Bold or elsewhere, in such ample manner as the late abbot of the said dissolved monastery of Hales aforesaid and his predecessors had kept and occupied the [67] same within the manor of Swell aforesaid; all those grounds in Nether Swell aforesaid theretofore in the tenure of John Winsmore or his assigns; all that half acre of land in Nether Swell sometimes in the tenure of the curate of the church of Stowe in the said county of Gloucester; all that fishing of the river or water of the whole manor of Nether Swell, with all profits and commodities to the same belonging; all those portions of tithes whatsoever, and all and all manner of tithe of corn, grain, blade, sheaf, hay, wool, lambs, pasture and other tenths and tithes whatsoever in and upon the premises or any part of them growing, renewing or increasing; (being the premises in question;) to the several uses by the said indenture limited as aforesaid: and it also recites the power to the said Sir Robert Atkyns the father, "for leasing the premises," as it is set forth in the said indenture. Then it is witnessed by this indenture of lease, that the said Sir Robert Atkyns the father, in consideration of the rent thereby reserved, in pursuance of the power to him reserved in and by the said recited indenture, and by virtue thereof, and of all and every power and authority whatsoever, did, by that his present writing indented, under his hand and seal, testified by the several witnesses whose names are thereupon indorsed, demise, lease, grant, and to farm let, to the said Thomas Dacres, Robert Dacres and John Dacres and their assigns, the said manor, and all and singular the said lands, tithes, tenements, hereditaments and premises, with their and every of their rights, members and appurtenances, in Swell Inferior otherwise Nether Swell: and all and every the rents reserved upon any leases or grants; to hold to them the said Thomas, Robert and John Dacres, from the making thereof, for and during the natural lives of them the said Thomas, Robert and John Dacres and the life of the longer liver of them; yielding and paying therefore, during the said term, unto the said Sir Robert Atkyns party thereto, and after his decease, to such person or persons respectively to whom the said manor and premises were limited, according to their respective estates and titles, the yearly rent of three hundred and threescore pounds at Michaelmas and Lady-Day, by even and equal portions.

In which said indenture of lease is contained a clause, in these words; viz. "The true intent and meaning of this estate or term for lives, so hereby granted and made to the said Thomas Dacres, Robert Dacres and John Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises by the said recited indenture, to the right heirs of the said Sir Robert Atkyns, party to these presents,

[\* Deleatur verbum "nephews;" and note, that all the lessees were then much under the age of 21 years.]

and to such person or persons to whom the said Sir Robert Atkyns, party to these presents shall any way dispose of the same, from being barred by any recovery to be suffered, or by any other act to be attempted or done for the barring of the same."

[68] On 8th June 1698, John Dacres, one of the lessees in the last above-mentioned indenture of lease, alone, executed a letter of attorney, under his hand and seal, reciting the said last indenture of lease, and empowering and authorizing Thomas Barker, gent. as his attorney, to take livery and seisin of the premises last above-mentioned, from the said Sir Robert Atkyns the father; for himself (the said John Dacres) and for the said Thomas and Robert Dacres and every of them, in their names and for their use, according to the purport and true meaning of the said recited indenture of lease: and to enter and take possession of the said manor and premises in the said indenture contained, to the use of them and every of them; he the said John Dacres allowing of all and every the act and acts so done by the said attorney, to be as effectual and sufficient in law, as if he had been personally present and had done the same.

On 5th July 1698, Sir Robert Atkyns the father, being so seised as aforesaid, and then in the actual possession of the said manor and premises, did, in his own person, deliver seisin and possession thereof unto the said Thomas Barker, to the use of the said Thomas, Robert, and John Dacres and of every of them, and of the survivor of them, according to the purport and true meaning of the said indenture; he the said Thomas Barker being authorized and appointed, by a letter of attorney under hand and seal of the said John Dacres, and by him duly executed, "for him and to his use and in his name, and for the said Thomas and Robert Dacres, and to their use and in every of their names, to take and receive the said livery and possession of the said capital message, manor and premises, accordingly:" as by an indorsement on the said letter of attorney (which is set out in the verdict) appears.

But the jury found, that the said Thomas Dacres, Robert Dacres and John Dacres, the lessees named in the last mentioned indenture, or either of them, never were in possession of the premises in question, otherwise than by the said livery and seisin so given by the said Sir Robert Atkyns the father as aforesaid; and that they or either of them did not receive or pay any rent for or in respect of the said premises; and that the said indenture of lease was not found in the custody of Thomas Dacres the surviving lessee, at the time of his death.

On 27th May 1708, Sir Robert Atkyns the father, being so seised of the said premises, and of the remainder and reversion thereof as aforesaid, made his will, dated the same 27th day of May 1708, attested by four witnesses; and thereby confirmed his wife's jointure; and then re-[69]-cited "that he was seised of the remainder and reversion in fee, of the said manor and other the premises in question; and that such remainder or reversion, after the death of his wife, was also further expectant upon an estate in special tail, settled upon his son Sir Robert upon his marriage, by the abovementioned deed of 12th June 1669; and that he had made a lease to the said Thomas, Robert and John Dacres, for their lives and the life of the longer liver of them, according to the power he had reserved to himself upon the said settlement:" after which recital, he disposed of his said remainder or reversion in fee, [and the benefit of the trust of the said lease,] to the lessor of the plaintiff, in tail male.

The whole devise was in the following words—viz. "I give and confirm unto my said wife Dame Ann Atkyns, all those lands, tenements and hereditaments in Lower Swell aforesaid, which were settled upon her for her jointure, before our marriage: and I hereby further give and devise to her, for term of her life, my manor of Lower Swell, and all the rest of my lands, tenements and hereditaments whatsoever in Lower Swell aforesaid, for term of her life, as an addition to her jointure. And whereas I am seised of the remainder and reversion in fee, of the said manor of Lower Swell, and of the rest of the said lands, tenements and hereditaments in Lower Swell, so settled, and by this my will given and confirmed to my said wife for her life; which remainder or reversion, after the death of my wife, is also further expectant upon an estate in the said manor and lands in special tail settled upon my son Sir Robert Atkyns upon his marriage, by deed dated the 12th of June 1669, and upon his sons by his now wife and no other wife; and whereas I have made a lease, dated \* the 8th day of June in the year of [our] Lord 1698, executed by livery and seisin, to Thomas Dacres, Esq. and to Robert and John

\* The testator mistakes the date of this lease: it was 31st May. V. ante, p. 66.



Dacres, gentlemen, for the lives of the said Thomas, Robert and John Dacres, and the life of the longer liver of them, according to a power I reserved to myself upon the said settlement made upon the marriage of my said son Sir Robert Atkins; now I give and devise the said remainder or reversion, and the benefit of the trusts of the said lease for lives, to my grandson John Tracy, (the now younger and second son living of my son-in-law John Tracy of Stanway in the said county of Gloucester, Esq. by my daughter Ann Tracy his wife,) and to the heirs male of the body of my said grandson by him to be begotten. And if my said grandson happen to die without issue male, then I give and devise the said remainder or reversion, to the next younger son of the said John Tracy my son-in-law, called Ferdinando Tracy, and to the heirs male of the body [70] of the said Ferdinando. And for default of such issue, then I give and devise the said remainder or reversion to the next younger son my said son-in-law John Tracy may happen to have by my said daughter, and to the heirs male of the body of such next younger son;” and so on, to other still younger sons, &c. (These devises were all upon condition that the said sons respectively so inheriting the said manor and lands, should constantly use to call and write themselves by the name of Atkins only for their surname, and by no other surname.) And then the will proceeds thus—“I do further give and devise all my houses, and all lands, tenements and hereditaments situate lying and being in or near Cursitor’s Alley in Holborn within the City of London or the suburbs thereof, or within the county of Middlesex, or in either of them;” in like manner, and upon the like condition, &c. And, reciting that the reversion or remainder of his manor and lands in and of Sapperton aforesaid, and of the advowson of the church of Sapperton, and of and in his manor of Pinbury and of the lands thereto belonging, as also of Pinbury-Park, was in him and his heirs; and also of the seven hundreds of Cirencester, and of the hundred of Bisley, all in the said county of Gloucester; he devised the same in the like manner. The words of his will are these—“I having also made a lease for lives, of the said manors of Sapperton and Pinbury, and of the said advowson of Sapperton, and of the said Pinbury-Park, and of all the said several hundreds, the better to preserve and support the said remainders and reversions from being cut off or barred by any recovery. And if my said younger grandsons happen to die without issue male, then I give and devise the same reversions and remainders to my nephew Richard Atkins (eldest son of my late brother Sir Edward Atkins deceased) and to his heirs.”

On the 9th February 1709, Sir Robert Atkins, the father, died, seised of the premises in question.

Upon his death, Dame Ann, his widow and relict, entered thereupon; claiming the same for her life, for her jointure, under and by virtue of the above-mentioned indenture of the 26th April 1681: and was in possession thereof.

The jury then find an indenture tripartite dated the 18th of May 1710; made between Richard Atkins, Esq. eldest son and executor of Sir Edward Atkins (the surviving trustee in whom the terms for years mentioned in the greater deed were vested,) on the first part; Joseph Walker, gent. on the 2d part; and the said Sir Robert Atkins, (the son) on the 3d part: by which, after reciting the indenture of release of 12th June 1669, and that it was therein mentioned, that Sir Clement Farnham and Ed-[71]-ward Atkins were possessed of several terms for years in the premises in question, and that they were to stand possessed thereof in trust for such person and persons to whose use and uses the same were limited by the said indenture; and reciting that the said Sir Robert Atkins (the son) then claimed the said manor and premises by and under the said indenture: and that Sir Clement Farnham was dead, and the said Edward Atkins (afterwards Sir Edward Atkins, Knt. Lord Ch. Baron of the Exchequer) survived him, and was also then dead, having first made his will and the said Richard Atkins executor thereof, and that he had proved the same: the said Richard Atkins, at the instance and request of the said Sir Robert Atkins (the son) testified by his executing the said indenture, and in consideration of 5s. paid to him by the said Joseph Walker, assigned over the said manor and premises in question, to the said Joseph Walker, to hold to him, his executors, administrators and assigns, for all the then residue and remainder of the terms whereof the said Sir Clement Farnham and Edward Atkins or either of them were possessed; in trust for the said Sir Robert Atkins (the son) and the heirs male of his body, by the before-mentioned Dame Lovis his wife; (the said premises being so limited in and by the said indenture



of release of 12th June 1669). In which said indenture there is a covenant from Sir Robert (the son) to indemnify the said Richard Atkyns, his heirs, executors and administrators against any damages he or they might sustain by reason of his making the said assignment to the said Joseph Walker as aforesaid.

The jury further find, that Dame Ann Atkyns being so in possession of the premises as aforesaid; in Trinity term 1710, 9 Ann, an ejectment was brought in the Court of Common Pleas for the recovery of the said premises, against her the said Dame Ann and the tenants in possession of the same premises, by John Philips, upon the several demises of the said Sir Robert Atkyns the son, and of the said Joseph Walker: in which ejectment, the demises were laid upon the 22d day of May 9 Ann; to hold from the 20th day of the same May, for seven years. And the said ejectment was tried at the Bar of the Court of Common Pleas, in Michaelmas term following: and a general verdict was found for the plaintiff; and judgment was entered up thereupon, against her and the rest of the defendants therein, for the said John Philips; and he recovered terminum suum predictum, and had an habere facias possessionem.

The jury further find, that upon this trial, the said two indentures, called greater and lesser deeds, of 12th June 1669, were, both of them, read and given in evidence to the jury: but that the deed of assignment, of 18th May 1710, was not produced, not given in evidence, to the jury.

[72] They find, that soon after the said judgment in ejectment, and during the life of Dame Ann, Sir Robert Atkyns (the son) entered into and was in possession of the premises in question, and in the said declaration in ejectment mentioned.

They find, that on 1st January 1710, John Philips, the said plaintiff in ejectment, surrendered the two terms mentioned in the said declaration in ejectment to be demised to him by the said Sir Robert Atkyns (the son) and Joseph Walker, to the said Sir R. A. (the son) then in possession of the premises.

They further find, that on the 17th January 1710, the said Sir R. A. the son, being so in possession as aforesaid, and during the life-time of the said Dame Ann Atkyns, widow, made a feoffment to James Earle, of the premises in question in fee; by indenture tripartite of that date, made between himself on the first part; James Earle, yeoman, on the second part; and John Holmden, gent. on the third part; which feoffment in fee is therein declared to be for the docking, barring, and destroying all estates tail, use and uses, reversions and remainders, at any time thentofore made, created, or limited of and in the manor and premises in question; and for the vesting and settling an estate in fee simple therein, to and in the said Sir Robert the son. Sir Robert (the son) did therefore in consideration of 5s. thereby grant, bargain, sell, enfeoff and confirm unto the said James Earle his heirs and assigns, the premises in question, to hold to and to the use of the said James Earle his heirs and assigns for ever; to the intent and purpose that the said James Earle might become perfect tenant of the freehold of the said premises, in order for the suffering a common recovery in Hilary term then next; wherein the said John Holmden was to be demandant, the said James Earle tenant, and Sir Robert himself vouchee. Which recovery, it was thereby declared, was to be and enure to the use and behoof of the said Sir Robert Atkyns (the son) his heirs and assigns for ever; and to or for no other use, intent or purpose whatsoever, and by this same deed, Sir Robert Atkyns (the son) constituted Edward Carter and John Langford his attornies and attorney, either jointly or severally to enter upon and take seisin and possession of the premises, and to give and deliver seisin and possession thereof to the said James Earle and his heirs and assigns for ever, according to the purport and true meaning and for the purposes in the said deed mentioned.

And the jury find, that on 20th January 1710, Edward Carter, one of the said attornies, entered upon the premises, and gave seisin and possession thereof to the said James Earle, by virtue of the said warrant of attorney [73] contained in the said indenture: as appears by a memorandum indorsed upon the said indenture, and found by the verdict.

They find that in Hilary term 9th Ann. (1710), a recovery was suffered of the premises; wherein John Holmden was demandant; James Earle, tenant; and Sir Robert Atkyns (the son) and Lovis his wife, vouchees; and seisin executed thereon: which recovery they find to be prosecuted, had and executed to the several uses mentioned in the said deed of feoffment. And they find, that after this recovery,

Sir Robert the son continued in possession of the premises till the 9th of November 1711.

They find the death of the said Sir R. A. (the son) on 9th November 1711, without issue male by the said Lovis his wife, who survived him.

They also find, that an ejectment was brought for the premises, against Robert Atkyns, Esq. and his tenants of the premises in question, in Hilary term 1711, 10 Ann. by John Miles, as plaintiff, on the several demises both laid to be made on 14th February, 8 Ann. 1709, which is five days after Sir R. A. the elder's death) of Dame Ann Atkyns the jointress, and of Thomas Dacres, the surviving lessee under the indenture of lease of 31st May 1698. And in Easter term 1712, 11 Ann, a general verdict was given for the plaintiff, on both demises, on a trial at Bar in this Court: and judgment was entered up accordingly, "that the plaintiff do recover his several terms aforesaid." And the said Dame Ann Atkyns entered upon the premises in question, immediately after this last judgment; and continued in possession thereof till 9th October 1712: when she died.

Soon after the death of Dame Ann, the (original) (a) defendant Robert Atkyns, Esq. nephew and heir male to Sir R. A. the son (and also heir at law to Sir R. A. the father) entered upon the premises, and continued in possession thereof till his death; which happened on 16th March 1753. [Robert's death (b) was just three months after the now lessor of the plaintiff's actual entry: and it was after issue joined in this present ejectment.]

John Dacres, one of the lessees in the indenture of lease dated 31st May 1698, died in 1705.

Robert Dacres, another of them, died in 1706.

Thomas Dacres, the third of them, survived the other two: and died on 23d July 1752.

[74] They find that John Atkyns, the lessor of the plaintiff never was in possession of the premises in question or any part thereof, nor in receipt of the rents and profits thereof or of any part thereof; nor entered thereupon, till the 15th of December 1752; when he made an actual entry into and upon the same; claiming the same as devisee thereof under and by virtue of the will of the said Sir Robert Atkyns the father; and ejected, drove out, and removed the said Robert Atkyns, Esq., Charles Coxe, Thomas Horde, &c. therefrom; and was seised thereof, as the law requires; and being so seised thereof, made the demise to the said Cyprian Taylor the now plaintiff, on the 16th of December 1752, to hold from thence for fifteen years; by virtue whereof the said Cyprian Taylor entered on the 18th, and was ejected by the defendants on the 19th.

And then they conclude generally, as usual; submitting the matters of law to the judgment of the Court, upon the above facts.

This case was argued four several times; first, on Tuesday 3d June 1755, by Mr. Yorke, for the plaintiff, and Mr. Knowler for the defendants; again, on Tuesday 11th November 1755, by Mr. Pratt for the plaintiff, and Mr. Perrot for the defendants; a third time, on Tuesday 11th May 1756, by Mr. Caldecot for the plaintiff, and Mr. Serjeant Prime for the defendants; and a fourth time, on Friday 19th November 1756, by Mr. Caldecot for the plaintiff, and Mr. Knowler for the defendants: but it is unnecessary to repeat the three first arguments particularly; because the last includes the general substance of them.

The sum of what was urged on the part of the plaintiff was, that the leasing and jointuring powers existed at the time when they were executed by Sir Robert Atkyns the father; that those powers were well executed by him; that the lease and jointure

(a) He was one of the defendants, and all the other defendants were as much original defendants as he was, but that the word original is quite improper. The reporter had probably read some equity reports, and took the epithet original from those reports, in which it is properly used. Where a defendant dies, and the cause is revived against his representatives, there the deceased is properly called the original defendant, in contradistinction to his representatives, who were not originally any parties to the suit: and so in case at law, where proceedings may be revived by *sci. fa.* after an abatement, the word original may be properly used, but not in the present case, where there are no new defendants.

(b) If Robert had been the sole defendant, the suit would have abated.



made by him, in pursuance of those powers, were an impediment to his son Sir Robert the Younger's suffering a common recovery; that even supposing that James Earle was a good tenant to the præcipe, yet the entry of Dame Ann the jointress, within the five years, avoided this recovery; and consequently, that the remainder or reversion in fee, devised to the lessor of the plaintiff by Sir Robert the father, was not barred by the recovery thus suffered by Sir Robert the son.

These points were entered into very largely, by Mr. Caldecot and the gentlemen who had spoken before him, on the same side.

They first endeavoured to prove (a) that the powers [75] reserved to Sir R. A. the father by the two deeds of 12th June 1669 were in being and valid at the time of the execution of the lease to the Dacres; and secondly, that they were well executed: and consequently that there were estates of freehold subsisting at the time when Sir R. A. the son made the feoffment to Earle; viz. Dame Ann's jointure, and the lease to the Dacres: and therefore, thirdly, they insisted that these life-estates were impediments to Sir R. A. the son's suffering the common recovery. They denied that Sir Robert Atkyns, the son, was tenant in tail in possession, at the time that he made the feoffment to James Earle: so that Earle could not be a good tenant to the præcipe. And they urged, that even admitting that Sir R. A. the son was tenant in tail in possession, yet he could not upon this naked possession, without the freehold, make a good tenant to the præcipe without the jointress and the lessee for life's joining: and that the Court cannot, (under 14 G. 2, c. 20, § 1,) presume a previous surrender or conveyance of the estates for life, in order to make the recovery good.

They further, fourthly, insisted, that supposing Sir Robert Atkyns, the son, was tenant in tail in possession, and also that there was a good tenant to the præcipe; (so that the recovery was good, as a common conveyance;) yet the re-entry of Dame Ann Atkyns, the jointress, within the five years (in 1712) actually avoided this recovery; which, if not void, was at least voidable by the tenant for life: and this re-entry of the tenant for life re-vested all the subsequent estates.

The great stress of the question lies (as they said) upon the tenant to the præcipe.

The first point, in order of time, is the validity of the two powers created by the greater deed of 1669.

But there is no ground, either for the supposition of a fact, "that the lesser deed must have been executed last:" or for any inference in point of law, "that it operates to the extinction of these powers."

The fact concerning the priority of execution of the two deeds cannot, now, be determined by any evidence: therefore presumption must determine it.

Now one of these deeds is an agreement to execute the other: consequently, must have been prior to it. The lesser deed covenants; the greater performs that covenant: therefore the lessor was prior. If it had been [76] executed last: that would have destroyed the very effect of it and the powers raised by it. Dame Mary was giving up and exchanging her former jointure: and therefore she might desire a single distinct deed, to secure her own interest. For which purpose, a deed of covenant was the most proper: and there was no need to incur this lesser deed, with the powers inserted in the greater deed; which powers did not concern her. Whereas, in order to support a contrary argument, it is necessary to suppose a new agreement (without, and even against, any reason for it,) to alter and destroy the former agreement. But if the parties had meant so, they would have so expressed it.

However, supposing the lesser deed to have been actually executed last; yet being all now statu, the law will order the time, so that the proper deed shall be taken to be anterior, and the other subsequent, according to the reason of the thing and the intent of the parties. *Digges's case*, 1 Co. Rep. 173. *Albany's case*, 1 Co. Rep. 107, and 2 Rep. 75, *The Lord Cromwell's case*.

And the operation of the fine will follow the construction of the deed.

*Countess of Rutland's case*, 5 Co. 26 a.

Therefore, the existence of the powers being established, the next question is, "whether they have been well executed." Dame Mary's jointure has not been objected to: but the lease made to the Dacres has; (first) as being without a sub-

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(a) This is wrong: the powers were only in the greater deed; lege therefore that "the two powers reserved to Sir R. A. the father by the great deed of 12th June 1669."



sisting power in Sir R. A. the elder, the lessor to make it ; (secondly) as being fraudulent, even supposing him to have had power to make it : (thirdly) as the livery and seisin was made to the attorney of one only of the three lessees, and not to all three,\* or their joint-attorney.

Now it is true, that a tenant in tail in possession may suffer a recovery : so also may a tenant in tail in remainder, if he can get in the tenant for life.

But the original donor may interpose as many estates for life, as he pleases, before and prior to the tenancy in tail. And this lease to the Dacres, under the power, is just the same as if it had been originally interposed. And the declaration of the intention will not vitiate the estate limited to these Dacres : if it had been even a condition annexed, in restraint of alienation, such a condition would have only been void ; and the estate, good. Co. Litt. 24 a. *Corbet's case*, 1 Co. 84. *Mary Portington's case*, 10 Co. 35 b.

[77] As to fraud—there is nothing fraudulent in this lease. And both the terms have been actually recovered at law.

If Sir R. A. the father's superfluous declaration has any effect, it makes the lease good : and it would have been adjudged good, if it had been called in question whilst it subsisted. 2 Leon. 132, *Moore and Savill's case*.

And no one is hurt or defrauded by this lease. Not the jointress : for the full and best rent is reserved. Therefore Cro. Eliz. 5, *The Countess of Sussex's case* does not affect this case ; for there, the jointress suffered. Nor is the tenant in tail hurt ; for the same reason, as to his rent : and as to the postponing his power to suffer a recovery, it was legal, and might have been done by a real actual demise for life or lives. And the eyes of this Court do not pierce further than the shell† of the conveyance ; not to the design of it. As in cases of terms to preserve contingent remainders, this Court cannot hinder the trustee from destroying them : so, of terms to attend inheritances ; which this Court cannot hinder the mortgagee from getting in. Cro. Car. 190. The case of *Nash v. Preston*, is a strong case to shew that the Court of Law will not meddle with the equity of the case.

Now this lease has pursued the power : and this Court will not meddle with the intent.

Leases made by churchmen, for the benefit of their families, are generally as fictitious as this : and yet they are always allowed to be good.

As to the livery and seisin—this livery to Thomas Barker enured to the use of all the three Dacres, according to the purport and true meaning of the letter of attorney, most explicitly, therein expressed, and so declared at the time of the livery by Sir R. A. the elder who gave it.

This sufficiently appears (as the present infeoffment was by deed,) from Bro. Abr. title *Fessements de Terres*, pl. 16, 67, 72, and Co. Litt. 48 b. 49 a. But 2 Anders. 196, pl. 14, the case of *Dary v. Abbot*, is in point : it is most exactly the same case as this.

So that the life-estates of Dame Ann and of the three Dacres appear to have been well created.

Consequently therefore, a double freehold is sufficiently established ; viz. one, in Dame Ann ; the other, in the Dacres.

[78] From hence it follows, thirdly, that Sir Robert Atkyns the son, was by them precluded from suffering this recovery : as he was not tenant in tail in possession, at the time of his making the feoffment to James Earle. Therefore he was to gain a freehold as he could ; by right, or wrong : and it may be said, that either of them will do.

But even supposing him to have been tenant in tail in possession, yet James Earle was no good tenant to the præcipe.

When he recovered against Dame Ann, he was not tenant in tail in possession : but he recovered against her, upon a supposition “that he was.” Which supposition was grounded therefore upon a mistake. And the terms which Philips recovered as his lessee, and surrendered to him, were both of them fictitious. So that the feoffment to Earle must fall to the ground ; having no foundation to support it. And though livery was given to him by Sir Robert, yet Sir Robert himself continued in possession till his death.

[\* And it might have been added as all three were under age.]

† Legal trusts.

Which observations being premised, this part of the case may be considered, 1st, on Sir Robert's verdict and judgment against Dame Ann; and 2dly, on his subsequent feoffment to Earle.

First—His entry under the judgment cannot amount to a disseisin; nor had he thereby, an estate pursuant to his title, as there claimed by him; it could not be more than an estate in tail, expectant upon two freeholds. It could not be a disseisin: because it was an entry under a verdict. In truth, he gained only a bare naked possession, without the freehold. And so is the writ of habere facias possessionem: and the judgment is "to recover the term" only. And Cro. Eliz. 438, the case of *Buteman v. Allen*, (upon a devise the same with that in the case of *Newys and Scholastica his Wife v. Larke*, in Plowd. 403,) also proves this.

Therefore the entry under the judgment in ejectment could give no title to Sir R. A. the son to suffer a recovery: it was a lawful entry; but an unlawful holding. Co. Lit. 57 b. A wrongful withholding is not a disseisin; but a deformation. Co. Litt. 277 b. 331 b. 354 b. 355, 356. And this is without the freehold.

It is like the cases of tenant at sufferance: 12 Assize 22. Co. Litt. 57 b. 1 Ro. Abr. 659, title Disseisin, letter C. pl. 10, 11. Cro. Jac. 169. The case of *Butler v. Duckmanton*. Co. Lit. 270, 271. Cro. Eliz. 238. The case of [79] *Allen v. Hill*. All which cases concur to prove "that nothing shall operate by way of disseisin, but a tortious entry."

And there is no middle kind of holding, between a naked possession, that disturbs nothing; and a fee, which disturbs every thing.

Then, secondly, as to the feoffment to James Earle. It gained no estate to Earle. This is a very great point to families, for the preservation of intails.

If the contrary construction should prevail, even tenants at will might do the same thing.

But the line is drawn thus; viz. "that a tenant in tail, with the freehold, may bar: but without it, he can not."

A real feoffment indeed may do it: but a fictitious one cannot: but shall be considered as fraudulent and void, like that in Savile, 126, *Leon. White v. William Bacon*. It is not a discontinuance: *Swift v. Heath*, Carthew, 109, 110.

Sir R. A. the son, gained no fee by it, to himself; nor any to Earle; and the Court will consider it as merely collusive.

That he gained none, to himself, appears from 1 Brownlow, 230, *Dame Pett's case*. 2 Inst 412, 413. Cro. Car. 302, *Blunden v. Baugh*. Bracton, lib. 4, pa. 161, 162. Co. Lit. 153. Dy. 62, 11 Assize 6, *Powsley v. Blackman*, Cro. Jac. 659. *Bull v. Wyatt*, Cro. Car. 388.

That he gained none to Earle, is equally true. Earle gained no estate of freehold, by this feoffment; either as a wrong-doer, or as a disseisor. 1 Ventr. 360, Serjeant Maynard's argument in *Moor v. Pitt*.

He might indeed be taken as a disseisor, at the election of the right owner; but not against it. And here was no intention of a disseisin. Cro. Jac. 643, *Ferrers v. Farmer*. 1 Mod. 107, *Fountain v. Cook*. In fact, here was no actual disseisin: for Sir R. A. the son continued in possession. Neither was here any force or expulsion. And it is not every entry, that is a disseisin: it is no disseisin, unless there be an expulsion. Co. Lit. 181. 1 Salk. 246, pl. 2, most expressly.

Considering this feoffment as part of the conveyance of a common recovery, as a common assurance, Sir Robert the Younger had no power to make a feoffment.

[80] It is not hereby meant that he could not in fact make a feoffment: every man in possession may do it. But this Sir R. A. the son, could not convey an estate of freehold, by any rightful conveyance, as fine, release, or bargain and sale. And if he cannot do it by a rightful method, will the law permit him to do it by a wrongful one? Surely not. The possession of a tenant at sufferance is not sufficient to build a title upon. Co. Litt. 278. Cro. Jac. 169. Cro. Eliz. 238.

Common recoveries are now considered as a mere conveyance: and the recoveror is a mere instrument and creature of the tenant in tail. 2 Rep. 77, *Cromwell's case*. Poph. 23, the case of *Crocker and York v. Dormer*. Cro. Jac. 643, *Sir John Ferrers, and Sir John Curson v. Sir Richard Fermor and Others*. 2 Ro. Rep. 247, S. C. (at the end of it). 1 Mod. 107, *Fountain v. Coke*. So, the known case of copyholds, 4 Co. 28 a. Coke's Complete Copyholder; and the case in 1 Ro. Rep. 223, *Herbert v. Binion*.

From all which cases it is clearly to be inferred, that the whole transaction is one common assurance ; that the recoveror is a creature and instrument of the tenant in tail ; and that it shall not be considered as a tortious entry and a disseisin, in a common assurance.

Such a feoffment as this, may be made by any person in possession : and, if this should be established, it may be of very mischievous consequence : and will introduce a new law, contrary to all former rules and doctrines.

The stat. 14 G. 2, c. 20, considers a common recovery as a common assurance ; and has a proviso, " that the person had a title to make a tenant to the præcipe." And here is not the least ground to presume that the tenants for life either joined or surrendered their estates.

Now if the law considers that some persons have this power, and others have not ; the law will never suffer that to be done by fraud, which can not be done fairly and regularly. And this whole transaction is fraudulent and collusive, and done eo animo to bar the subsequent estates ; and is therefore void, as a fraud, within the rule of *Fermor's case*, 3 Co. 77 b. which considers an estate made by collusion and fraud, as no estate.

Lastly.—Admitting the facts of Sir R. A. the son's being tenant in tail in possession ; and also, that there was a good tenant to the præcipe : yet the re-entry of the jointress actually avoided it, and re-vested all the subsequent estates.

[81] If the recovery was not absolutely void, but good as a common conveyance, yet it was voidable : and if it was voidable, then it was actually avoided by the entry of Dame Ann, upon demises laid as far back as the 14th of February 1709.

To prove this, they applied the cases in 11 Co. 51 b. *Lifford's case* ; Cro. Eliz. 540, *Holcombe v. Rawlyns* ; 1 Anderson, 352, *Butler v. Baker* ; Fitz-Gibbon 225, *Bunker v. Cooke* ; Holt's Cases, 748 ; 1 Co. 14 b. *Sir William Pelham's case* ; and a case in C. B. in H. 12 Ann, *Goodtitle v. Ridsen*.

It is like the regress of a disseisee, which avoids all intermediate acts, by relation.

Mr. Knowler, who twice argued this case for the defendants, included in his last argument all that had been or could be urged on that side of the question : and it was to the following effect.

The main question upon this case is, " whether the recovery suffered by Sir R. A. the son, be a good recovery."

For it is insisted by the lessor of the plaintiff, " that the recovery is void, as being suffered by a person who had only a bare possession, and had no power to make a tenant to the præcipe."

But if the recovery is good, the lessor of the plaintiff can have no title : because he claims under a limitation in fee, expectant on the determination of an estate tail, which is barred by the recovery.

The limitations, under which all the parties derive their title, are contained in two deeds, dated 12th June 1669 : which, from their bulk, and for distinction's sake, have been called the great deed and the little deed.

The great deed is a release, grounded on a bargain and sale for a year : the little deed is a covenant to levy a fine, and a declaration of the uses of the fine.

In speaking to the question,

Four matters must be taken into consideration, viz.

First, the order in which the two deeds were executed ; and in what manner they influence each other. And from [82] this consideration it will appear, whether the leasing and jointuring powers did exist at the time when they were exercised by Sir Robert Atkyns the father.

Secondly, supposing the leasing and jointuring powers did then exist, then whether those powers were well executed by the said Sir Robert the father.

Thirdly, supposing they were well executed, then whether the lease or the jointure, made pursuant to these powers, were an impediment to Sir Robert Atkyns the son's suffering the recovery.

Fourthly, if the recovery was good, then whether the re-entry of Dame Ann, under the second ejectment, did avoid it.

First, as to the order in which the two deeds were executed ; and in what manner they influence each other.

It is found by the verdict, that Sir R. A. the father, being seised of the estate in question and of several other estates, on 12 June 1669, made and executed three



indentures. By the first, he in consideration of a marriage before that time had with Dame Mary his then wife, and of her releasing a former jointure made to her before their marriage, covenanted that he and the said Dame Mary his wife and Sir Edward Atkyns (his father) would levy a fine to Edward Carteret and John Lowe, of the estate in question only ; to the use of Sir R. A. the father for life, sans waste ; remainder to the said Dame Mary, for life, for her jointure ; remainder to Sir R. A. the son and the heirs male of his body by Lovis Carteret his intended wife ; remainder to the right heirs of Sir Robert the father.

By the second indenture (taken in the order as they stand in the verdict) the estate in question is bargained and sold by Sir Edward A. and Sir R. A. the father, to Sir Edward Carteret and John Lowe, for a year.

By the third indenture, Sir Edward A. and Sir Robert A. the father, in consideration of a marriage before that time had between Sir R. A. the father and Dame Mary his then wife, and of a marriage to be had between Sir R. A. the son and Lovis Carteret, and of her marriage portion, and for a provision to be made for Dame Mary, of a jointure, release the estate in question (inter alia) to Carteret and Lowe and their heirs, to the use of Sir R. A. the father for life, sans waste ; remainder (except timber) to Dame Mary for life, for her jointure ; remainder to Sir R. A. the son and the heirs male of his body on the body of [83] Lovis Carteret ; remainder to the right heirs of Sir R. A. the father. (These are all the limitations in this indenture, concerning the estate in question.) Sir R. A. the father covenanted with Sir George Carteret (the father of Lovis C.) that for the better securing the estate in question to Sir Edward C. and John Lowe and their heirs, he and Dame Mary his wife and Sir Edward Atkyns would levy a fine to Carteret and Lowe and their heirs, to the uses before declared.

In Trinity term 1669, a fine with proclamations was levied, of the estate in question (together with other estates) by Sir Edward A. Sir R. A. the father, and Dame Mary his then wife, to Sir Edward Carteret and John Rowe.

It is not found, which of the two deeds was executed first ; (though it was a matter of fact :) so that the priority of execution must be determined by the Court, from circumstances and presumptions.

The order in which the two deeds stand in the verdict, concludes nothing, one way or the other : since they are placed there, as they were given in evidence.

Then he proceeded to compare the two deeds, and to reason upon them ; and argued very elaborately, that either the little deed was executed after the great deed ; or that the little deed was made with a view to control or correct the great deed ; or that the great deed, and the little deed, and the fine must be considered as one assurance, (though not as incorporated, and as one single act :) and in either case, there is an end of the leasing power, and also of the jointuring power.

And he argued very strenuously, that the fine would extinguish both those powers ; because they were powers appendant and annexed to Sir R. A. the father's estate for life, and not collateral to his estate.

Second point or head—supposing the great deed was last executed, or that it controls or corrects the little deed ; then

Whether the leasing and jointuring powers were well executed by Sir R. A. the father.

He chose to say nothing as to the execution of the jointuring power ; no circumstances attending the execution of it, having been laid before the jury : but confined himself to the other, (the \* leasing power).

Now this lease is void, as against law ; being made for no other purpose than to restrain Sir R. A. the son from suffering a recovery. For that restraint is against law.

The power to suffer a common recovery, is a privilege inseparably incident to an estate tail : it is a potestas alie-[84]-nandi, which is not restrained by the Statute de Donis ; and has been so considered ever since *Taltaram's case*, [12 E. 4, 14 b. pl. 16]. And this power "to suffer a common recovery," cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant.

That it cannot be restrained by condition, appears by Co. Litt. 223 b. 224 a. and *Sonday's case*, 9 Rep. 128.

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\* See the note at the end of the reply, pa. 104, 105, accounting for curtailing this part of the argument.

That it cannot be restrained by limitation, appears by Cro. Jac. 696, *Foy v. Hinde*; and by *Sonday's case*, and other books.

That it cannot be restrained by custom, appears by the case of *Taylor and Shaw*, in Carter 6 & 22.

That it cannot be restrained by recognizance, or by statute, appears by *Poole's case*, cited in Moore 810.

That it cannot be restrained by covenant, appears by the case of *Collins v. Plummer*, 1 Peere Wms. 104.

That an attempt to suffer a common recovery cannot be restrained, appears by *Corbet's case*, in the 1 Rep. 83. *Mildmay's case*, in the 6 Rep. 40, and the case of *Pierce v. Win*, in 1 Vent. 321.

And that a conclusion to suffer a recovery cannot be restrained, appears by *Mary Portington's case*, in the 10 Rep. 35.

So that the question is reduced to this, "whether that can be effected by a lease made pursuant to a power, which can not be attained by a condition, limitation, custom, statute, recognizance, or covenant."

Since the law has been thus careful to preserve this incidental privilege of suffering a common recovery, to a tenant in tail, surely it will not permit this new experiment, equally destructive to that privilege, to take place. This is the first attempt of the kind: and it is a sound rule of law, "that what never has been, ought not to be permitted."

[85] The lease is also void as being fraudulent: for it was made to deprive Sir R. A. the son, of the profits of the estate, and of an incidental power over it. And the fraud which made it void, was apparent. And as the estates affected by the lease, subsisted before the lease was made, the lease was fraudulent at common law.

To prove the lease to be fraudulent, he relied on Savile, 126, the case of *White v. Bacon*, H. 32 Eliz. In a formedon, the tenant pleaded non-tenure: on which, the parties were at issue. The jury found "that the tenant made a feoffment to several persons, to their own proper use, before the writ purchased; and that the feoffees never took the profits of the land; but that the feoffor took them, until the day of purchasing the writ." And the doubt was, whether the feoffment was fraudulent as against the demandant. And the judgment of the Court was, "that it was fraudulent and void." Now if the feoffee's not taking the profits, but the feoffor's taking them, was a reason for adjudging the feoffment to be fraudulent against the demandant in that case; the lessee's not taking the profits, not paying the reserved rent, nor having the lease in his custody; but the lessor's continuing in possession and taking the profits to the day of his death, seem in the present case, to be full as cogent reasons for determining this lease to the Dacres to be fraudulent, against Dame Ann and Sir R. A. the son.

If this case should be answered by saying "the feoffment therein mentioned was made void by 13 Eliz. c. 5, made against fraudulent grants;" the reply would be "that that statute was made in affirmance of the common law;" as appears by *Twin's case*, in the 3 Rep. 82 b. But he argued that the lease was fraudulent not only at common law, but likewise by the statute. For the marriage of Dame Mary with Sir R. A. the father, and Dame Mary's releasing her former jointure, were a valuable consideration for the estate limited to Dame Mary for life: and the marriage portion of Lovis Carteret was a valuable consideration, which extended to the limitation to Sir R. A. the son, and the heirs male of his body by Lovis Carteret.

Here it hath been observed, "that if the lease had been called in question whilst it subsisted, it could not have been avoided; but would have been adjudged absolute, for the benefit of the lessees:" and 2 Leon. 132, *Moor* and *Savill*, and other books, were cited as authorities to support the observation.

Answer—The objection to the lease is, "that it never did subsist," for the reasons which have been mentioned: and if the lease was void from the beginning, it is a [86] contradiction, to say "it shall be adjudged absolute." And the authorities cited are, all, of conditions subsequent to the estate created at the same time with the condition. In which cases, there was no objection to the estate; (for the estate was allowed to be well created:) but the objections were to the conditions, which were subsequent to the estate.

It has been observed farther, "that the eyes of the Court do not pierce further than the shell of a conveyance; not to the design of the maker of it." Here indeed



one must be at a loss for an answer; for want of knowing what the shell of a conveyance is. But there is one thing that appears upon this special verdict, which very much favours, if it does not directly establish what we have been contending for: and that is the verdict which is found to have been obtained by Sir R. A. the son, against Dame Ann the second wife of Sir R. A. the father; which verdict is a disaffirmance of the leasing and jointuring powers; and could not have been obtained, if those powers had subsisted. It is true, there is a deed found also in the special verdict, which was made between the death of Sir R. A. the father and the bringing the ejectment, and to which Sir R. A. the son is a party: in \*<sup>1</sup> which deed there is a recital "that Sir R. A. the son then claimed the estate in question, by and under the great deed;" which deed was not given in evidence on the trial of the ejectment. But this finding is a matter of no moment: for the little deed was executed either before, or at the time, or else subsequent to the time, of executing the great deed. If it was executed subsequent to the execution of the great deed, then the little deed and fine control the great deed, by extinguishing the powers. If it was executed before or at the time of executing the great deed, then the two deeds and the fine may be taken as one assurance; (V. ante 83). And in that case, the little deed corrects the great one, by limiting the estate in question, to Sir R. A. the father, discharged of the powers. And in either case it may be said, with great truth, "that Sir R. A. the son claimed under the great deed." However, supposing the person who drew the deed, had mistaken the law, and made a false recital, surely a mis-recital of matter of law will not conclude a Court of Justice. And what Sir R. A. the son's own opinion upon the matter was, will appear by the recent pursuit of his title against Dame Ann; for Sir R. A. the father died in February 1709: and in Trinity term following Sir R. A. the son brought his ejectment against Dame Ann, who was then in possession of the estate under the jointuring power.

But it having been found, "that afterwards Dame Ann brought an ejectment, and recovered the estate, [87] upon two demises, one made by herself, and the other by the surviving lessee for life;" it hath been insisted that Dame Ann could not have obtained that verdict, unless the two powers, or one of them at least, had then existed.

To which it may be answered, that it does not appear that the little deed was produced in evidence, upon the trial of that ejectment. Or perhaps the jointuring power only might then be in question: or there might have been other reasons for the difference in opinion. But however it might happen, still that verdict is not conclusive.

Here, Mr. Knowler argued that the lease to the Dacres must have determined in 1711, upon the death of Sir R. A. the son without issue male: and that the lessor of the plaintiff was barred of his remedy by this action of ejectment, (being an action grounded on an entry:) because it was not brought within 20 years after his title accrued; and consequently, his entry was not lawful, by 21 Jac. 1, c. 16.

But these parts of his argument are omitted, for the reason given in the note, p. 104, 105.

Third point or head.—But supposing the leasing and the jointuring powers did exist, and were well executed by Sir R. A. the father: the matter which falls next under consideration is, "whether the lease or jointure made in execution of the powers, were an impediment to Sir R. A. the son's suffering the recovery."

The point we shall endeavour to establish is, that James Earle, the person against whom the writ of entry was brought, was tenant of the freehold when judgment was given against him in the common recovery. And we shall begin with observing that the jointure or the lease could be no impediment to Sir R. A. the son's suffering the recovery; because neither of the lessees or Dame Ann were in possession of the estates, at the time when Sir R. A. the son made the feoffment to the said James Earle.

\*<sup>2</sup> If the Court should be of opinion, on the authority of 2 Anderson, 196, "that

\*<sup>1</sup> The indenture tripartite dated 18th May 1710. Vide pa. 70.

\*<sup>2</sup> Note—Upon his first argument, he had urged (upon the authority of Bro. Abr. title *Feoffment de Terres*, pl. 67) "that no freehold passed by the livery, to any of the three lessees, except John Dacres who executed the letter of attorney to take it: which John dying in 1705, the lease expired then." But he did not now insist upon this point: but seemed, rather, to give it up.



the livery under the letter of attorney of John Dacres, vested the freehold in his co-lessees as well as in himself; and not in himself only;" then we insist that the livery was void, because the [88] lessees were in possession by the deed. For if tenant for life has a power to make leases for lives, and makes a lease for life by livery, the livery is void; because the lease takes effect by the deed; for by sealing the deed, the power is executed. 2 Levinz, 149, *Wigson and Garret*. 1 Ventris, 291, *The Earl of Leicester's case*. And the livery being void, the lessees were never in possession: for it is found by the verdict "that the lessees or either of them were never in possession otherwise than by the livery."

And as the lease was no impediment, so the jointure could be none. For it is found "that Dame Ann being in possession by virtue of the deed of appointment, and claiming the estate for her life for her jointure, an ejectment was brought on the demise of Sir R. A. the son and J. Walker his trustee, against Dame Ann and the tenants in possession, for the recovery of the estate; and that there was a verdict for the plaintiff, and judgment on it." And "that a writ of possession was awarded; and that soon after the judgment, and during the life of Dame Ann, Sir R. A. the son entered into, and was in possession of the estates, and that he continued in possession to the day of his death." By this, it appears that the jointure and possession of Dame Ann was removed out of the way.

It can be no objection to the legality of Sir R. A. the son's possession, "that the judgment was not executed by a writ of possession:" since something equivalent to it is found, viz. "that soon after the judgment Sir R. A. the son entered into and was in possession of the estate." And there is no rule of law more uncontroverted, than, "that a recoveror may enter without a writ of execution, where the demand is certain." The demandant, after judgment in a common recovery, may enter, or take out execution at his election. *Shelley's case*, 1 Rep. 106. *Mary Portington's case*, 10 Rep. 38. Conusee may execute a fine excoutory (which does not take effect till execution) by entry. Bro. tit. — The plaintiff may have a redisseisin, on the Statute of Merton, c. 3 (which gives it after a recovery in an assize of novel disseisin and delivery of seisin by the sheriff,) as well where he executes the recovery by entry, as where the sheriff delivers seisin to him. The patron who recovers quære impedit, may present, without a writ to the bishop, Hutton, 66, *Ruld v. Bishop of Lincoln*. And the lessor of the plaintiff may enter, after recovery in ejectment, 2 Sid. 156. Sir Robert the son being thus in possession of the estate; and the possession which is found to have been in Dame Ann, having been removed; the effect and operation of the feoffment, comes next in order, to be considered.

[89] But Mr. Knowler said, he would, out of the respect due to what came from the Court, take notice of an\* intimation of one of their Lordships, expressing a desire to hear it argued hypothetically, supposing the less deed to have been first executed, and supposing the powers to have subsisted and to have been well executed, and consequently that Sir R. A. the son was only tenant in tail in remainder; what would be the effect of the entry of such tenant in tail in remainder, under or in consequence of a judgment in ejectment.

And he hoped, he said, to make it appear beyond controversy, that Sir R. A. the son, after his entry in consequence of the judgment in ejectment, became tenant in tail in possession; i.e. became seised of an estate tail executed.

The gentlemen who have argued for the lessor of the plaintiff, have called the possession of Sir R. A. the son a naked possession. But he, to maintain his position, would shew that the right of possession was in Sir R. A. the son.

There is a sound distinction in law, between a naked possession, and a right of possession. A disseisor has only a naked possession: the disseisee has the right of possession; for he may enter upon the disseisor. But when a descent is cast, the right of possession is no longer in the disseisee; but is in the heir of the disseisor; for the disseisee cannot enter upon the possession of the heir. So that a right of possession, and a right of entry, are convertible.

A judgment is an act of law: and whilst it continues in force, it destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party; but gives a right of possession to the recoveror. And if the judgment in ejectment

\* This had been intimated by one of the Judges, at the end of the second argument.

did not produce this effect, the lessor of the plaintiff could not enter, or be entitled to the writ of *habere facias possessionem*: but his having a right to enter, and to sue out that writ, infers his right to the possession. Whilst the judgment stands in force, it removes an intervening estate out of the way: and during that time, it is the same thing, as if it had never existed. And the recoveror's right to the possession will continue till the judgment is reversed by error, or falsified in another action. Like the case where the tenant in tail suffers an erroneous recovery; so long as the recovery remains in force, it is a bar to the tail, and the issue in tail has no right to the estate tail; for if the tenant in tail should disseise the recoveror, and die, the issue would not be remitted; because he has but one [90] title to the land, (which is the title by descent;) and there must be two titles in the same person to make a remitter. Co. Litt. 349 a.

Now the consequence of this is, that the right to the possession, and the remainder in tail, meeting in the same person; and that person being Sir R. A. the son; the possession and the remainder in tail united, and Sir R. A. the son became seised of an estate tail executed, or (in other words) of an estate tail in possession.

If the nature of an action of ejectment, and the consequence resulting from a recovery in it, be considered, this will appear in a clearer light.

An ejectment is a possessory action; in which almost all titles to land are tried: whether the party's title is, to an estate in fee, fee tail, for life, or for years, the remedy is by one and the same action. In an action of ejectment, the plaintiff recovers only the possession of the land: and the execution is, of the possession only. But if the lessor of the plaintiff recovers only the possession of the lands, it may be asked "how he becomes seised according to his title." To which it may be answered, that when a person is in possession by title, (as every person is, who enters in execution of a judgment in ejectment, because the law does no wrong,) the possession and title unite. For it is a rule of law, "that when a man, having a title to an estate, comes to the possession of it by lawful means, he shall be in possession according to his title:" as where the title is to have a fee, he becomes seised in fee; where the title is to have an estate tail, he becomes seised of an estate tail; and so on; the law casting the estate upon him according to his title. And were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates: and it would never answer the purpose for which it was brought into use, if (as the counsel on the other side would have it) the lessor of the plaintiff had no more than a bare possession, after an execution or entry on a judgment in ejectment. But this is not all. For a great absurdity would follow, were it otherwise: a man would have a rightful possession, with an immediate remainder to himself in tail; a notion which never existed, till this case came to be debated.

What is it that converts an estate tail in remainder into an estate tail executed, in any case? certainly, nothing more or less than the possession's coming to the remainder in tail. For if there is tenant for life with remainder to a third person in tail, nothing comes to the remainderman upon the death of the tenant for life, but the possession: for the estate tail was in him before.

[91] And whilst the estate tail continued executed, Sir R. A. the son made the feoffment to James Earle: which discontinued the tail, and vested a defeasible fee in him: and the præcipe, upon which the common recovery was suffered, being brought against him; and Sir R. A. the son being a party to the common recovery, as vouchee; the common recovery, thus circumstanced, barred the estate tail and the remainders over.

And though Dame Ann falsified the recovery in ejectment brought by Sir R. A. the son, by the judgment in the ejectment afterwards brought by herself, yet that falsification had no other effect upon the estate, than to revive her right to the possession. Like the case just now cited, of an erroneous common recovery suffered by the tenant in tail; where, if the issue in tail reverses the common recovery by a writ of error, the reversal revives his title to the estate tail; and consequently he is then tenant in tail, by remitter. So that Dame Ann, by means of the recovery in the ejectment brought by herself, having the right to the possession, became tenant for life again, in possession; with a remainder in fee thereupon expectant to the recoveror in the common recovery, or to the person to whose use the common recovery was declared.

That estates may open and shut, or be spread and expand as events happen, is not



unusual in our law. If an estate is limited to A. for life; remainder to his first and other sons, in tail; remainder to A. and the heirs of his body: till A. has issue, he is seised of an estate tail executed: upon the birth of a son, that estate opens, and lets in the son; and A. thereupon becomes tenant for life, with remainder to his son in tail. And this was *Lewis Bowle's case*, 11 Co. 80. So if lands are limited to all the children, either in possession, or remainder; upon the birth of the first child, the whole estate vests in him or her; upon the birth of another child, the estate opens, and takes in that child; and opens in like manner on the birth of every other child. 1 Ld. Raym. 310, 311, *Earl of Sussex v. Temple*. 2 Vern. 525, *Cook v. Cook*.

But the resolution of the question now under consideration does not altogether depend on the quantity of the estate which Sir R. A. the son had, at the time when he made the feoffment: it depends on the quality of the conveyance he made use of.

All the gentlemen who have argued this case on the other side, have blended and confounded the several operations of different conveyances; and have not considered them with that distinction and precision that is necessary for the solution of the present question. If due attention were given to the operation of the several conveyances which the law has established, the seeming difficulties of this part of the case would be removed.

All conveyances operate as a feoffment, or as a grant.

A feoffment operates on the possession: without any regard to the estate or interest of the feoffor. A grant operates on the estate or interest which the grantor has in the thing granted. But, to be more particular—according to Lord Coke's enumeration, a man may purchase or convey lands by ten manners of conveyance; viz. by feoffment, grant, fine, common recovery, exchange, release, confirmation, grant of reversion with attornment, bargain and sale, will.

To make a feoffment good and valid, nothing is wanting, but possession: and where the feoffor has possession, though it be as bare and naked as the gentlemen would have it, yet a freehold or fee-simple passes, by reason of the livery. Poph. 39. Litt. § 595, 599, 611, 698. Co. Litt. 366 b. 367 a.

A grant passes nothing but what the grantor may lawfully grant. Poph. 39. Litt. § 608.

A fine and common recovery are likened to a feoffment: for one is called a feoffment, of record, and the other is said to be in nature of a feoffment of record. That which occasions the likeness between a feoffment fine and recovery, is, that they all pass a fee; though the feoffor, conusor, or tenant have none. Co. Litt. 9 b. But, to give them this uniform operation, the conusor in the fine, and the tenant to the præcipe, must be seised of a freehold; i.e. an estate for life, at least; otherwise, the fine may be avoided, by the plea of "partes finis nil habuerunt;" and the recovery, by the plea of non-tenure, i.e. that the person against whom the writ was brought, was not tenant of the freehold, by right, or by wrong." By this, it appears that a fine and a common recovery are both void, for want of a freehold: but it no where appears, notwithstanding what has been urged, that an estate in the feoffor, is necessary, to support a feoffment. But it does appear, and I have a great authority for it, that it is no plea, in avoidance of a feoffment, to say that "the feoffor has nothing in the land, at the time of the feoffment:" because the land passes by the livery: if the operation of the feoffment is questioned, the only plea is "n' enfeoffa pas:" which puts in issue only the livery. This is the opinion, and this is the language of Littleton: 10 Ed. 4, 8, 9.

[93] All other conveyances, as exchange, release, confirmation, grant of reversion, bargain and sale, will, pass nothing but what the grantor may lawfully convey, without livery; and, on that account, are in the nature of a grant. Litt. § 606, 607, 609, 610. Hardr. 410, *Edwards v. Slater*. It is the operation of these conveyances, that the gentlemen, in the course of their argument, have applied to a feoffment: but with what propriety, is submitted to the Court, upon what is now disclosed.

But it has been said, "that such a feoffment as this, may be made by any person in possession: and if established, will introduce a new law in Westminster-Hall, contrary to all former rules and doctrines."

To which objection, the answer is, "that it is most clear, that a feoffment may be made by any person in possession:" for it is the doctrine the law teaches: and it has been the language of the greatest professors of it. Lord Coke, in his comment on the 25th chapter of W. 2 (which gives a writ of novel disseisin, where tenant for years



aliens in fee, by feoffment,) grounds his distinction between cases which are within the Act and cases which are not within the Act, on possession only. For he says, though the Act speaks of an alienation by feoffment, by a tenant for years; yet it extends to tenant by elegit, statute merchant, statute-staple, tenant at will, and tenant at sufferance; because all these have a possession: but it is otherwise of a bailiff; for he hath no possession at all." This shews how greatly one of the gentlemen is mistaken, when he asserts "that a conveyance of an estate of freehold, by a tenant at sufferance would be void\*:" since it appears by the statute, and by the comment upon it, "that a feoffment by a tenant at sufferance (who has no more than a bare possession) will unquestionably pass a freehold." And the case of *Butler v. Buckmanton*, Cro. Jac. 169, proves no more than that the release of tenant in tail to a tenant at sufferance, is not good for want of a privity between them. Besides, a release, (as has been already observed,) passes no greater estate than the releaser can lawfully convey.

Lord Ch. Just. Holt lays it down as clear law, in the case of *Hunt v. Burn*, H. 1 Annæ, "that if lessee for years makes a feoffment with livery; though the lessor be on the land, protesting against it, yet the land passes; "because the lessee was entitled to the possession." And Lord Ch. Just. Holt is supported in his opinion, by the case of *Read and Morpeth v. Errington*, Cro. Eliz. 321, where the question was, "if a feoffment by lessee for [94] years, the lessor being upon the land, was a good feoffment:" for it was pretended that his being upon the land guarded the land, so that no feoffment could be made. But the Court was of opinion that the feoffment was good; "because the lessee had the sole right to the possession; and livery ought always to be given of the possession."

Notice has been already taken, that it is no plea in avoidance of a feoffment, to say "that the feoffor had nothing in the land at the time of the feoffment." Let us here add the form of pleading a feoffment, by tenant for life, and tenant for years; good pleading being an infallible test of the law. If feoffment in fee is pleaded by tenant in fee the conclusion is, "that the feoffee was by virtue thereof seised, in fee:" and the same conclusion is made on the feoffment in fee of the tenant for life and tenant for years, "that by pretext thereof the feoffee was seised in fee." The entry of *Albany's case* in 1 Rep. 108, is a proof of this.

It appears by *Jenning's case* in the 10th Rep. 43, "that the feoffee of lessee for years was a good tenant to the præcipe." In the case of *Smith v. Parkhurst*, or *Dormer and Fortescue*, it was admitted that there would have been a good tenant to the præcipe, if Mr. Just. Dormer had made a feoffment. And the question in *Sir William Pelham's case*, 1 Co. 14 b. is an admission "that the feoffment of lessee for years will pass a freehold."

"That possession only would support a feoffment," was the doctrine at Westminster-Hall, in elder times. In Perkins (a book of no mean authority,) section 200, it is laid down as a rule, "that without possession, a man cannot make livery." A feoffment by the lessee for years, though the lessor be upon the land, passes the land: and the reason for this is rendered in the book; "because the lessor had nothing to do with the possession."

It was the law, when lands were devisable only by custom, that a man might devise "that his lands should be sold by his executors." In which case, the lands descended, upon the death of the testator, to his heir at law: and the executors took no interest by the will. Babington, a learned Judge, in putting this case, and taking notice of the feoffment of the executors, makes this remark: "And so," says he, "a man may have a lawful freehold, from a person who had nothing in the land; as a man may have fire from a flint, which has no fire in it." And he further illustrates his conclusion, with the instance, "that a woman shall recover her dower (which is an estate for life) against a guardian in chivalry, who has no freehold." 9 H. 6, 24.

[95] In 10 H. 8, 10, it is mentioned as a thing notorious, "that those who have no freehold may convey a freehold." The conveyance which will pass a freehold from a person who has none, must necessarily be a feoffment: since there is no other conveyance in the law, which will produce the like effect.

Before the Statute of Uses, a cestuy qui use conveyed the use by bargain and sale; and afterwards levied a fine to stranger. And the question was, whether the

\* V. ante, p. 80.

fine was not void ; as neither of the parties had any thing in use or in possession : for by the bargain and sale, the use was in the bargainee ; and nothing was in the bargainor, or in the stranger. It was argued that if this fine was not good, great inconvenience would follow ; for that many recoveries had been suffered against the bargainor, after he had conveyed the use. To this Fitzherbert replied, "It is the folly of purchasers, that they do not take a feoffment from the cestuy qui use, before the fine is levied : for if they do, the fine will be good. I, for my part, says he, will never purchase any land without taking a feoffment ; so that I may be in possession when the fine is levied : for then the fine will undoubtedly be good." 27 H. 8, 20. The possession here spoken of, must be a freehold at least ; because nothing less than a freehold will support a fine : for if neither conusor or conusee have an estate of freehold in possession, remainder or reversion, at the time of levying the fine, the fine is void. The feoffment here spoken of, is the feoffment of a cestuy qui use, after he had parted from the use, and whilst the freehold and inheritance of the estate was in the feoffees : so that it was the feoffment of a person who had only a bare and naked possession (unaccompanied with right,) to a stranger. The feoffment could not have been made good by the statute of 1 R. 3, c. 1 ; because, after the bargain and sale, the use was in the bargainee ; and the feoffor was no longer cestuy qui use. This was the opinion, and this was the practice of one of the greatest lawyers of the age in which he lived : for it is said, that Fitzherbert and Baldwyn were the greatest lawyers of that age. The observations upon the opinion of Fitzherbert, are, that if a feoffment from the cestuy qui use to a stranger, after he had conveyed the use, would have made the fine undoubtedly good ; the like feoffment would have made a good tenant to the præcipe : and for this plain reason ; "because the feoffment passed a freehold." How would this great Judge have been surprized, to have heard the operation of a conveyance which he relied on as the basis of his titles to his estates, doubted and debated ! This case is an additional authority, "that the feoffment of a tenant at sufferance will pass a fee." For after the cestuy qui use had conveyed the use by bar-[96]-gain and sale, he was no longer a tenant at will, to his feoffees. It is likewise a proof "that the feoffment of a deforceor, who is a wrongful with-holder, passes a fee." For after the bargain and sale, the cestuy qui use had no right to the possession ; but was a wrongful with-holder. Upon this, it is submitted, whether the confirmation of this doctrine, by the judgment of the Court, will introduce a new law into Westminster-Hall, contrary to all former rules and doctrines ; or whether it will not rather revive a doctrine almost worn out of memory. It is so long since a feoffment was in common use, that it is no wonder the gentlemen should think the doctrine new ; and that the properties of a feoffment should be so little known.

But it has been said "that the feoffment of tenant in tail in remainder expectant upon an estate for life, will not make a discontinuance : though the feoffment was made with the consent of the tenant for life : " and for this, the case of *Swift v. Heath*, Carthew, 109, 110, was cited. This must be admitted, because a feoffment does not make a discontinuance, unless the tenant in tail is seised of the estate tail, in possession. But does this case prove "that a feoffment by a remainder-man with the consent of the tenant for life, is void ? " nothing less. The question, in the case cited, "whether the feoffment made a discontinuance," admitted the feoffment to be good : for the doubt was upon the operation of it.

To put an end to the question, there is a case, in which it was determined "that the feoffment of him in reversion or remainder, in the absence of the tenant for life, is a good feoffment." It is in *Dyer*, 340. The case was, that he in remainder in fee enfeoffed a stranger, in the absence of the tenant for life ; who neither attorned, nor assented to the feoffment, but occupied the estate, during his life : and it was holden to be a good feoffment for the fee-simple. Where is the difference between this case, and the present ? In the case before the Court, was not the feoffment made by the remainder-man, in the absence of Dame Ann, the tenant for life ? Did she ever attorn or assent ? And did not she occupy the estate, during her life ? The only difference that can be pretended between the two cases, is, that in one, the remainder-man was tenant in fee ; in the other, tenant in tail. But will that make any difference ? it is impossible it should : because the feoffment, in both cases, took effect by the livery.

It has been further said, "that Sir R. A. the son could not convey a freehold by



a rightful conveyance; as by fine, release, or bargain and sale: and if not by a rightful, he could not do it by a wrongful one."

[97] Here is a distinction made, which was never met with. According to their notion of instruments of conveyance; a fine, release, and bargain and sale, are rightful conveyances: a feoffment, a wrongful one. Whereas it is most manifest, that all conveyances are, in themselves equally rightful, and are to be made use of according to the nature of the case to which they are applicable: and their being rightful, or wrongful, does not depend upon their names or their properties. That a freehold will not pass, by a fine, release or bargain and sale, from a person who has only a bare and naked possession, (for that is the subject we are now upon,) does not proceed from those conveyances being lawful ones; but from the nature of those conveyances; whose property it is, to convey nothing but what the maker of them may lawfully convey; because they operate as a grant. Therefore, to infer from thence, "that a freehold will not pass by a feoffment," a conveyance of a different operation, and whose property is to pass a freehold and fee, by force of the livery, is an inconclusive argument.

Another observation has been made, "that if the law considers that some persons have this power, (to make a feoffment,) and others have not; the law will never suffer that to be done by fraud, which cannot be done fairly and regularly."

Answer. Every one who can get into possession, has and ever had a power to make a feoffment: and the law makes no distinction of persons. And whenever a tenant in tail in remainder has obtained the possession, (whether by right or by wrong,) and has done an act, whilst in possession, to make a tenant to the præcipe, in order to suffer a common recovery; no instance can be produced, where such act has been adjudged fraudulent, unfair, or irregular.

It is very common, in practice, for tenant for life to surrender his estate to the remainder-man in tail, conditionally; in order to give the tenant in tail in remainder an opportunity to bar the estate-tail, and the remainders over: and though such surrender is a mere contrivance between the tenant for life and the remainder-man in tail, yet no common recovery was ever avoided on that account.

If tenant in tail in remainder disseises the tenant for life, and during the continuance of the disseisin suffers a common recovery; by their own admission, the common recovery is not avoidable by reason of the disseisin. So, where trustees to preserve contingent remainders during the life of a tenant for years, have conveyed the freehold, [98] to make a tenant to the præcipe, in order to give the remainder-man in tail an opportunity of suffering a recovery; there is no instance of such a recovery being set aside at law, upon a supposed practice between the tenant for years, the trustees, and the remainder-man in tail. And if a remainder-man in tail, who comes to the possession by a wrongful act, or by stratagem and contrivance, may make a tenant to the præcipe, in order to suffer a recovery; surely, a remainder-man in tail who comes to the possession by a lawful act, may do the same.

Where tenant in tail is party to the recovery, as tenant or as vouchee, such recovery is not in the eye of the law either fraudulent or collusive: because the law has made the estate-tail, and all the remainders, and the reversion expectant on it, subject to the pleasure of the tenant in tail, and given him a right to bar them all. If a reversioner expectant upon an estate tail could avoid a recovery suffered by the tenant in tail, as fraudulent, collusive, unfair, or irregular: the law would have devised some means for avoiding it: and the reason why there are no such means is, because a reversion expectant on an estate tail is of no consideration in law. A reversion expectant on an estate tail is no assets. The reversioner cannot falsify a common recovery suffered by tenant in tail: neither is rescit given by the statute of W. 2, c. 3, to a reversioner on an estate tail. The reason of all this is, because the estate tail is an inheritance which may continue for ever. There is no provision by the statutes of 32 H. 8, c. 31, and 14 Eliz. c. 8, to preserve a remainder or reversion expectant on an estate tail, as there is when they are expectant on an estate for life, and the tenant for life is only vouched.

But *Fermor's case*, 3 Co. 78, has been objected: as if there was no difference between a fine or recovery by tenant for years, tenant for life, or a copyholder, by covin, to the intent to bar the reversioner or the lord of his inheritance; and a recovery suffered by tenant in tail, to the intent to bar the estate tail and the reversion.



It has been matter of surprise, to hear the gentlemen mention the statute of 14 G. 2, c. 20. Because that statute is made in aid of recoveries; and not to invalidate them; and more especially as there is a proviso in the Act, "that it shall not be construed to prejudice or affect any question in law, which may arise upon common recoveries not remedied or intended to be remedied by it: but all such common recoveries are to remain and be of such force and effect as they would have been, if the Act had not been made." Besides, there is a proviso in the Act "that no common recovery shall be called in question after 24 years."

[99] The principal argument which the gentlemen have opposed to the doctrine which we have been endeavouring to support, may be reduced to the head of inconvenience: and they have argued upon it, as if the decision of the question depended on private opinion, and not on the law. But the question is not, "what inconvenience will attend the determination, either way:" but "what is the law." The inconvenience, (if there be one,) arises from the nature and operation of a feoffment; and cannot be avoided, but by taking away that conveyance, or depriving it of an operation which it has been allowed to have, by all the sages of the law. But to do this, is not in the power of a Court of Justice: since no maxim of the common law can be abrogated or abolished, but by a legislative authority.

It was once thought to be a great inconvenience, "that a descent, immediately after a disseisin, should take away the entry of the person disseised." At another time, it was thought to be no small one, "that the son should lose his patrimony, because he happened to be born out of time." And till lately, an heir might have been deprived of his family-estate, by the warranty of an ancestor who was never in possession of it.

The inconveniences occasioned by the maxims I have just now hinted at, were as great as that which is pretended to arise from the feoffment of a tenant in tail in remainder expectant upon an estate for life: and yet they continued through ages of the law, till the Legislature took them away. The inconveniences which attended the law in those instances were as universal as any that can be suggested to follow from the doctrine we have been endeavouring to support; and yet Courts of Justice never thought themselves warranted to depart from the law.

Could the Courts of Common Law have determined that a descent, after a recent disseisin, did not take away an entry; without determining at the same time, that a descent does not take away an entry? Could they have determined "that a posthumous child should take, though the estate which was the support of the limitation to it, determined before its birth?" without resolving at the same time "that a contingent remainder should take effect, though it did not vest during the continuance or upon the determination of the estate created for its support?" Or could they have determined "that an heir should take an estate, notwithstanding the warranty of his collateral ancestor;" without determining "that collateral warranties did not bind?" And can the Court determine, in the present case, "that the recovery is void;" without adjudging "that a feoff-[100]-ment has not the operation, which it has had ever since it became a common assurance?"

When the law is doubtful, it is allowable to draw an argument from inconvenience: but where the law is clear and precise (as it is "that the feoffment of a person in possession, let him come to that possession how he will, passes a fee;") an argument from inconvenience is not admissible; because it tends to undermine and overthrow the law.

Much has been said of disseisin; and many critical observations have been made upon that subject, in order to shew that Sir R. A. the son could not be a disseisor. All that needs be said to them, is that Sir R. A. the son entered by right or by wrong: (for there is no medium:) and "that he entered and took the profits," is admitted. Now if he entered of his own wrong, he was a disseisor; for he ousted the tenant for life; and if he was a disseisor, it is agreed there was a good tenant to the præcipe. If he entered by right, then (for the reasons already offered) he had power to make a tenant to the præcipe by his feoffment; so that in either case, James Earle was a good tenant to the præcipe, at the time when judgment was given in the common recovery. And so he was warranted, he said, to conclude, that the recovery is good, and barred the estate tail limited to Sir R. A. the son; and consequently, the remainder fee, which was limited to Sir R. A. the father, and by him devised to the lessor of the plaintiff.

The fourth point or head.—Supposing the recovery to be good, whether the re-entry of Dame Ann, under the recovery and judgment in the second ejectment, did avoid it.

The gentleman who made this question, said “it seemed to be of considerable weight.” Whether it be so or not, we shall see presently. What he undertook to maintain, was, “that the entry of Dame Ann, after she had recovered in the second ejectment, re-vested her estate for life and the remainder in fee; and put the estate in the same plight it was in before the common recovery was suffered.” And to make this out, he compared the entry of Dame Ann to the regress of the disseisee, which voids all intermediate acts, by relation; and made that instance the foundation of his argument.

Mr. Knowler here observed, how inconsistent this argument of the gentleman was with the former. The direc[101]-tion and force of his former argument under the last head was to shew “that Sir R. A. the son entered by title, and could not possibly be a disseisor.” The drift of this argument is to prove him to have been a disseisor. This shews how difficult it is to be consistent, when a person would reconcile matters not supportable.

The question is not to be determined by the rule or instance which the gentleman has applied to it; but upon this distinction, “where the entire estate is defeated,” and where only part of the estate is defeated, by one who has a prior title.” The case which the gentleman puts, falls under the first member of the distinction: the present case falls under the second member of it.

The subsisting estate, at the time when Dame Ann entered under the judgment in the second ejectment, was an estate in fee in Robert Atkyns the nephew and heir of Sir R. A. the son. All the interest that she could derive to herself by force of the judgment in the second ejectment, was an estate for life: for she could recover no otherwise than according to her title. And therefore Dame Ann's entry under that judgment could have no other effect than to diminish and lessen the interest of Robert Atkyns, by taking out of it an estate for her life. This will appear by some instances which shall be mentioned. Tenant for life surrenders his estate to the next remainderman in tail, conditionally; to enable the remainderman to suffer a common recovery; a recovery is suffered: and, the condition being broken, the tenant for life re-enters; the re-entry of the tenant for life will not avoid the recovery, and revive the estates that were barred by it. This appears by every day's experience. One of the gentlemen seemed to admit the law to be so; and accounted for it, by saying, “it is because the tenant to the præcipe was made by force of a rightful estate.” But that is not the reason. The true reason is (what has been already mentioned) “that only part of the estate is defeated by the entry of the tenant for life; and not the entire estate.” A tenant for years, or by elegit, can avoid or falsify a recovery, during their particular estates only. A wife can avoid a recovery suffered by her husband alone, as to her title of dower only, and no further. Remainderman in tail, expectant on an estate for life, disseised the tenant for life, and levied a fine with proclamations; the tenant for life entered on the conusee: and it was determined “that notwithstanding the regress of the tenant for life, the reversion remained in the conusee, not defeated.” And this was the case of *Okes ex dimis. Lord Sturton*, which is cited in Popham, 65, 66. Lessor disseises his lessee for life, and makes a lease for life, to another; the first lessee re-enters: he leaves the reversion in the se[102]-cond lessee for life; who shall have the rent reserved on the first lease. *Earl of Gloucester's case*, cited in *Sir Moyle Finch's case*. More proofs might be brought, to confirm this part of the argument: but in so plain a case, these may suffice. And with them we may conclude, that the re-entry of Dame Ann, under the recovery and judgment in the second ejectment, did not avoid the common recovery suffered by Sir Robert Atkyns the son.

And let it be observed, that the arguments made use of, have not been drawn from general reasons and reflections; but have been suggested from authorities, and from the experience and practice of learned men.

Upon the whole, he prayed judgment for the defendants.

In reply—it was urged on the part of the plaintiff—

First, as to the great and little deeds—that the little deed did not revoke the greater one, or destroy the powers thereby given. Which was supported chiefly by arguments drawn from the deeds themselves.



As to the <sup>\*1</sup> lease to the Dacres being fraudulent, (V. ante, 85,) the case in Savile, 126, is not like the present: for here were express legal motives for making the lease; whereas there were none, in that case, for making the feoffment.

As to livery—it was not necessary; and therefore void. 1 Vent. 291.

As to the recovery—the authorities are not ad idem:

Nor as to the feoffment. For this is a fictitious possession, and in nubibus: not an actual possession. No freehold is recovered in ejectment. So that Sir R. A. the son was not tenant in tail in possession, for want of the freehold. And without being tenant of the freehold, the recovery could not be valid. Mr. Knowler admits “that the possession of the bailiff would not do.” (V. ante, 93), and surely, this case is stronger than that of bailiff.

As to Cro. Jac. 169, the case of *Butler v. Duckmanton*, (V. ante 80 & 93), the possession of the tenant at sufferance was considered as no possession at all, in that case. Therefore we may admit all Mr. Knowler’s cases: because they do not come up to the present case of Sir R. A. the [103] son’s possession; consequently the remainder is not affected by any thing done under this nugatory possession.

Dame Ann was tenant of the freehold: and without disseising her, there could be no tenant to the præcipe, who would be tenant of the freehold. Sir R. A. the son did not enter as a disseisor; but as having a title. And he had a title under the judgment, to enter. And the estate which passed by the feoffment, was according to his right. 2 Ro. Abr. 5. Co. Litt. 52 b. And the warranty extended only to the fictitious title in ejectment. The possession only was transferred to him; not the freehold: and this was a mere naked possession; an accidental possession. Carthew, 110, proves that the remainders were not discontinued for want of tenant to the freehold. Dame Ann was never out of possession of the freehold.

So that the estate which Sir Robert gained by his entry upon Dame Ann could not be an estate tail in possession; because there was a prior rightful estate for life in another person. Therefore it must be an estate tail in remainder.

It is asked, “when he first began to hold over unlawfully?” the answer is—from his first entry.

His entry was not wrongful: therefore he cannot be considered as a disseisor. But he held over, unlawfully. It is like a tenant by sufferance; or a man who enters upon the King, (who cannot be put out of possession;) or a husband after the death of his wife, &c. And it is not easy to apprehend the distinction between entering “under the ejectment;” and entering “in pursuance of the ejectment.” Consequently, his was a mere naked possession: and the freehold remained undisturbed in Dame Ann.

As to the fraud and collusion of suffering a recovery—there is surely such an insufficiency of estate in a tenant in tail in remainder, that he cannot suffer a common recovery. And surely the Court will not permit a person who cannot be a tenant to the præcipe himself, to make a tenant to the præcipe. And they strongly urged the vast inconveniences that must attend this doctrine now advanced, “that a tenant in tail in remainder only, who can obtain a mere naked possession, may legally suffer a recovery and bar the subsequent remainders.”

Fourth point.—As to the re-entry of Lady Ann—the verdict did nothing: it is the entry that revests. It vested her estate, which was an estate for life: whereas Sir R. A. the son’s entry under his verdict only operated to give [104] him a naked possession; he having no right to an estate tail in possession. And he could not be tenant in tail in possession, to one purpose; and in remainder, to another. Then her re-entry left him tenant in tail in remainder, as it found him.

In the case in 2 Ro. Abr. 421, title Remitter, letter i. pl. 1, the wife entered under an Act of Parliament, which remitted her.

5th point, (as to the remedy). The plaintiff is <sup>\*2</sup> not barred of his entry, by the Statute of Limitations, 21 J. 1, c. 16. For the recoveree was not intitled to suffer a recovery; not being tenant in tail in possession.

As to Dame Ann’s recovery in the ejectment brought by Miles—the demise was

<sup>\*1</sup> Here is a like omission as to the argument concerning the validity and determination of the lease to the Dacres, as in the adverse argument. See the notes on p. 83, 87, l. 19, 104, and 105.

<sup>\*2</sup> The rest of this argument is omitted; for the reasons given in the subsequent note.

laid so far back as to overreach the whole term which Sir R. A. the son had recovered : it was laid so far back, as to five days after the death of Sir R. A. the father. And her estate had never been discontinued ; nor her right of entry taken away. So that Sir Robert the son was never tenant in tail in possession. The lessor of the plaintiff could not therefore enter till the jointure of Dame Ann was at an end, and her life-estate determined. Neither could he enter, so long as the lease to the Dacres was in being ; which did not expire till the death of Thomas Dacres, the surviving lessee, on 23d July 1752.

Note—the last of the four arguments of this case was intended chiefly for the information of Lord Mansfield, who had not heard any of the former.

Before it came on, his Lordship (having read the case, and seen notes of all the former arguments) sent for the counsel and agents on both sides ; and told them, that a point occurred to him, which did not seem to have been particularly attended to in drawing up the special verdict, and which he observed had been very little gone into in any of the former arguments ; that it seemed to him material : and therefore he wished to have it spoken to : and he chose to apprize them of it before-hand, to avoid further expence and delay to the parties ; because if he should defer mentioning it, till after he had heard them in Court, and if they should omit going fully into that point in their argument, and his Lordship should continue to think it material, it must occasion a new argument.

The point was, “whether, supposing the recovery to be bad, yet the plaintiff’s ejectment was not barred by the Statute of Limitations.”

[105] That depended, he said, upon many considerations, which he desired them to think of : as, first, whether the lease was made pursuant to the power, or, (in other words), whether the lease was void, as not being made pursuant to the power ; (secondly) whether it was not determined, upon the extinction of the estate tail in 1711 ; (thirdly) whether, at this special verdict was found, an objection from the Statute of Limitations was now open to be made ; and he mentioneed some cases to them, which he desired them to look into.

Accordingly, upon this last argument, the said question was very fully discussed, on both sides : but, to avoid prolixity, I have omitted to report these arguments of the counsel ; because every thing material upon \* this point will appear from the following unanimous resolution of the Court, given by Lord Mansfield.

Lord Mansfield now delivered the resolution of the Court ; (having first stated the case and special verdict).

Sir Robert Atkyns the son being dead without issue male, the reversion in fee, devised to the lessor of the plaintiff, is come into possession : and consequently, he must be intitled to judgment in this ejectment ; unless the defendants can set up a bar to his right, or to his remedy by an ejectment.

They set up a bar to both.

In bar of his right, they insist upon the common recovery suffered in Hilary term, 9 Ann. A. D. 1710. In bar of his remedy, they insist upon the Statute of Limitations.

The common recovery, if duly suffered, certainly destroyed the right of the lessor of the plaintiff. The Statute of Limitations, if his title of entry accrued above twenty years before the 15th of December 1752, has certainly taken away the remedy by ejectment.

The merits therefore must depend upon two general questions.

First, whether the said common recovery was duly suffered.

Secondly, whether this ejectment is barred by the Statute of Limitations.

As to the first, the objection is, that there was not a [106] good tenant to the præcipe : for Lady Atkyns, the widow of Sir Robert the father, had an estate for life in the premises ; and did not join by surrender or otherwise, in any conveyance of the freehold to James Earle, the tenant against whom the præcipe was brought. (There is no occasion to entangle this part of the case with the demise to the three Dacres.)

The defendants contend that there was a good tenant to the præcipe, upon two grounds ; (1st) because Lady Atkyns had no estate for life ; and so Sir Robert the son, was tenant in tail in possession ; (2dly) suppose she had an estate for life, yet Earle was a good tenant to the præcipe, by disseisin : which they endeavour to prove

\* They fell under the second point. See ante p. 83 in the note ; and p. 87 and 102.



two ways, viz. 1st, that Sir Robert Atkyns, by his entry, was himself a disseisor, and by his feoffment the 17th of January 1710, conveyed the freehold he had acquired by disseisin, to James Earle; and 2dly, suppose Sir Robert the son was not a disseisor, yet his said feoffment was a disseisin, and made James Earle a good tenant of the freehold by disseisin.

As to the first ground, "that Lady Atkyns had no estate for life,"—the whole argument depends upon this proposition, "that the lesser deed was executed after the greater deed; and consequently, the power to Sir Robert Atkyns the father, to make a jointure, was distinguished by the fine levied in Trinity term 1669." But the jury have not found the fact, "which was first executed." Both deeds bear the same date. They are both consistent. They are both manifestly but one agreement, executed by different instruments, to answer different purposes, and to suit (probably) the convenience of one party, who was interested only in a small part of the transaction.

The fine levied in Trinity term 1669, pursued both deeds, and comprizes all the premises in the greater deed by which the powers were created.

It never could be the intent, to revoke these powers, at the instant they were created; by the lesser deed, which makes no mention of them; or by a fine levied, agreeable to the greater deed, in which they are contained.

Sir Robert Atkyns, who survived the transaction above thirty years, has shewn by many acts, that he understood the powers to be well created and subsisting.

If it was necessary, we ought to presume the lesser deed first executed, to support the clear intent of parties, in a family settlement made for valuable consideration; [107] for it is impossible to suppose, they could really mean to revoke or extinguish these powers, and take this way of doing it. But, in this case, there is no room for presumption: the internal evidence of the thing itself, speaks them to be one transaction; and the same, to all intents and purposes, as if expressed in one instrument.

As the jointress clearly had an estate for life, the next ground is "that James Earle was a good tenant to the præcipe, by disseisin."

The better to judge of this question, it may be proper to try to find out what the old law meant by a disseisin which constituted the tenant of the freehold, in respect of every demandant suing out a præcipe; although the owner's entry was not taken away: (for where the right of possession was acquired, and the owner put to his real action; there without doubt the possessor had got the freehold, though by wrong).

All the law concerning disseisins, which is any way applicable to the present inquiry, existed, and was in use and practice, before the assize of novel disseisin. The assize was introduced, (probably from the usage of Normandy, for the Grand Customier treats of assizes,) in or before the reign of Henry the II<sup>d</sup>. Glanville, who wrote in that reign, calls the great assize a benefit "*clementiam principis, de consilio procerum, populis indultam*:" and the \* Myrrour, fo. 93, says "Glanville introduced it."

Seisin is a technical term to denote the completion of that investiture, by which the tenant was admitted into the tenure; and without which, no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse.* Feud. lib. 1, tit. 25, lib. 2, tit. 1. 2 Craig, lib. 2, tit. 2.

Disseisin therefore must mean some way or other turning the tenant out of his tenure, and usurping his place and feudal relation. At the time I speak of, no tenant could alien without licence of the lord. When the lord consented, the only form of conveyance, was by feoffment publicly made, *coram paribus Curie*, with the lord's concurrence. Homage, or fealty, was solemnly sworn; and suit of Court and services were frequently done.

The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers.

The freehold never could be in abeyance; because the lord must never be at a loss to know upon whom to call, as his tenant; nor a stranger, at a loss to know against [108] whom to bring his præcipe. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted, and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*.

If the disseisor died: after one year's non-claim, the descent to his heir gave him

\* C. 2, § 25, p. 150, edit. 1642.

the right of possession, and took away the true owner's entry. The stat. of 32 H. 8, c. 33, requires five years non-claim. The feoffee of a disseisor acquired title and possession, at the time I speak of, by one year's non-claim. The descent to his heir remains privileged as it was at common law : for the 32 H. 8, c. 33, extends not to any feoffee of the disseisor, immediate or mediate, Co. Litt. 256 a. The feoffee of a disseisor was favoured ; because he came innocently into the tenure, by a solemn and public investiture, with the lord's concurrence.

But the Statute \*1 "Quia Emptores Terrarum," which took away subinfeudations, and gave free liberty of alienation to the tenants of subjects, and to those who held of the King, as of an honor or manor ; and other statutes which extended the power of alienation to the King's tenant in capite : the frequent releases of feudal services ; the Statutes of Uses, and of Wills ; and, at last, the total † abolition of all military tenures : have left us little but the names of feoffment, seisin, tenure and freehold ; without any precise knowledge of the thing originally signified, by these sounds ; the idea modern times annex to freehold, or freeholder, is taken merely from the duration of the estate.

Copyholds, and the customary freeholds in the north, retain faint traces in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder, or customary freeholder de facto, in prejudice of the rightful tenant. It is obvious too, that usurping such copyhold or customary tenure, is a different fact, from a naked possession, or occupation of the land.

But, whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisins, upon every change of a tenant by descent or alienation, and upon every usurpation of the real right ; will easily comprehend, that at the time I speak of, it may be as notorious who was the feudal tenant de facto, as who is now de facto incumbent of a living, or mayor of a corporation.

Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin, differed from a possessor by wrong. Bracton,\*2 c. 2, De Assisa Novæ Disseysinæ, fo. 160, puts many cases of possession wrongfully [109] taken, which he calls intrusion ; because there is no disseisin : "possessio quæ nuda est omnino, et sine aliquo vestimento ; quæ dicitur intrusio." Vestimento is seisin, investiture ; (from whence, the Saxon term vest ;) a metaphor, the feudists took from clothing : by which, they meant to intimate, "that the naked possession was clothed with solemnities of the feudal tenure." A particular tenant, according to feudal notions, was in as of the seisin of the fee, of which his estate was a part. If he aliened the fee, (which he could only do by solemn feoffment with the concurrence of the lord of whom the fee was held,) he forfeited his particular estate, for having betrayed his seisin with which he was intrusted ; but on account of the privity and confidence between him and the reversioner ; and the notorious solemnity of the Act of Investiture, his feoffment disseised the reversioner.

Bracton, who wrote in the reign of Hen. 3 (before tenants could alien without licence,) mentions the disseisin in this case, as a necessary consequence, and as a thing which could not possibly be otherwise ; c. 3, De Assisa Novæ Disseysinæ, 161 b. (a) "Item facit quis disseysinam, cum quis in seysina fuerit ut de libero tenemento & ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo : alium feoffaverit, in præjudicium veri domini, & fecerit alteri liberum tenementum ; cum duo simul et semul, de eodem tenemento & in solidum, esse non possunt in seysina." He considers it as impossible for the true tenant not to be put out, when the other actually came into his place.

So late as the 32d of Eliz. in the case of *Matheson v. Trot*, 1 Leon. 209, (b) the

\*1 18 E. 1.

† Vide 12 C. c. 24, and 13 C. 2, c. 7.

\*2 Vide lib. 4, c. 1, 2.

(a) This seems to be a mistake of Bracton : it may not be easy to understand clearly all his distinctions ; but this is clear, that disseisin was not, in his idea of it, a complicated fact as here represented : thus much is certain ; that in his sense of intrusion, that might be without disseisin, and he defines it in the beginning of the second chapter to be ubi quis, &c.

(b) It appears by the report of that case in 2 Leon. 190, and by the reference to



distinction upon which the judgment turns is "that Henry Denny gained a wrongful possession in fee ; but did not gain any seisin ; so no disseisor : therefore the descent to his heir is not privileged."

Nobody can disseise the King ; neither can any one be disseised to the use of the King. The King may be wrongfully dispossessed : but the intruder's injurious possession is *sine aliquo vestimento*, and called intrusion. The King cannot be made a disseisor ; not because it is wrong : (for he may, in fact, withhold the possession of land from a subject contrary to right :) but the reason seems, according to the feudal system, to be this : a subject never could stand in the King's seisin or tenure ; and the King never could be in the seisin, tenure, or feudal relation of a subject. By that policy, all real property was held, mediately, or immediately, of the King ; in the King himself, all real property was allodial.

[110] The precise definition of what constituted a disseisin which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known ; but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded. For, after the assize of novel disseisin was introduced, the Legislature, by many Acts of Parliament, and the Courts of Law, by liberal constructions in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property ; if, by bringing his assize, he thought fit to admit himself disseised.

It lay against advisers, aiders, or abettors, who were not tenants. Co. Litt. 180 b. It lay against the tenant who was no disseisor ; as the heir of a disseisor, or his feoffee. Stat. Gloucester. It lay for the owner, against the disseisor of the disseisor. The tenant's not being ready to pay a rent-seck when demanded, was, for the benefit of the owner's remedy, a disseisin. Lit. § 233. It lay for outrageous distress. 2 Inst. 412. It lay against guardian, or particular tenant who made a feoffment, as well as against their feoffees. 2 Inst. 412. The Stat. of Westm. 2, c. 25, extends it to a man's depasturing the grounds of another ; or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. Style, 407. If a guardian assigns dower to a woman not dowable ; the owner may elect to make her a disseisoress. 24 Ed. 3, 43 (cited in Cro. Car. 203). In a word ; for the sake of the remedy, as between the true owner, and the wrong doer, to punish the wrong ; and as between the true owner and naked possessor, to try the title ; the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements or hereditaments.

The reports of assize can only relate to cases, where the owner admits himself disseised.

The law-books treat of disseisin, with a view to the assize ; which was the common method of trying titles, till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize.

These are the common places from whence many descriptions have been cited of a disseisin. But such [111] authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant, and freeholder *de facto*, in spite of the true owner. Yet the definitions in the books, (though very imperfect) savour often of that which originally was an actual disseisin, in spite of the owner.

Littleton, in § 279, defines disseisin, with an &c. ; "where a man enters into lands or tenements (where his entry is not congeable,) and ousteth him which hath the freehold, &c."—The comment says, "every entry is no disseisin, unless there be an ouster of the freehold." And Co. Lit. 153 b. says, "disseisin is putting a man out

it in Co. Lit. 240 (b) that the judgment was not founded upon the point here mentioned, but upon one very different, viz. as expressed by Ld. Coke there, that an entry by an heir of the deviser, and dying seised, would not by law take away the entry of the devisee : for if it should it would be a bar to his right, because the devisee hath only a title of entry, like the case of a title of entry for breach of a condition or mortmain, in which and other like cases, no dying seised and descent will take away an entry.

of seisin, and ever implies a wrong : but dispossession or ejectment, is putting out of possession, and may be by right or wrong. Disseisin est un personal trespass de tortious ouster del seisin."

Though the term "disseisin," used, happens to be the same ; the thing signified by that word, as applied to the two cases of actual disseisin, or disseisin by election, is very different. This distinction of disseisin at election, is made in the case of *Blunden v. Baugh*, Cro. Car. 303, of which case, we have seen a manuscript report, fuller than the printed one. The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held "that the lessee for years of the tenant at will, was a disseisor at the election of the original lessor, for the sake of his remedy ; but never could be looked upon as the freeholder, or a disseisor in spite of the owner, or with regard to third persons." The manuscript report says, if a præcipe was brought against him, he might say "I am not tenant to the freehold." A variety of like cases are put in Cro. Car. ; (to which I refer—:) in the manuscript report, there are more.

When the easy specific remedy was by assize, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a disseisin. So, since an ejectment is become the easy specific remedy, he may elect to call the wrong a dispossession.

Where an ejectment is brought, there can be no disseisin ; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease : but there is no real or supposed re-entry, after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry.

If the lessee for life, or years, makes a feoffment, the [112] lessor may still distrain for the rent, or charge the person to whom it is paid, as a receiver ; or bring an ejectment ; and choose whether he will be considered as disseised. *Metcalf on the demise of Kynaston v. Parry and Others* ; a case reserved at Salop Assizes 25th March 1742, for the opinion of the Court of Exchequer ; (who gave judgment in it, on the 24th of November 1743,) was this. Tenant in tail, of lands leased by his father, to a second son, for lives (a) (under a power,) upon his father's death received the rent from the occupier, as owner, and as if no such lease had been made, during his whole life. He suffered a common recovery. It was holden "that this was only a disseisin of the freehold at election ; and that therefore he could not make a good tenant to the præcipe : " and the recovery was adjudged bad.

Except the special case of fines with proclamations, (which stands entirely upon distinct grounds,) and the construction of the stat. of 4 H. 7, c. 24, for the sake of the bar ; I cannot think of a case, where the true owner, whose entry is not taken away, may not elect, (by pursuing a possessory remedy,) to be deemed as not having been disseised.

The consequences of actual disseisins, considered as such, continue law to this day. The disseisee cannot dispose, or devise : the descent takes away his entry. There are two cases cited in the case of *Blunden v. Baugh*, material to this point. *Pously v. Blackman*, B. R. Trin. 18 Jac. Rot. 1230. Palmer, 201, which is more fully stated in the manuscript report, than in \*Croke. The case (in effect and operation) was this. Tenant at will made a lease for years : the original lessor devised. Though the lease by tenant at will, at the election of the original lessor was a disseisin, yet they adjudged his devise good ; because he had not elected to admit himself disseised ; and, by making a will, intimated the contrary.

Another case, (not in the report in Cro. Jac. but cited in the manuscript,) was in the 14th of Eliz. Sir Ambrose Cone, of his own head, entered into lands of Sir William Hollis ; and paid Sir William, afterwards, a certain rent, claiming to hold as tenant at will : and died. His heir entered : upon whom, Sir William entered. It

(a) That and the case Cro. Car. 302, were cases only of recovery of rents, and not of an actual possession by the feoffee ; besides, according to the report of the case of *Metcalf v. Parry*, it was not material whether the recovery was good or not ; for the lessor of the plaintiff was lessee under a power in the settlement creating the entail ; and therefore his title did not at all depend on the invalidity of the recovery, but singly on the question whether the power was well executed or not.

\* V. Cro. Jac. 659, S. C.



was adjudged "that at the election of Sir William, Sir Ambrose was a disseisor: but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was no disseisin; and consequently, the descent no bar to his entry."

[113] In the case of *Pously v. Blackman*, Palmer, 205, it is said, "if a disseisee devise, and afterwards enter; the devise is good:" which Dodderidge denied, and said there must be a new publication. Which seems right, if there ever was a disseisin: for, where an actual entry is necessary, it will not make good a conveyance made before; as was holden in B. R. & Dom. Proc. in the case of \* *Berrington v. Parkhurst*. The actual entry could not support the lease made before. Yet in † *Salk*. 237 it is agreed, "the devise is good, because he was seised ab initio, so as he might bring trespass:" i.e. he never was disseised at all, by his election; and he might make that election, without an entry; he might bring his ejectment, he might bring trespass, without a re-entry. If it was not for this doctrine of election, what a condition would men be in!

In the case of *Pously v. Blackman*, there was no entry: and after much argument, it was at last resolved unanimously by the whole Court, from the inconveniences which will be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, "that the devise was good." And in the manuscript report where it is cited, one point said to have been resolved, is "that the owner, by making a devise, shewed his election, not to be disseised."

I will now consider whether James Earle can be deemed a good tenant of the freehold by disseisin.

Disseisin is a fact. It is not found: all the jury say, is, "that soon after the judgment in ejectment, Sir Robert entered and was in possession." This must be taken to be an entry in consequence of the judgment—It was so considered upon settling the special verdict: otherwise the defendants have no case; for it is not found, that Lady Atkins was ever ousted, or quitted the possession, or that Sir Robert ever was seised.

Taking possession, under a judgment in ejectment, never could be a disseisin of freehold.

Suppose it a real proceeding—the termor of a disseisee might, at the old law, recover against the disseisor: he might recover against the feoffee of his lessor. But he never could thereby become a disseisor of the freehold: he never could be other than a termor, enjoying, in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alienee; if the lessor was disseised and [114] might enter, it enured to the disseisee; if his entry was taken away, it enured to the heir or feoffee of the disseisor, who in that case had the right of possession.

Suppose the proceeding (as it is) a fictitious remedy. Then in truth and substance, a judgment in ejectment is a recovery of the possession, (not of the seisin or freehold,) without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and substance can only be possessed according to right, prout lex postulat.

If he has a freehold, he is in as freeholder. If he has a chattel-interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. If he has no title, he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits.

It is found, that the ejectment was brought by Sir Robert Atkins, to recover the possession: but it is not found, that he claimed the freehold.

The title must now be taken as in this special verdict. Therefore it appears he had no right to the possession. His feoffee could be in no other condition than himself: he had a possession, without prejudice to the right; and could convey no other. He was not in as a particular tenant;—there was no privity of any seisin:—he had only a naked possession.

But the case is still stronger. The true owner cannot even elect to make a person in possession under a judgment in ejectment, a disseisor. He could not bring an assize of novel disseisin: the entry is not injustè & sine judicio; but under authority

\* May 1738.

† 1 Salk. 237, *Bunter v. Coke*.

of a Court of Justice, and lawful; therefore not liable to punishment by fine, (as every disseisin was.)

The true owner may enter upon a disseisor: but after a judgment in ejectment, an actual entry would not be permitted. If there had been any election in this case; "the true owner elected not to be disseised," and recovered by ejectment: which if there had been a disseisin, would have purged it.

But there is still behind, (though it happens not to be necessary), a larger ground, upon which to determine this question; and more satisfactory, because more intelligible; from the nature of a common recovery now, and a feoffment to make a tenant to the præcipe, with that view only.

[115] The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it.

Nothing could be more agreeable to the law of tenures, than a male fee unalienable. But this bent "to set property free" allowed the donee after a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the Statute de Donis repeated what the law of tenures said before, "that the tenor of the grant should be observed;" than the same bent permitted tenant in tail of the freehold and inheritance, to make an alienation, voidable only, under the name of a discontinuance. But this was a small relief.

At last, the people having groaned for 200 years under the inconveniences of so much property being unalienable; and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the Legislature;—the same bent threw out a \* fiction, in *Taltarum's case*; by which, tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely.

Public utility adopted and gave a sanction to the doctrine; for the real political reason, "to break entails:" but the ostensible reason, "from the fictitious recompence," (a) hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention. Till, at last, the Legislature applauded common recoveries, and lent their aid by the Acts of 11 H. 7, c. 20. 33 H. 8, c. 31. 34 & 35 H. 8, c. 20. 14 Eliz. c. 8, and lately 14 G. 2, c. 20: (which is a retrospective and declaratory law, and seems to have restored the original tenant to the præcipe). Before the Statute of *Quia Emptores Terrarum*, subinfeudations, whereupon rents and services were reserved, did not prevent the præcipe's lying against the freeholder of the seignory. When common leases to farmers, for one or more life or lives, reserving rent, came in use; they, for that purpose, resembled subinfeudations, and ought not to prevent the præcipe being brought against the owner of the freehold, under which such leases were granted.

As the Legislature has, for ages, avowed the proposition; we may now say "that common recoveries are a mere [116] form of conveyance." All necessary circumstances of form and ceremony are taken from its fictitious original.

The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property.

Alienations were allowed; yet in such a shape as necessarily required deliberation and delay: and they were only allowed to be made by tenant in tail in possession; or by tenant in tail in remainder, with consent of the owner of the first estate for life. The eldest son was restrained in the life-time of his father, or mother, or any other ancestor or relation, seised for life, under a family settlement.

The Act of 14 G. 2 proceeds, upon the parties to a recovery having power to suffer it. Sir Robert Atkyns the son had no right to suffer a common recovery, without the concurrence of the jointress. Any contrivance to do it without her joining, is artifice and evasion.

If tenant in tail in possession is disseised; though the præcipe be brought against the disseisor, yet, if he is vouched, the recovery shall bar; because he had power to bar.

In *Lincoln College case*, 3 Co. 59, the Judges support the collateral warranty of Sibil; because she and Edward had power to bar.

\* Pigot of Common Recoveries, p. 7, 8, 9, 10. [2 Leon. 66.]

(a) This was not so as to the remainders and reversions. Pig. 13, 14.



In *Jenning's case*, 10 Co. 44, the recovery is supported, because the parties had power.

By parity of reason, this recovery ought not to be supported, because the parties had no power: if it was; the law must be overturned.

Every remainder-man in tail might easily get a naked possession, and make a secret feoffment.

The plan of marriage and other family settlements, is "to limit a remainder to the first, and every other son in tail." The negative which the father now has upon the eldest son's suffering a common recovery, is the very means and consideration of getting the estate re-settled, upon the marriage of the eldest son. By this method, the moment he attains to the age of 21 years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. This consequence alone, in a case unprecedented, is a sufficient objection.

[117] When a termor, after the 4th of H. 7th, made a feoffment, and levied a fine with proclamations, and insisted upon five years non-claim; the Judges, with strong sense, said, though a feoffment by tenant for life, or years, or at will, is a disseisin; it shall not operate as a disseisin, to enable the termor himself to bar the inheritance, by a fine with proclamations according to the 4th H. 7, c. 20. For, say they, "it was never the intent of the makers of the Act, that those who could not levy a fine, should, by making an estate by wrong and fraud, be enabled to bar those who had right. For if they themselves, without such fraudulent estate could not levy a fine to bar them who had the freehold and inheritance: certainly the makers of the 4th of H. 7, c. 20, did not intend that by making of an estate by fraud and practice, they should have power to bar them: and such fraudulent estate is as no estate, in the judgment of the law." So say I, in the present case. It was never the intent, that those who could not suffer a recovery, should, by making an estate by wrong and fraud, be enabled to bar those in remainder or reversion who had a right. For if they themselves, without such fraudulent estate, could not suffer a recovery to bar those in remainder and reversion; certainly, the framers of this qualified species of alienation, did not intend, that by making an estate by fraud and practice, they should have power to bar them: and such fraudulent estate is as no estate, in the judgment of the law.

The Judges then put many cases, where a recovery in dower, or other real action; a remitter to a feme covert, or an infant; a warranty; a sale in market overt; the King's letters patent; a presentation; an administration;—in short, all acts temporal and ecclesiastical, shall be avoided by covin: and from thence argue that a fine which the parties had no power to levy directly, shall not be supported indirectly by covin. So argue I, in the present case: a common recovery which the parties had no power to suffer directly, shall not be made good by wrong and fraud.

In the spirit of the makers of the 14 G. 2, I say the parties to this recovery had not power to suffer it: therefore it is substantially bad.

This is not the case of a feoffment to a third person, [but] for his own benefit: it is, in effect, to the use of Sir Robert, the wrong-doer, himself. The law considers a feoffee to the intent to be tenant to the præcipe, as a mere instrument for one purpose of form only. His wife shall not be endowed; his statutes or judgments shall not affect the land: if he had a term for years, it shall not merge. Let me appeal [118] then to the oldest authorities, in those times when the solemnity and notoriety of feoffments, and the feudal veneration in which they were held, gave them all that wonderful efficacy we read of: could a man by his own injurious feoffment, have acquired an advantage to himself? Littleton shall answer: he tells us what was established long before he wrote. Lit. § 395, "If a disseisor infeoff his father in fee, and the father die seised of such estate, by which the lands descend to the disseisor as son and heir, &c.; in this case, the disseisee may well enter upon the disseisor, notwithstanding the descent: for that as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the descent; quia particeps criminis."

After the Statute de Donis, tenant in tail in remainder, with the concurrence of the freeholder, might make a voidable alienation, by discontinuance: but he could not acquire to himself that privilege, by an injurious entry and feoffment. "He in remainder in tail disseises tenant for life, and makes a feoffment, and dies without issue, and the tenant for life dies; he in reversion may enter: it is no discontinuance." Co. Lit. 347 a. b. It is no disseisin of the reversion. "If remainder-man for life

disseise the immediate tenant for life ; after the death of the immediate tenant, he is in as tenant for life." Neither should a reversioner, by an injurious entry upon the tenant for life, be, in respect of strangers, allowed to transmit to his heir the privilege of descent. If the reversioner disseises tenant for life, and dies seised ; the descent shall not take away the entry of a stranger. Hob. 323.

From the whole, we may conclude—if, before the introduction of common recoveries as a conveyance, this question had been agitated in an adversary real action, upon a plea "that Earle was not tenant of the freehold ;" it would have been adjudged, from the law and artificial learning of tenures, "that he could not be so considered." If the question had been, "whether tenant in tail in remainder should, by such injurious entry and feoffment, require a benefit to himself, to the prejudice of his reversioner ;" it would have been adjudged, from eternal principles of justice, "that an act founded in wrong should not, by virtue of the crime itself, become legal, for the author's advantage."

As it is now agitated, when recoveries are established as a species of alienation ;—the only question is, "whether the rule of law which requires the concurrence of the owner of the first estate for life, shall be overturned." It is better to subvert the rule directly, than suffer it to be done by a secret injurious entry and feoffment ; which cannot be prevented, and which the owner may never hear of.

[119] There is no injury or wrong, for which the law does not provide a remedy. But if this stratagem should prevail, redress must follow too late ; unless the entry of the tenant for life shall avoid the recovery. If it would, there is an end of the present question : for, the jointress entered, and was intitled to the profits from Sir Robert Atkins as a trespasser ab initio.

In every light, and upon every ground of law, this recovery is bad.

As there is no bar to the right of the lessor of the plaintiff—

The second general question is "whether the lessor of the plaintiff is, by the Statute of Limitations, barred from recovering in this ejectment."

This point was certainly not insisted upon at the trial : and therefore the special verdict is not adapted to it. The abstruse learning, upon which the validity of the common recovery depended, might engross the whole attention at the trial : and the special verdict having no facts (which easily might have been found,) particularly applicable to an objection from the Statute of Limitations, might occasion the question not having been made at the Bar, till the last argument. The point however is certainly open, upon this special verdict.

An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter : therefore it is always necessary for the plaintiff to shew, that his lessor had a right to enter ; by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years adverse possession is a positive title to the defendant : it is not a bar to the action or remedy of the plaintiff, only ; but takes away his right of possession.

Every plaintiff in ejectment must shew a right of possession, as well as of property : and therefore the defendant needs not plead the statute, as in the case of actions.(a)

The question then is, whether it appears upon this special verdict, "that the lessor of the plaintiff might enter, when he brought this ejectment."(b)

On the 9th of November 1711, Sir Robert Atkins died without issue male.

[120] On the 19th of October 1712, Lady Atkins, the jointress, died. Then accrued the title of entry of the lessor of the plaintiff. His only excuse for not entering is, "that he was prevented by the said lease of the 31st of May 1698, to the three Dacres."—That upon the death of Thomas Dacres the surviving lessee, on the 23d of July 1752, a new title of entry accrued : upon which he entered on the 15th of December, 1752 ; and brought this ejectment.

Three answers are given : any one of which, if well founded, is sufficient.

(a) This is not necessary ; for twenty years possession is a good title in ejectment for a plaintiff as well as for a defendant, 2 Salk. 421, pl. 5. Ld. Raym. 71, let the right of property be where it will. Salk. 685.

(b) See 17 Dom. Proc. 132, that the question put to the Judges, was, "whether sufficient appears by the special verdict in this cause to prevent the lessor of the plaintiff by force of the Statute of Limitations of the 21st of James the 1st, from recovering in this ejectment ?"



1st. That the said lease was absolutely void, and of no effect.

2d. If good, it determined by the estate tail being spent; by the express tenor of the demise.

3d. If subsisting, yet upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and made part of his title deeds; therefore could not stop the statute's running to protect an adverse possession, nor give him any new right of entry.

First. That the lease was void.

Sir Robert Atkyns the father, being only tenant for life, could, by virtue of his ownership, make no estate to continue after his death. This lease, therefore, after his death, can only be supported by his power; if it was made pursuant to it.

"Whether it was made pursuant to his power," is the question.

The limitation and modifying of estates, by virtue of powers, came from equity into the common law, with the Statute of Uses. The intent of parties who gave the power, ought to gain every construction. He to whom it is given, has a right to enjoy the full exercise of it: they over whose estate it is given, have a right to say "it shall not be exceeded." The conditions shall not be evaded; it shall be strictly pursued, in form and substance: and all acts done under a special authority, not agreeable thereto, nor warranted thereby, must be void.

Of all kinds of powers, the most frequent is, that "to make leases." For the encouragement of farmers, to occupy, stock, and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a per-[121]-manent lease, he could not enjoy to the best advantage, during his own time; and they who came after, must suffer, by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor; that the annual revenue shall not be diminished; nor those in succession or remainder, at all prejudiced in point of remedy, or other circumstance of full and ample enjoyment.

There are two methods of leasing, in common use in this kingdom: at the best rent; and upon fines; which, as the lives or leases drop, are considered among the annual profits. This power is always adapted to both. It is inserted in almost every strict settlement of every kind. It is inserted in the greater deed of the 12th of June 1669; and given indiscriminately to Sir Robert the father, Sir Robert the son, and Lovis his wife.

The nature and view of a power, so usually given, is well understood: and Courts of Justice have always looked with a jealous eye, to see that the conditions in favour of the next taker be pursued; not literally only, but substantially. It is not sufficient that the ancient rent be reserved: it must be reserved with all the beneficial circumstances. If payable before, at four, it cannot be reserved at two payments. *Lord Mountjoy's case*, 5 Co. 5 b. The whole rent must be payable annually during the whole term. In that case, it was holden "that less could not be reserved even to the lessor himself, during his own life."

One of the reasons in *Elmer's case*, 5 Co. 2, shews the rent must be payable annually during the term.

In the case of *Lady Charlotte Orby & Al' v. Lady Mohun*, 2 Vernon, 531, 542, Lord Cowper, Holt, and Trevor, all three held clearly that a lease "reserving the best rent," though good against an owner of the inheritance, was void under a power: and Cowper and Trevor held, that reserving the "ancient rent," where lands had been usually demised; though good and certain enough by reference, against an owner of the inheritance; was void under a power; because it put the remainder-man under difficulties in avowing.

"The intent was," say they, "that the tenant for life in possession might lease; so it was, on the other hand, that the revenue should not be diminished; but the ancient rent, at least, reserved; and in such beneficial manner, as might with certainty, and without any difficulty be recovered."

[122] "The question here is not," say they, "whether the lease is void for uncertainty, as between the lessor and lessee; but whether all requisities are observed, and such beneficial clauses and reservations as ought to have been, for the benefit of a third person, the remainder-man."

In the case of the *Earl of Cardigan v. Montagu*, 6th June 1755, a decretal order

on the Master's report; the Duke of Montague, tenant for life, without impeachment of waste, had power to lease, reserving ancient rent where usually demised, and best rent where not usually demised: he made twenty-four leases. The Master's report, as to many of the leases, which he reported bad, was submitted to: as where ancient covenants "to grind at mills, or to pay land tax," were not in the new lease; where some part, not within the power, is included in the lease; where many manors were included in the lease, reserving a sum certain <sup>\*1</sup> as the best rent: which laid the remainder-man under difficulties, to find out whether it was the best rent or not. As to five of them, which the Master reported to be good, exceptions were taken. Their validity turned upon this case. The words in the power were "reserving ancient, usual,† and accustomed rents, heriots, boons, and services." In the former leases, the tenants covenanted "to keep in repair:" that covenant was omitted in this. The Lord Chancellor was of opinion, that that covenant was a boon, and beneficial to the remainder-man; and held these leases void, for want of it. He took some days to consider; and declared he was clear upon the argument, but took time, because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was, that the estate must come to the remainder-man, in as beneficial a manner, as ancient owners held it.(a)

I have gone so far at large into the general doctrine, not from any difficulty: but because the point is of so much consequence to the lessor of the plaintiff. For, this writing of the 31st of May 1698, has not colour enough to make a question.

1st. It is no lease at all. The very definition of a lease, is a contract between landlord and tenant, by which both are bound in mutual stipulations.

A sale and lease are defined to be the same species of contract. A sale cannot be, unless somebody agrees to pay the price; nor can there be a lease unless somebody agrees to hire, and to pay the rent. This writing purports to be such a contract. It is an indenture: which implies reciprocal instruments tallying one with the other. It [123] professes being made by Sir Robert Atkyns on the one part, and the three Dacres on the other part. But it is not: the Dacres are not bound: they never executed this, or any counterpart. It does not appear they knew or consented to the making of it.

Livery of seisin was immaterial. A lease by virtue of a power, takes effect out of the settlement that gives the power. But John Dacres, who gave the letter of attorney to take livery, died in 1705, Robert died in 1706. Sir Robert Atkyns, the father, lived till 1709. Suppose, at his death, 360l. a year a beneficial rent: those in remainder could not demand it. Thomas Dacres had not executed the lease; he had not accepted it; he never had entered under it: no distress could be taken from him; no action could be brought against him.

One man cannot oblige another to be his tenant, at a high rent, without his consent. This is so plain, that on the part of the plaintiff, they have argued that Thomas Dacres was bound by acceptance; three ways—

1st. Because livery of seisin was taken in the name of John, Robert and Thomas.

Answer. Thomas gave no authority so to do: it does not appear that he knew of it. But the mere taking livery of seisin <sup>\*2</sup> if he never entered or occupied, would not be sufficient to charge him with the rent reserved.

2d. In the ejectment brought in Hilary term 1711, a demise was laid from Thomas Dacres, as well as the jointress: and the plaintiff had judgment to recover "separalet terminos."

Answer. The two titles are inconsistent: so there could not be really a recovery upon both. But the judgment pursued the declaration; and was mere form. It does not appear that Thomas Dacres knew his name was made use of: and he never entered, or took possession.

[<sup>\*1</sup> Instead of "certain," see hereon Eq. Abr. 343, cas. 5. Vin. Power A. 4, pl. 5. Cro. Car. 94. Hetl. 22. 3 New Abr. 361. 2 Vern. 544.]

[† Secus, in case of leases made pursuant to 32 Hen. 8. 3 Danv. 245.]

(a) This case of *Earl of Cardigan v. Montague*, is cited in 3 Bro. 281, 282, by which it appears that the case was removed into the House of Lords, after Montague was became Ld. Beaulieu; and there, in 281, it was said, by counsel that the decree of the Lords was disapproved by Lord Thurlow; but qu. as to the citation. Ib. 282.

[<sup>\*2</sup> This is wrong, as appears from 3 Bac. 336, 337.]



3d. That acceptance shall be presumed. And it is compared to grants: and *Thompson v. Leach* is cited. (V. 3 Lev. 284.)

Answer. The ground of *Thompson v. Leach*, and of all the cases there put, is, "that a gift imports a benefit: and consent to receive a bounty may fairly be presumed, till the contrary appear." But the offer of lands to a substantial man at a rack rent, does not import such a benefit, as nobody in his senses could refuse. And here, there is no room to presume: for the contrary appears. Thomas [124] Dacres dissented, during his whole life: and never took possession. The contrary appears too, from the writing itself. It never was the intent that the Dacres should take possession or pay rent. It was to be a conveyance only of the ideal freehold: which might nonsuit the remainder-man, in case he brought an ejectment against third persons; or prevent his suffering a recovery: but never could be any security to him for his rent.

It is immaterial, whether an owner of the inheritance could convey an ideal freehold, to delay the tenant in tail, claiming under his grant, from suffering a recovery.

The question here is, whether it be that usual husbandry lease, reserving a rack rent, which is intended by every power of leasing.

It is very clear that none of the lessees were bound by this writing; more especially, that Thomas Dacres was not. But I go further: Sir Robert Atkyns, the nominal lessor, was not bound by it. The deed never was out of his own possession. The declared intent proves it a trust for Sir Robert himself. His will, under which the lessor of the plaintiff claims, avers it to be a trust, and devises it as such.

It is no objection to a lease under a power, "that it is in trust for him who executes the power:" provided the legal tenant be bound, during the term, in all requisite covenants and conditions. But here, at the death of Sir Robert the father, those in remainder had no tenant to resort to: and the nominal tenant never did in fact enter, nor could either in law or equity, ever have been compelled to enter, or pay one farthing rent. So that this writing, calling itself an indenture, and purporting to be a contract, is waste paper only, by which nobody ever was bound.

But suppose it had been executed by the three Dacres; it could not be supported as a lease within the meaning of the power; upon a variety of plain objections, in respect of the premises, the rent, and the remedy.

1st. As to the premises demised—it comprizes too much; and lays the remainder-man under difficulties to know whether the best rent is reserved. It extends to things out of which no rents can be reserved; as tithes, rents of assize, rents of customary tenants, commons, feedings, and lands in the several tenures of particular persons.

The condition of the power is, that there should be no term exceeding three lives in being at the same time: yet the demise extends to all and every the rents reserved upon any leases or grants.

[125] 2dly. As to the rent reserved—the power requires "the best rent that can be reasonably got, to be reserved payable during the term."

There is no covenant for payment. Under a mere reservation, it could not be payable till entry: and therefore, in fact, might never be payable, during the term. It is not found "to be the best rent."

3dly. As to the remedy—there being no covenant to pay the rent, the lease might be assigned to a succession of beggars. There being no clause of re-entry, the ground might lie unoccupied without any, or not sufficient distress upon it: so that the remainder-man could neither have his rent nor his land. There is no counterpart; an unusual omission, and very prejudicial.

Therefore the lease could not have been supported, if it had been executed by the three Dacres: which is not the case.

Every fraudulent, unfair, prejudicial execution of such a power, in respect of those in remainder, is void at law.

If the lease be a void execution of the power, against all claiming under the settlement, it cannot be made good against the reversion in fee, whereof Sir Robert Atkyns the father was seized, either by virtue of the livery, or by way of estoppel, supposing the three Dacres to have executed: because an interest would have passed, during the life of Sir Robert Atkyns the father; and there is no estoppel where any interest passes; and to make it operate by virtue of the livery, out of the reversion in fee, would be contrary to the whole intent of the deed plainly expressed. Which brings me to a second answer given.

2d answer. Suppose this pocket undelivered grant of the ideal incorporeal freehold, a good execution of the power; they have argued that it determined with the estate tail; that the only cause of the grant being "to preserve the reversion during the estate tail" must qualify the grant, and amount to a limitation; that there is no technical form of words necessary to express a contingency, upon which an estate for lives may sooner determine.

The deed might have said expressly, "if the heirs male of Sir Robert Atkyns the son continue so long;" or, "that the lease should determine, if, during the lives, the estate tail should be spent." That the intent of the deed, plainly expressed, is tantamount.

[126] 3d answer. Suppose it to subsist;—it is as a trust, and devised as such, to attend the inheritance of the lessor of the plaintiff; which came into possession the 9th of October 1712: his title and right of entry then accrued.

This lease was one of his muniments; a mere weapon in his hands: and it would be going a great way, to say "such a form should take from an adverse possession the benefit of the statute."

But as we are all, clear, "that at the trial, a surrender of such a lease might, and ought to be presumed, to let in the Statute of Limitations;" the special verdict, here, not having found such surrender, we cannot come at the justice of the case in that shape.

It is unnecessary to go into this point, or the former: and it would be very improper, unnecessarily to do it.

If the Dacres had no estate by virtue of this demise, upon the 9th of October 1712, then this ejectment was not brought within twenty years after the lessor's title accrued: and no facts are found, to excuse him within any of the exceptions.

Therefore we are all of opinion that there should be judgment for the defendants.

A writ of error was brought in the House of Lords; and came on upon Thursday 26th January 1758. The counsel agreed, and were allowed, to argue the last point, for the judgment of the House, first: because, if their Lordships should be of the same opinion with the Court of King's Bench, "that this ejectment was barred by the Statute of Limitations," it would be quite unnecessary to go into the first question.

All the Judges were ordered to attend. To whom, after the argument at the Bar was over, the House proposed the following question, viz.

"Whether sufficient appears by the special verdict in this cause, to prevent the lessor of the plaintiff, by force of the Statute of Limitations of the 21st of King James the First, from recovering in this ejectment."

Whereupon, the Lord Chief Justice Willes, having conferred with the rest of the Judges, delivered their unanimous answer, "that sufficient does appear by the special verdict in this cause, to prevent the lessor of the plaintiff, by force of the Statute of Limitations of [127] the 21st of King James the First, from recovering in this ejectment."

Then the judgment of the Court of King's Bench was affirmed, with 5l. costs.

GREEN *versus* MAYOR OF DURHAM. Wednesday, 26th Jan. 1757. Bye-law, to prevent persons from being made free, except in certain conditions good. [See 2 Lev. 238, 239. 4 Bur. 2043, 2044.]

Mr. Just. Wilmot absent (in Chancery).

This case was set down in the Crown-Paper, as a special verdict, and was so called; and was argued by one counsel on each side, in the same manner as if it had been a special verdict: but it was only a verdict upon six several traverses to the return of a mandamus (on 9 Ann. c. 20), directed to the Mayor of Durham, commanding him to swear and admit Robert Green into the place and office of a freeman of the Company or Fraternity of Free-Masons, &c. of the City of Durham.

The right set up by Robert Green was his having been duly elected and admitted a freeman of the company: but the objection to his being sworn by the mayor, was, "that he had not conformed to certain bye-laws particularly specified in the return and found by the verdict."

The return was—that Durham is and from time immemorial hath been an ancient city, &c.; and also, that a power is given by a charter of Tobias then Bishop of



Durham, (in 44 Eliz.) confirmed by King James the First, to the mayor, aldermen, and common council for the time being, or the major part of them, (of whom the mayor and six of the aldermen to be seven,) to make bye-laws, in the stead, for, and in the name of the whole corporate body of the City of Durham and Framwelgate.

Then the return set forth, that certain bye-laws were duly made by the mayor, aldermen and commonalty, in due manner met and assembled at the Guildhall, &c. on 8th of November 1728. And it particularly sets forth and specifies three several bye-laws, as having been then there made by them; to wit—

That for the effectual preventing all persons being made free, that have not a right or title to their freedom in the said city, and for the better regulating of the same, the mayor, one or more alderman or aldermen of the said city, and the wardens and stewards of the several and respective companies for the time being, shall from henceforth meet at the Guildhall or toll-both in the said city, [128] four times in every year, viz. on the first Monday after Martin-mas, the first Monday after Candle-mas, the first Monday after May-Day, and the first Monday after Lam-mas. And every person that is hereafter to be admitted a freeman of the said City and Borough of Framwelgate, shall be then and there called, at three of the said several meetings, before such his admittance to be a freeman; and to be approved of by the said mayor and one or more alderman or aldermen, and the wardens and stewards of the several and respective company or fraternity (for the time being) whereof he or they is or are to be made and admitted a freeman or freemen respectively, or the majority of the said mayor, alderman or aldermen and wardens of such respective company then and there present.

That any warden, steward, or other freeman that shall make any person a freeman of the said city or of any company therein, contrary to the said last ordinance or bye-law above mentioned, shall respectively forfeit and pay the sum of 30l. to the Mayor, Aldermen, and Commonalty of the said City of Durham, to be by them recovered by action, or distress of the offender's goods, or otherwise; and to be paid into the chest or hutch, for the use of the said mayor, aldermen, and commonalty, to defray any public expence that may happen to the said corporation or fraternity.

That in case the mayor of the said city for the time being shall swear \* any person that has not actually served seven years as an apprentice with a freeman of one of the said companies or fraternities, belonging to or used in the said city, or shall not be justly entitled to the same † by ancient usage or custom within the said city, he shall forfeit and pay the sum of 30l.: which said sum shall be recovered, &c. ut supra, and to be paid ut supra.

All which said several ordinances and bye-laws the return alledges to have, ever since the making thereof, been constantly observed and kept, &c. and to be still in their full force and virtue, &c.

That Robert Green was not elected and admitted a freeman of the said Company of Free Masons, Rough Masons, Wallers, Paviours, Plaisterers, Slaters and Bricklayers.

That Robert Green was never duly called to be a freeman of the said City of Durham and Framwelgate, nor ever approved of by the mayor, and one or more alderman or aldermen of the City of Durham and Framwelgate aforesaid, and the warden and stewards of the said Company or Fraternity of Free Masons, &c. before his supposed [129] election and admission to be a freeman of the said company or fraternity, according to the first ordinance or bye-law above mentioned, as he ought to have been.

And for these reasons the said mayor has not sworn and admitted him, nor administered the oaths to him usually taken for the due execution of the said office.

Upon this return, Green takes six several traverses: on which issues were tried.

1st issue—that the mayor, aldermen and commonalty did not duly meet, &c. on 8th November, 1728, in order to make bye-laws, &c. modo & forma, &c.

2d issue—that they did not in due manner make the first bye-law mentioned in the return.

3d issue—that they did not in due manner make the second bye-law mentioned in the return.

4th issue—the like denial of their making the third bye-law mentioned in the return.

[\* There seems to be an omission of some words here.]

[† This also shews that there is an omission, for there is nothing to which the word same can relate.]

5th issue—that he was elected and admitted a freeman of the said Company or Fraternity of Free Masons, &c. as in the writ is alledged.

6th issue—that he was duly called to be a freeman of the said City of Durham and Framwelgate aforesaid, and was approved of by the wardens and stewards of the said company to be a freeman of the said City of Durham and Framwelgate.

The jury find, as to the first issue—that upon the 8th of November 1728, the then mayor and aldermen and commonalty did in due manner meet and assemble, at, &c. in order, &c. in such manner and form as the said mayor by his return hath alledged.

As to the 2d issue—that the said mayor, aldermen and commonalty did then and there, in due manner, make the 1st bye-law in the return mentioned, in such manner and form as is therein by the said mayor alledged.

As to the 3d issue—that they did in due manner make the 2d bye-law, in manner and form, &c.

As to the 4th issue—the like finding, with regard to the 3d bye-law :

[130] As to the 5th issue—that Green was elected and admitted a freeman of the company, as in and by the writ is alledged : but that before such his admittance, he was not called at any meeting held according to the said bye-law in the said 2d issue mentioned, nor approved of by the then mayor, and one or more alderman or aldermen, and warden and stewards of the said company or fraternity, nor by a majority of them, according to the said bye-law.

As to the 6th issue—that the said Robert Green was not duly called to be a freeman of the said City of Durham and Framwelgate, and approved of by the wardens and stewards of the said Company or Fraternity of Free Masons, Rough Masons, &c. to be a freeman of the said City of Durham and Framwelgate.

This case was argued on the 24th of November 1756, by Mr. Ambler for the plaintiff, and Mr. Clayton for the defendant ; when the Court ordered it to stand for judgment of the then next term.

Lord Mansfield now delivered the resolution of the Court.

The general question depends upon Robert Green's right to the franchise which he claims.

The objection to his right arises from his not being qualified according to the bye-law.

If the bye-law is good, and binding, and he appears to be an object of it ; he is certainly not qualified, and the mayor has returned a sufficient reason for not admitting and swearing him.

All the objections which have been made, therefore, tend to set aside the bye-law ; or, if the bye-law be good, to shew that *Robert Green's case* is not within it.

It has been argued that the bye-law is void, upon two grounds ;

1st. From want of authority to make it ;

2dly. From the subject-matter.

As to the first—the objection is, that the bye-laws are returned to be made by the mayor, aldermen, and commonalty ; whereas the power is given to the mayor, aldermen, and twenty-four common council or the major part of them ; of whom, the mayor and six aldermen should be seven.

Answer. The power to the select number is, to [131] “make bye-laws in the stead, for, and in the name of the whole corporate body.” These bye-laws might be made by the select number, acting in the name of the whole corporate body ; and must be so intended : for the jury find, “that they did in due manner meet, and in due manner make the bye-laws.”

As to the second—that the bye-law is unreasonable and void : for it is likened to the case of *The Taylors of Ipswich*, 11 Co. 53. A bye-law “that none should work at his trade, until he had presented himself to the Company of Taylors, and proved that he had served seven years as an apprentice, and admitted by them to be a sufficient workman.”

Answer. In that case, the bye-law was against law : it was against the 5th of Eliz. ; and a farther restraint than that Act had made.

But this bye-law is not against any law—it is not a restraint upon trade : but seems a reasonable regulation, to prevent persons being unduly made free, who are not intitled by birthright, service, or purchase. It provides a method for previously examining into the right of those who claim to be made free.

Obj. “That there is no method to compel a meeting of the mayor, alderman or aldermen, and the wardens and stewards of companies.”



Answer. This objection extends equally to all corporate assemblies, by custom, charter or bye-law. But there is a known method, by mandamus.

Obj. If a person has a right to be admitted a freeman, yet unless he be approved of by the mayor, &c. he is not to be admitted : and there is no method to compel them to approve.

Answer. If the mayor, &c. disapprove, without cause, a mandamus will lie, suggesting the qualification and right of the person claiming to be a freeman, and commanding the mayor to approve and admit.

But supposing the bye-law good, it has been argued, that this case is not within it.

1st obj. The mandamus is, to admit Green to the freedom of the company : the bye-law relates only to the freedom of the city.

[132] Answer. It appears from the second bye-law, to be the same thing.

2d obj. The bye-law prohibits indeed the election of persons not called, and approved, &c. ; and subjects disobedience to a penalty ; but does not make the election void, and cannot transfer the right of election vested in the electors, to the mayor, &c.

Answer. These objections are founded upon a misunderstanding of the bye-law, and a misconception of the nature of the case. The writ recites "that Green had been duly elected and admitted a freeman ;" and therefore commands the mayor to swear him—the mayor returns the bye-law, &c. ; and "that before Green's supposed election and admittance (by the company) to be a freeman, he was not called and approved by the mayor, &c." And the fact found by the jury is, "that he was elected and admitted by the company : but not called and approved by the mayor, &c." So that it appears upon this record, that the intent of the bye-law was, that no person should be elected and admitted a freeman of the company, unless he was called at the assembly and approved, &c. ; which was a previous act to be done before the company could elect him ; the way to prevent the abuse "that the company unduly admitted persons to their freedom : " and the second bye-law inflicts a penalty on the company, who should make any one free, without the previous calling and approbation ; and the third bye-law inflicts a penalty on the mayor, who should swear any such person.

The stating the fact answers both the objections. For the bye-law makes the appearance and approbation a necessary qualification, to the being made free by the company, and a restraint upon them to elect any one to his freedom, before his conforming to the bye-law : and the right of election is not transferred to the mayor, but remains where it was.

Obj. It is not returned "that there was any assembly, at which Green might appear, to be called."

Answer. It shall be intended,—and if in fact there was no assembly, Green might have pleaded it as an excuse.

Obj. He might have been elected and admitted, before the making this bye-law.

Answer. The jury have found, "that he was elected and admitted : but that he was not called and approved pursuant to the bye-law." So that the bye-law was in being, at the time of his election, &c.

[133] It is to be observed, that it is not stated, what is the method of the company's electing freemen, nor any thing in the charter concerning it. For aught that appears,\* the first bye-law may be agreeable to the ancient usage, and revived by this bye-law and enforced with penalties : but supposing it to be introductory of a previous qualification, it seems to be reasonable and well calculated to prevent improper persons, not entitled, being made free. It is much more reasonable than the custom of London, "that no broad cloth should be sold, but what was brought to Blackwell-Hall to be examined ;" 5 Co. 62. Yet this custom was held good ; because it was to prevent fraud.

We are of opinion that none of the objections are well founded ; and therefore that the return ought to be allowed.

Consequently, as this was the case of traversing a return to a mandamus, pursuant to the statute of 9 Ann. c. 20, the rule was taken,

That judgment be entered for the defendant.

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\* [Nothing is to be intended in a return to a mandamus ; per Cur. 2 Show. 282.]

GOODTITLE, EX DIMISS. CHESTER, *vers.* ALKER AND ELMES. Friday, 28th Jan. 1757. An ejectment lies by the owner of the soil, for land over which a highway lies ; and a wall or building upon it, may be described in the declaration as land ; but perhaps if a house were built upon it, it ought to be described as such. [S. C. Bull. 99, cited.]

Tr. 26, 27 G. 2, Rot. 590.

[Referred to, *Harrison v. Rutland* [1893], 1 Q. B. 155.]

This case was first argued on Tuesday the 4th of February 1755, when there were only three Judges ; Mr. Just. Wright having (two days before) resigned, and Mr. Wilmot (who was appointed to succeed him) not being then called a serjeant : and it was again argued, and determined on this day, (when Mr. Just. Wilmot was also absent, in the Court of Chancery.)

It was a special verdict in ejectment for an acre of land lying in the parish of St. Philip and Jacob in the county of Gloucester. It finds, as to one piece of land, containing fourteen inches in length, and thirty-three feet in breadth, (parcel of the premises ;) and as to one other piece of land, containing three feet six inches in length, and seven feet in breadth, (other parcel of the premises ;) and as to one other piece of land, containing two feet in depth and fourteen feet in length, (other parcel of the premises contained in the declaration ;) that Thomas Chester, Esq. was in 1648 seised in his demesne as of fee, of and in the manor of Barton Regis in the county of Gloucester, with the appurtenances. That the said T. C. Esq. being so seised, certain articles of agreement were, on 24th June 1648, made between the said Thomas Chester and [134] one John Gotley otherwise Dowle, reciting a presentment by the homage, at a court leet of the said manor, holden 10th of April 1648, "that the said John Gotley alias Dowle, in the new building of a house at Lafford's Gate, had encroached upon the waste of the said Thomas Chester then and yet lord of the said manor, fourteen inches in length and thirty-three feet in breadth, without his house ; together with a porch, without the wall adjoining to the said house, of three feet and a half ; for the which encroachment, the said John Gotley alias Dowle was by the said jury amerced ; as by the presentment aforesaid, in the rolls of the said court, appeared ;" the said Thomas Chester and John Gotley thereby agreed, not only concerning the said amercement, (whereof the said Thomas Chester thereby acquitted and discharged the said John Gotley ;) but also the said Thomas Chester, for the consideration thereafter mentioned, agreed to permit and suffer the said John Gotley his executors and administrators, to continue the peaceable enjoyment of the said ground and waste encroached, without his disturbance ; and also to have liberty to set and place a post in the street, &c. and three other posts, &c. without any disturbance or trouble by him the said Thomas Chester, &c. for the term of 100 years from the day of the date of the said articles. In consideration whereof the said J. G. alias D. for him, his heirs, executors, &c. covenanted and agreed to pay to the said T. C. his heirs or assigns, the sum of 6s. 8d. per annum yearly, &c. during the said term : in consideration whereof, the said T. C. granted and agreed to let the said encroachment or encroachments to stand, for and during the said term, without any disturbance, &c. ; so as the said yearly rent or sum of 6s. 8d. be duly paid, &c. And it was further found, that the two first pieces of land particularly mentioned and described in the verdict, are the two several pieces of land mentioned in the said articles to be encroached on by the said John Gotley otherwise Dowle ; and parcel of the waste, and part of the tenement in the declaration mentioned ; and were so encroached and taken in by the said J. G. otherwise D. in the building or erecting the messuage or house mentioned in the said articles, some small time before the date of the said articles ; and then were lying in and part of the said manor, and were part of a public street and King's highway, called West-Street, in the parish of St. Philip and Jacob in the said county of Gloucester, and leading from the City of London to the City of Bristol.

The jury likewise find that the said yearly sum of 6s. 8d. was duly and constantly paid, in pursuance of the said articles, by the defendants and those whose estate they have, to the said Thomas Chester and the successive lords of the said manor, (his descendants,) during all the said term of 100 years ; and from the end thereof, till Lady-Day 1750.

[135] Then they find that the defendants Alker and Elmes, sometime in the year



of our Lord 1748, erected certain palisadoes before the front of the said house, and thereby took in and inclosed the third piece of land, above particularly mentioned and described, then lying in and being part of the said manor, and being then other part of the said public street and highway; and have kept the same so inclosed ever since, to this time: and that that part of the said street where the said encroachments were so made, at the several times of the said encroachments, contained in breadth (including the said encroachments) sixty feet and no more.

The jury find Thomas Chester, Esq. the lessor of the plaintiff, to be heir at law to that Thomas Chester, Esq. deceased, who executed the articles; and, as such, to be seised of the said manor with the appurtenances, as the law requires: and that, being so seised, he made the demise to the plaintiff: by virtue of which demise, he entered, &c.; and was ejected, &c. But whether upon the whole matter aforesaid in form aforesaid by the said jurors found, the said G. A. and L. E. are guilty of the said trespass and ejectment, as to the said three pieces or parcels of land, parcel, &c. by them supposed to be done, or not, the said jurors are wholly ignorant, &c. and so the verdict concludes in the ordinary form.

The counsel for the plaintiff made two questions; viz.

1st question—whether an ejectment will lie for these premises as described in the declaration.

2d question—whether the defendants are at liberty to controvert the title of the plaintiff; or are estopped from so doing.

First—it may be objected, “that no ejectment will lie of land which is part of the King’s highway.” But it is plainly and beyond controversy part of the lord’s soil; though it is indeed said to be part of the highway. This highway is found to be sixty feet wide. Therefore if enough be left for a public way, the rest belongs to the lord: at least, he is not guilty of a nuisance, if he should erect any thing upon the overplus part of it.

Now sixty feet is much more than enough for any highway: and the encroachment is only from the front of the house; not in the middle of the highway.

The overplus of the soil is not vested in the Crown; but in the owner of the soil. 2 E. 4, 9, Bro. & Fitzh. Abr. [136] tit. Chimin. In Tr. 13, 14 Geo. 2, C. B. and at Serjeant’s Inn, *Selman v. Courtney* (concerning giving in evidence, a right to a highway,) it was unanimously holden that, in trespass, the defendant may justify that it was a highway, but cannot give it in evidence; and that the right to the soil was not in the Crown.”

If the highway was taken out of the lord’s waste, the right and property of it is clearly in the lord; and the lord may distrain in it: so is 17 E. 3, 43, pl. 31. If it was not taken out of the waste, it belongs to the owners of the soil on each side. The case of *Selman v. Courtney* (supra) was so determined by all the Judges.

The owner of the soil may cut down the trees, and may have an action for digging the soil. So is 1 Ro. Abr. 392, pl. 2, and 1 Ro. Abr. 392, pl. 3, title Chimin Private, letter B.

In the case of *Sir John Lade v. Sheppard*, H. 8 G. 2, B. R. the land was the property of the plaintiff, who made it a street; and the defendant’s bridge rested upon it; and he had (by leave of the commissioners of sewers) arched over the ditch, and dug the ground, and fixed posts upon it. It was holden “that this making a street was only a dedication of it to the public, for the particular purpose of passing and repassing; and that the soil belonged to the owner. V. 2 Strange 1004, S. C.\*

The general question is, “whether a part of a highway be recoverable in an ejectment.”

The description of a highway is laid down in Co. Litt. 56 a. The property of the soil of the highway (as has been already proved) is in the lord of the soil. An action of trespass must be founded on possession: and an ejectment is an action of trespass. In Cro. Eliz. 339, *Jordan v. Cleabourne*—per Popham and Gawdy, it was holden† to be but a personal action, and a trespass in its nature. Therefore the plaintiff might be possessed of it; and consequently may recover possession of it, in an ejectment: for if he has a right to the possession, he must have a remedy for it.

\* My own note agrees with Sir John Strange’s. “The property remained in the owner of the soil: he only gave the use of it to the public.”

[† I.e. in ejectment.]

It is not every encroachment, that is a nuisance to the public: some encroachments may stand. Fitzh. Abr. 77 a.\* No. 447, 8 E. 3, is one instance of it. But there, the King must be intended to be the owner of the soil: otherwise, the rent would have belonged to the owner of the soil; not to the King.

The sheriff may deliver full seisin of the thing here demanded. In proof of which, they mentioned a note of a case before Lord Ch. Baron Pengelly, in Wiltshire; where [137] an ejectment was brought for a cottage in the highway; and it was objected, "that it would not lie, because the sheriff could not deliver possession:" but Ld. Ch. B. Pengelly over-ruled the objection; and said that Mr. Justice John Powell had been of that opinion which himself then went upon, and had done the like.

They insisted very strongly, that the sheriff can give seisin of the thing; subject to the rights of others upon this property, for particular easements. Co. Litt. 4 a. Cro. Eliz. 421, *Welden v. Bridgewater*. Co. Litt. 48 b. For the rights of others are not to the possession; but to mere easements, which are collateral to the thing itself. Cro. Jac. 263, *Sir William Wrey v. Vesper*. And there is no reason for making any difference between public and private easements. This argument might as well be used in regard to such an easement, as a right to set up stalls in a fair or market. But the case of *The Mayor of Northampton v. Ward* in 2 Strange, 1238, is a full proof "that trespass is the proper remedy for erecting stalls in a market." Now if a person should build a house, instead of setting up a stall; would not an ejectment lie, by the owner of the soil?

Secondly, (under the first question,) it will also be objected here, "that the thing demanded is not sufficiently described;" the ejectment being only "for an acre of land."

The plaintiff's counsel said they did not dispute the case of *Knight v. Syme*, Carth. 204. 4 Mod. 97, S. C. [V. also 1 Salk. 254, S. C. and 1 Shower, 338, S. C.] "that an ejectment of so many acres of arable and pasture, without shewing the quantum of each sort, is not good." But they observed that in the present case, two answers may be given to this objection; viz. 1st. That this is no part of the doubt of the jury: therefore the Court will not lay any stress upon it. 2dly. That the special verdict has ascertained the nature and the quantity and the situation of this land; for, it is found to be part of the waste, and is described even to inches: so that the sheriff can have no doubt, what to deliver possession of.

Second general question—the plaintiff's counsel said that this is an unconscientious defence; as the defendants have already enjoyed this a hundred years under these articles, and have constantly paid the rent: and therefore they are estopped from controverting the lessor's title. They cited 1 Salk. 276, *Trevian v. Lawrence & Al'*, and 2 Ld. Raym. 1036, 1048, S. C. in support of this position; and likewise to prove that not only the parties, but also the Court and jury, are bound by this estoppel: in further confirmation whereof, they also cited Co. Lit. 352, and 231, and Litt. § 374.

[138] And therefore they prayed judgment for the plaintiff.

The counsel for the defendants began with observing upon particular parts of the verdict, which they thought to be material. As that it is expressly found "that part of this land is part of the street, which is part of the King's highway:" and the third parcel is expressly found to be "other part of the said street or highway." And the jury likewise find, "that the way is in breadth (including the encroachments) sixty feet, and no more:" which is far from finding a surplus. That it is not found "that the defendants claim under Gotley." That the ejectment is "for one acre of land with the appurtenances:" but the verdict describes three parcels by inches and feet. The plaintiff is found to be lord of the manor of Barton Regis; in which manor this waste lies: and the two pieces first mentioned are found to be encroached upon and taken in, by erecting a house; and that upon the third, certain palisadoes were erected. And the doubt of the jury is "whether the defendants were guilty of a trespass upon these parcels of land."

Then they proceeded to their objections.

1st objection—the plaintiff's demand, and the finding of the jury, are not agreeable to each other; so as to intitle the plaintiff to recover, upon this verdict. For the demand is of an acre of land, merely: whereas it is found "that a house is built

[\* Tit. Assize, pl. 447.]



upon the former two parcels." And this was a fact within the plaintiff's privity : and therefore the ejectment ought to have been brought for the house ; not for the land. So is F. N. B. pa. 192 : though with a qu. indeed there. But, however, 39 H. 6, 8, and Bro. Demaunde, pl. 14, S. C. and also pl. 5, & pl. 33, sufficiently prove "that the demand ought to be, of an house ; not of arable land ;" (as the term "land," imports). So also do Plowden, 168, 170, *Hyll v. Graunde*. Jenkins, 6th century, pl. 83, fo. 268. Cro. Eliz. 234, *Hays v. Allen*. Co. Entr. 642, S. C. 2 Roll. Abr. 704. Title Trial, pl. 22, and Dyer 47 b. *Banister v. Benjamin* (in margin).

And if it was not to be thus specifically demanded, as it is at the time ; there could be no certainty how to deliver possession. And such specification would be liable to no objection : for in P. 12 G. 1, B. R. *Sullivan v. Segrave*, 1 Strange, 695, an ejectment "de parte domûs" was holden to be good.

But here, the verdict finds what the plaintiff's words of demand are not apt and fit to entitle him to recover.

[139] The sheriff may break open a house, to deliver possession of part of it. 5 Co. 91, *Semaine's case*, second resolution. Style, 238, more than enough, is error : and less is bad. In 2 Ld. Raym. 1470, *Bindover v. Sindercomb*, a description of "part of a house" was holden to be good ; because it sufficed to describe it to the sheriff.

Where the land may be ascertained, by being at the plaintiff's peril shewn to the sheriff ; yet even there, it must be land of the same quality, as was demanded ; (ejusdem generis). Savile, 28, case 67, *The Queen v. Ayleworth*. Cro. Eliz. 265, *Scriven v. Prince*. Cro. Eliz. 465, *Portman v. Morgan*. A demand of land must (in our law) be certain. *Luttrell's case*, 4 Co. 87 b.

There was a case of one *Degony Green v. William Johns*, in 1715, where a house was actually sawn asunder : (they said they had the declaration from the heir of the defendant). It was an ejectment of an acre of land, (but further described indeed,) of which the Dean of Exeter was the claimant : and, though there was no judgment or execution ; yet, by consent, the house was sawn asunder, in order to deliver possession.

Though strict nicety has of late years been gotten over, yet sufficient accuracy and precision is still necessary : and part of a house can never be said to be within the description of land. Co. Lit. 4 a. is no authority against this ; nor 4 Co. 87 b. And in Cro. Jac. 654, *Royston v. Eccleston*—ejectment "de unâ domo & de uno pomario" was holden good, upon the principle of their conveying a sufficient certainty, so as the sheriff might deliver possession. Palm. 337, S. C. 11 Co. 55, *Savel's case*. 1 Salk. 254, *Knight v. Symes*. 1 Show. 338, S. C.

And it would be very dangerous, if certainty of description should not be strictly kept to.

Second objection. This appears to have been parcel of the waste ; and ought to have been so described : and also it is part of the King's highway. Therefore no possession, or no full possession, at least, can be delivered of it.

P. 15 G. 2, B. R. In the case of *Popple v. Dobson*, "waste-ground" was thought a good description ; sed adjourn'. (Cur adviſ') Cro. Car. 511, *Mulcary and ——— v. Eyres and Others*, on error in ejectment, from Ireland, "bogge" was holden a good description.

[140] And it being the King's public highway, the plaintiff can never have possession delivered of it. The owner cannot levy a fine of it : nor can he distrain it ; as may be seen in 2 Inst. 13.

In cases of encroachments or purprestures on it, these encroachments are upon the King : and so is 2 Inst. 272, expressly ; "dicitur purprestura, quando aliquid super dominum Regem injustè occupatur, ut &c. ; vel in viis publicis obstructis." And the remedy is by presentment or indictment. 9 Co. 113. 5 Co. 73 a. 27 H. 8, 27 a. But an action lies, only where a man receives a special injury.

How can the plaintiff have plenam seisinam of this ? In 1735, 8 Geo. 2, there was a case of *Well-advised, ex dimiss. Sir Bouchier Wray & Al' v. Foss et Al'* in ejectment, at the Summer Assizes at Exeter.\* The declaration described a piece of

\* [This case as here reported was denied by Lord Mansfield, post, 143, expressly, and also by Denison J. : and as it seems by Foster, J. who all thought there must have been circumstances in it, not appearing by the state of it. As to Wilmot, J. he was not in Court at the argument ; and therefore did not give any opinion.]

land, containing forty feet in length, and four feet in width, part of the manor of J. But the plaintiff was nonsuited. For the land was part of the waste: and upon evidence, it appeared to be part of the highway, on which the defendant had built. Lord Hardwicke held, "that no possession could be delivered of the soil of the highway; and therefore no ejectment would lie of it: and if it was a nuisance, the defendant might be indicted."

In the present case, all these three pieces of land are part of the King's highway, and are encroached upon: and the two former have subsisting nuisances upon them.

If a highway lies within a manor, it must be agreed (especially as found here) that the lord has the property of the soil; to be used consistently with the privileges of the subject: but the question is, what remedy the lord has, in case of a nuisance upon such part of his property as lies in the King's highway. We say, he has no specific remedy, by ejectment. The case of *Sir John Lade v. Sheppard*, 2 Strange, 1004, does not prove that an ejectment will lie: that was not an ejectment; but an action of trespass. And perhaps an action of trespass might have been here maintained: but not an ejectment. And if the lord of the soil should recover and continue it, he would thereby become a wrong-doer: whereas, according to 2 Inst. 294, it is the wisdom of the law, so to resolve, "ut sit finis litium."

As to Fitzh. Abridgment 77 a. It is the case of the King: and by his prerogative, he may continue it, if it be no injury to the subject. But a highway must always continue a highway. Cro. Jac. 446, *Fowler v. Sanders*, fully proves "that it cannot be narrowed: neither can it be "inclosed."

[141] Second general question. As to the estoppel—it does not appear that the defendants claim under Gotley, therefore that point is out of the case.

It was urged by the counsel for the plaintiff, by way of reply—that as to the estoppel, the Court must necessarily intend, upon this finding, that the defendants themselves paid the rent, and erected the palisadoes in 1748: and the rent which was paid from the end of the term till 1750, must be presumed to be paid by them; they being then in possession. A special verdict is not to be taken strictly; like a special pleading.

As to the \* 1st objection made by the counsel for the defendants—non constat that this land is built upon: it is only found "that in the new building of a house at Lafford's Gate aforesaid, Gotley had encroached upon the lord's waste, so many feet, &c." But it does not follow that Gotley actually built upon the land, which he so encroached upon. For there are very many other ways of encroaching upon another's land, besides building upon it: for instance, a penthouse overhanging and dropping upon it, may be an encroachment. No express fact of building upon this land is found. Indeed it is said in the finding, that the third piece of land is taken in and inclosed with palisadoes, by the said J. Gotley. But the palisadoes answer this expression: he inclosed it with them.

They agreed to the doctrine of the necessity of sufficient certainty in the demand: but said and insisted that it is sufficient, if the sheriff may know how to deliver possession.

The term "land" is said by Lord Coke, legally to include castles, houses, and other buildings. Co. Lit. 4 a. And by a grant of "all a man's lands," all his houses, mills and woods would pass: as appears in *Lutterel's case*, 4 Co. 87 b. And by the civil law, "appellatione fundi, omne ædificium & omnis ager continetur," *ibidem*. Therefore, as they would pass in a conveyance, there is no reason why they should not be included in an ejectment, upon a supposed lease: which lease, if it was a real lease, would undoubtedly carry them.

None of the things described in the declaration differ from the descriptions of them in the verdict.

Indeed it is only fourteen inches in length, that it is pretended any part of the house now covers. But the words are, that "whereas it was presented that the said J. G. [142] had incroached upon the waste of the manor of the said T. C. &c. fourteen inches in length, and 33 feet in breadth, without his house; together with a porch of

\* Observe that the two divisions of the first question were counterchanged, in the course of this argument: the counsel for the defendants having begun first, with that objection which the plaintiff's counsel had taken up (by way of prolepsis) in the second place. Vide pages 137 and 138.



three and a half feet in length, and seven feet in breadth, without the wall adjoining to the house." Now it is not necessary that the Court should consider these two pieces of land, as a house; especially the latter, upon which the porch is erected.

It is not found to have been a messuage at the time of the demise laid. On the contrary, the pieces of land incroached upon, are found to be parcel of the waste, and part of the tenement in the declaration mentioned; which tenement is not a house, but an acre of land. However, this objection cannot overthrow the whole verdict: for the third parcel is clearly land, and not house.

If a man builds upon my land, it would be very hard if I might not, notwithstanding this, demand my own land.

If the ejectment was brought de parte domûs, (which they did not admit that it could be,) how would the sheriff know which part to deliver possession of? The plaintiff must, in both cases, shew him, at his peril.

Though "pomarium" be good, yet it would equally be good, if called "land."

As to the <sup>\*1</sup> second objection made by the counsel for the defendants, the plaintiff's counsel replied, that the right is admitted to remain in the owner of the soil, to be used consistently with the privilege of the subject: which admission is sufficient for our purpose. He may dig sand or stones; provided he does not commit a nuisance in the manner of doing it. Therefore it is plain that he has a private right remaining in him.

An ad quod damnum alters no property: the owner retains the old road, discharged of the easement, which is transferred to another part of his land.

The Court have nothing to do with the nuisance, in this case: it does not appear to the Court, to be any nuisance to the highway; or that Mr. Chester will continue it, if he should recover the land.

Cro. Jac. 446, was for a special injury received from the defendant's laying logs in the highway: but though the King cannot narrow his prerogative, to the injury of the subject, yet it does not follow from that case that the property of the highway is not in the owner of the soil.

[143] Lord Mansfield asked whether they had any note or report of that circuit-case which was said to have been determined by Lord Hardwicke; and by whom it was taken; but there was no note or report of it; and it seemed to have been mentioned at the assizes, from some imperfect recollection. He therefore proceeded to give his opinion immediately; putting this case of Sir Bouchier Wray out of the way entirely; as being so loosely remembered and imperfectly reported, as to deserve no regard, nor to be at all clear and intelligible. He said it was impossible to suppose that Lord Hardwicke had any note or memory of such a point arising at the assizes: otherwise, he would wait till he could know the true state of it from his Lordship, from the deference he paid to so great an authority. But from the manner in which it is quoted, there is no ground to say what the state of that case or determination really was.

As to the question "whether an ejectment will lie, by the owner of the soil, for land which is subject to passage over it as the King's highway."

1 Ro. Abr. 392, letter B. pl. 1, 2, is express—"that the King has nothing but the passage for himself and his people: but the freehold and all profits belong to the owner of the soil." So do all the trees upon it, and mines under it (which may be extremely valuable). The owner may carry water in pipes under it. The owner may get his soil discharged of this servitude or easement of a way over it, by a writ of ad quod damnum.

It is like the property in a market or fair.

There is no reason why he should not have a right to all remedies for the freehold; subject still indeed to the servitude or easement. An assize would lie, if he should be disseised of it: an action of trespass would lie, for an injury done to it.

I find by the case of *Selman v. Courtney*, (a) Tr. 13, 14 G. 2, <sup>\*2</sup> that a point which

<sup>\*1</sup> See the note in p. 141.

(a) Yet it was ruled, as it seems soon afterwards by Wm. Fortescue, J. that it may be given in evidence on the general issue, that the locus in quo was the lord's waste; because it proves the defendant not guilty of any trespass to the plaintiff. *Goodwin v. Cooke*, 33 MSS.

<sup>\*2</sup> Vide ante p. 135, 136. [S. C. 12 Vin. 78, 79, pl. 91. in n. See also 1 Rol. Abr. 392 or 4 Vin. 515, pl. 3.]

had been before the Court of Exchequer in the case of *The Duchess of Marlborough v. Gray*, M. 2 G. 2, is now settled; viz. "that it's being a highway cannot be given in evidence by the defendant, upon the general issue:" which proves that the ownership of the soil is not in the King. I see no ground why the owner of the soil may not bring ejectment, as well as trespass? It would be very inconvenient, to say that in this case he should have no specific legal remedy; and that his only relief should be repeated actions of damages, for trees and mines, salt-springs, and other profits under ground. It is true indeed that he must recover the land, subject to the way: but surely (b) [144] he ought to have a specific remedy, to recover the land itself; notwithstanding its being subject to an easement upon it.

Second question. As to the description.

I do not know whether it is not even better described by the name of the land, than of a house, or part of a house.

I think it would have made the objection much stronger, if the plaintiff had only claimed the nuisance, instead of the land on which the nuisance is erected.

Here he does not claim the nuisance: he claims the land. And the tenants in possession of it defend themselves by saying "that they have erected a nuisance upon it." Now it would be a strange thing, if that should be a good defence against the owner's recovering his land.

But, however, this is not a house, (which perhaps ought, if it were so, to be particularly named;) but merely a wall or part of a wall or building: and there is not such preciseness required in ejectment, as there is in real actions.

The Courts will go to the utmost extent, in support of ejectments; that people may have specific remedies for their rights.

Dyer 47 a. pl. 6 is very strong. There, the recovery was, of "100 acres of land, 20 acres of meadow, and 40 acres of pasture in D." without mentioning any house or garden: and the better opinion seems to be "that the plaintiff should thereby recover the buildings built thereupon."

That was an action of a higher kind than an ejectment: it was a real action, a writ of intrusion, in which that recovery was had.

But here the building erected is only part of a house or wall: and it is erected, by incroachment, upon the plaintiff's land.

The case of the defendant is most unfavourable: for he insists upon holding the thing demanded without any pretence of title; and insists that the plaintiff shall have no specific remedy for his land.

Therefore I am of opinion that the plaintiff ought to recover upon this special verdict.

[145] Mr. Just. Denison concurred.

The difficulty at the assizes arose (as the Judge who tried the cause has † declared,) merely upon an apprehension that there had been a determination at the assizes formerly, by Lord Hardwicke, "that an ejectment would not lie for a property in soil, over which there was a highway; because the sheriff could not deliver possession of the highway."

But the reality of this authority has not been at all proved, to any kind of satisfaction.

Trespass would undoubtedly lie; why then should not an ejectment?

It is said "that the sheriff cannot deliver full possession."

But why not? Indeed, it must be subject to the easement: but there is no other difficulty in the matter.

Therefore I take it for granted, that there was something more in that cited case of *Sir Bourchier Wray's*, than we are now apprized of.

As to the second question—

It might have been perhaps difficult to have described this part of a house.

In that case in Dyer 47 a. I take it that the formedon in reverter was well brought

(b) This right has been since recognized by the 13 Geo. 3, c. 78, s. 17.

[† Note. Mr. Justice Foster, who tried the cause, had declared this, during the course of the argument. He said he should have had no doubt about it, at the trial; but upon it's being alledged "that Lord Hardwicke, (for whom every one has and ought to have a veneration,) had made such a determination;" and he would not take upon himself, to over-rule the opinion of so great a man.]



for the land, secundum formam doni: the plaintiff had nothing to do with what the defendant had done with it, or built upon it. And I think the four Judges who held on that side of the question, were in the right.

And upon this special verdict, the sheriff would have no difficulty to deliver possession; for any thing that I can see, to raise any.

I think that case in Dyer is good law. That was in a real action: and much more will the same reason hold upon ejectment, (which would even lie for tithes). (V. Cro. Car. 301.)

And I think this ejectment was better and more properly brought for land, than it would have been for "part of a house."

Mr. Just. Foster agreed that the case in Dyer was good law.

[146] And he repeated, that he had no doubt of the present case, when it was before him at the assizes, but from the then-apprehended authority of the cited case, said to be determined by Lord Hardwicke. (V. ante, 145.)

The owner of the soil has right to all above and under ground, except only the right of passage, for the King and his people.

And the case in 1 Ro. Abr. 392, letter B. proves this. (V. ibid. pl. 1, 2, 3, 4, 5, & 6.)

Therefore he entirely concurred with his Lordship and his brother Denison, (for Mr. Justice Wilmot was \* not present in Court at either of the two arguments of this case,) that there should be

Judgment for the plaintiff.

TOOKER *vers.* DUKE OF BEAUFORT. A commission under the Exchequer seal is admissible, though not conclusive evidence. [S. C. Bull. 233, and see 12 Vin. 268.]

[Referred to, *Neill v. Duke of Devonshire*, 1882, 8 App. Cas. 144.]

A new trial had been moved for, on a supposed misdirection by the Judge who tried the cause, in admitting a commission under the seal of the Court of Exchequer, P. 33 Eliz. Rotulo 290, to be given in evidence; (a)<sup>1</sup> although it was objected at the trial, that this commission was "res inter alios acta; of which the Beaufort family could have no notice, nor opportunity to defend it; and therefore it could not affect them: consequently, it ought not to have been at all admitted as evidence; for the same reason that a verdict in a cause between other parties cannot be given in evidence in a cause between strangers to the former cause."

N.B. This commission (P. 33 Eliz. Rotulo 290, in Scacc') was directed to five commissioners therein named, ad inquirendum, tam per sacr'um proborum & legalium hominum com' nr'i South'ton, quam per depositiones quorumcunque testium, ac omnibus aliis viis mediis & modis quibuscunque, "si prior aut prioratus Sci' Swithini Winton, in jure domus sive prioratus, fuit seiscitus in quibusdam terris vocat' Woodcrofts &c. ut parcell' de manerio de Hinton-Daubney;" necnon, "Si Henricus, pater noster, (in ejus vita,) Dominus Edwardus sextus, Regina Maria, aut nos ipsi, â tempore dissolutionis prioratus sci' Swithini, &c. &c." with an order for the sheriff to summon a jury, &c.(a)<sup>2</sup>

[147] To this, is returned an inquisition taken [thereon] the 9th of April, 33 Eliz.: whereby it is found "that the prior of St. Swithin, in right of his priory, was seised of the said lands called Woodcrofts, &c. as part and parcel of the manor of Hinton Daubney; and that from the dissolution of the said priory, King H. 8, King E. 6, and Queen Mary were seised, and Queen Elizabeth herself, in the same right to the 27th of May then last past."

There are also returned the interrogatories administered on Her Majesty's behalf, and the depositions taken thereon.

The substance of the Judge's report was, that he admitted this commission and the return to it, and the depositions, to be read in evidence: holding them to be

\* V. ante, 133.

(a)<sup>1</sup> Sayer in the report of this case (p. 297) states it to have been an exemplification under the seal of the Exchequer, not a commission. And see 3 Durn. 714.

(a)<sup>2</sup> On an issue between persons not parties nor privies.

admissible evidence, though not conclusive. That there was likewise much parol-evidence of the possession of both parties; and that there had been a mixed possession: but that he, in his direction to the jury, did lay great stress on this commission, &c. and that without its assistance, he should have thought the verdict for the plaintiff to have been a very hard one.

The report concluded, "that he himself (the Lord Ch. Baron) thought this piece of evidence to be admissible, but not conclusive; that it had great weight with the jury; and that if the Court should be of opinion that it was not admissible, he thinks there ought in that case to be a new trial."

This matter having been largely debated at the Bar, and afterwards fully considered by the Bench; and the Court having been of opinion "that the evidence was admissible, though not conclusive; and therefore that it was well and properly received;" and consequently, "that the rule for shewing cause why there should not be a new trial, should be discharged;" the said rule had been accordingly discharged.

But in the interim, whilst this question was depending before this Court, (who took time to advise upon it,) the Duke of Beaufort, the defendant, died.

Whereupon, (on Saturday, 13th November 1756,) Mr. Gould, on behalf of the plaintiff, moved for leave to enter up his judgment, as of the next term after the verdict; which was the term in which he might have entered it up, if the motion had not obstructed it. 1 Leon. 187, *Isley's case*.—It is discretionary in the Court to grant this or not. 1 Sid. 462, *Crispe and Jackson v. Mayor of Berwicke*, in point. [148] 1 Vent. 58, 90, S. C. in point. And in Hilary term last, the case of *Wyndham v. Chetwynd S. P.* (though a premature application).

Lord Mansfield.—It seems reasonable: take a rule to shew cause.

And

On Friday, 28th January 1757, on Mr. Gould's motion, this last rule (for entering up the judgment, as of the term next after the verdict,) was made\* absolute without defence.

*REX vers. MAURICE JARVIS.* Saturday, 29th January, 1756. Convictions on the Game Acts must particularly and negatively specify that the person convicted had not any of the qualifications required by the 22 and 23 C. 2, c. 25, and to which the Act of Ann. refers. [See also 7 Durn. 31. 1 East, 642. 2 Durn. 19. 6 Durn. 559.]

This was a conviction, (which stood in the Crown-paper,) upon 5 Ann. c. 14.

It was made by John Bythessea and John Turner, Esquires, two justices of the peace for the county of Wilts; and was to the effect following:

Be it remembered, that on, &c. John Webb of the parish of Hilperton in the county of Wilts aforesaid, yeoman, in his own proper person, cometh before us, &c. justices, &c. And now he giveth us the said justices to understand and be informed, that one Maurice Jarvis of Trowbridge in the county of Wilts, labourer, within three months now last past, that is to say, on the fourth day of September now last past, in the twenty-eighth year, &c. with force and arms, in a certain field commonly called, &c. lying and being within the parish and manor of Hilperton aforesaid, in the county of Wilts aforesaid, did unlawfully keep and use, and had in his custody and possession, one setting-dog and setting-net for the destruction of the game; and did then and there ride with and hunt the said setting-dog, with an intent to kill and destroy game; he the said Maurice Jarvis at the time and place when he so kept and used the said setting-dog and net and had the same in his custody and possession, was not qualified by any laws or statutes of this realm, to kill game, or to keep or use any nets, dogs or other engines for the destruction of the game; contrary to the form of the statutes in that case made and provided. And thereupon afterwards, that is to say on the said 10th day, &c. at, &c. aforesaid, Thomas Webb, servant and game-keeper to Edward Eyles, Esq.; for the manor of Hilperton aforesaid in the county of Wilts aforesaid, a credible witness in this behalf, in his own proper person, cometh before us, &c.; and taketh his corporal oath on the Holy Gospel of God, to speak the truth of and concerning the premises above-mentioned and specified in the said informa-[149]tion before us, the said &c. the justices aforesaid, having sufficient power and authority

\* V. post, p. 226, S. P.



to administer the said oath to the said Thomas Webb in this behalf; and the said Thomas Webb being so sworn as aforesaid, afterwards, that is to say, on the said 12th day, &c. upon his said oath so taken before us the said justices aforesaid, saith, deposeth and sweareth, of and concerning the premises aforesaid in the said information above-mentioned and specified, "that, &c. (fully proving the fact;) he the said M. Jarvis, at the time and place when he so kept and used the said setting-dog and net, and had the same in his custody and possession, was not qualified by any laws or statutes of this realm, to kill game, or to keep or use any nets, dogs, guns, or other engines for the destruction of game; contrary to the form of the statutes in that case made and provided."

Whereupon the said M. J. having first been duly summoned in this behalf to answer the premises, and having had due notice thereof, afterwards, that is to say, at the house of, &c. appearing and being present in his proper person before us the said, &c.: and the said Thomas Webb the witness aforesaid also appearing and being present before us the said justices; and the information aforesaid, and the matter therein contained, and also the said evidence thereupon given, having been heard and understood by the said M. J. in the presence of the said Thomas Webb the witness aforesaid, and of us the said justices; he the said Maurice Jarvis is asked by us the said justices, "If he the said M. J. hath, knoweth, or can say any thing for himself in his own defence, touching and concerning the premises aforesaid; and why he the said M. J. should not be convicted of the premises aforesaid, charged on him in and by the said information."

And the said Maurice Jarvis, now here before us the said justices, denies that he did keep and use the said setting-dog and net, and had the same in his custody and possession, in manner and form as is above charged on him; but shews no sufficient cause before us the said justices, why he should not be convicted of the offence above-said charged on him in the said information. And upon hearing and examining the whole matter aforesaid, and every thing alledged by the said Maurice Jarvis touching and concerning the premises aforesaid, it manifestly and plainly appears unto us the said justices, that the said M. J. was not then any wise qualified, impowered, licensed or authorized, by or according to the laws of this realm, to kill game; and that the said M. J. is guilty of the premises abovesaid, charged on him in and by the said information.

[150] Therefore it is now here considered and adjudged by us the said justices, that the said M. J. upon the testimony of the said Tho. Webb the witness aforesaid, on his oath before us the said justices so taken as aforesaid, be and is convicted of the premises aforesaid, according to the form of the statutes in such case made and provided; and that the said M. J. do forfeit the sum of 5*l.* for the offence aforesaid, as the statute directs, &c.

Mr. Gould, for the defendant, took exceptions to his conviction.

1st. The justices have not shewn that they had jurisdiction over this defendant. For they have not sufficiently shewn his defects of qualification; which ought to have been specifically particularized, with an allegation "that he had not any one of them:" I mean the qualifications mentioned in 22 & 23 C. 2, c. 25.

To prove this to be necessary, he cited *Rex v. Ellers*, (qu. what, or where?) H. 12 G. 1. 2 I.d. Raym. 1415, *Rex v. John Hill*; most directly in point, *Bluel, qui tam, v. Needs*, P. 9 Geo. 2, in C. B. (entered Tr. 7, 8 G. 2). Comyns, 522, 523. Pas. 9 G. 2, (which he also cited, to shew the distinction between a declaration and a conviction;) a general averment is sufficient in a declaration: but convictions must set forth what was the want of qualification.

M. 19 G. 2, B. R. *Rex v. Pickles*, (the 2d exception in that case;) where it was indeed holden that it was not necessary to insert the inferred or argumentative qualification (collected from 5 Ann. c. 14, but not mentioned in 22 & 23 C. 2) "of his not being lord of a manor:" but it was there agreed, that those required by the Act of 22, 23 C. 2, c. 25, ought to be negatively specified.

1 Strange, 497, *Rex v. Sparling*, H. 8 G. 1, B. R. which was a conviction for swearing: and his occupation was therein said to be leather-dresser; but it was not shewn that he was not a servant, labourer, common soldier, nor seaman. The Court held, that giving him the addition of leather-dresser was not enough: and instanced the necessity of specifying the particulars of the defendant's want of qualification, in convictions on the Game-Act: in order to give the justices a jurisdiction which they.

otherwise, have not; and they also held, that conviction naught, because the particular oaths and curses were not set forth. And that conviction was accordingly quashed.

2d exception. The witness was examined privately and ex parte, prior to the appearance of the defendant, and [151] in the absence of the defendant, so that the defendant had no opportunity of cross-examining him.

3d exception. The time when the defendant was unqualified is not at all ascertained, in the adjudication of his being guilty. For it is only averred "that he was then unqualified;" but several days and times, distinct from each other, have been antecedently mentioned. (V. 148, 149, 150.)

Mr. Norton contra, for the conviction, begun with the 2d exception—It was necessary for the justice to take a previous examination, as a ground and foundation for his issuing the summons: and when the defendant attended, after having been summoned, the evidence was then read to him; and the witness also attended: and the defendant was asked "what he had to say for himself;" and did not desire to cross-examine the witness.

To the 1st exception—he answered—first, by citing *Rex v. Chandler*, in 1 Ld. Raym. 581. Where Holt, in delivering the opinion of the Court upon a conviction for deer-stealing, says "that it is sufficient for the justice to pursue the words of the statutes; and they are not, in these summary convictions, confined to nice and strict legal forms; it is enough, if they pursue the intent of the statutes."

If the defendant is really qualified, he may shew it: but how can the prosecutor prove the negative? Some of the qualifications are such as cannot well be proved in the negative; but it is easy for him to prove the affirmative.

Tr. 9 G. 2, *Rex v. Ford*—Conviction for keeping an alehouse, without license. Objected, that there was another former law upon which he might have been convicted: and in 3 C. 1, c. 3, there is a proviso to exempt such as have been so. But Cur'. held that if the defendant had been before punished upon 5, 6 E. 6, c. 25, he might have shewn this. V. 1 Strange, 555, S. C.

*Rex v. Theed*, 1 Strange, 608. Conviction for obstructing an Excise-officer, who came to weigh candles. Objection, that the Excise-officer's entry might have been by night, (by 8 Ann. c. 9,) and then there ought to have been a constable present. Cur'. That might have been shewn on the part of the defendant, if in fact so; and then he would not have been convicted: but they would not presume it.

Now here, the defendant did not insist upon being any way qualified; but only denied the commission of the fact.

[152] This conviction follows the very words of the Act of Queen Anne: which does not enumerate the qualifications, as that of C. 2 does: and this conviction is on the \* Act of Queen Anne; and not on 22, 23 C. 2, c. 25.

10 Mod. (Lucas) pa. 27, *Queen v. Matthews*, Tr. 10 Ann. B. R. (1st exception).

Viner's Abr. tit. Game, letter A. fo. 3, S. C.

Burn, tit. Game, fo. 304, S. C. which was a conviction on 5 Ann. c. 14, where one of the qualifications (viz. not being a game-keeper, &c. being a new qualification allowed by that Act) was omitted. And Cur'. held that it was not necessary to enumerate any: but as some of them were enumerated, it was fatal to omit another of them. (N.B. This case was adjourned.)

*Rex v. Marriot*, 4 G. 1, (1 Strange, 66,) was the very point. It was holden indeed that the witness cannot take upon himself to adjudge the qualification: but no notice at all was taken, in the determination of that case, of the justice not having adjudged it.

Clearly, this defect can, at the utmost, be only form: for in substance, it is the same thing. And it follows the Act of 5 Anne in terms.

As the case cited by Mr. Gould, of *Rex v. Ellers*—it does not appear what the state of the case was.

And the case in Comyns, 522, 523, rather makes for us. It is as reasonable that the defendant should make it out, that he was qualified, and shew how, on a conviction, as in an action.

In the case of *Rex v. Pickles*,—the conviction was affirmed: and yet a qualification within the Acts was omitted.



And this law can never, or hardly ever, be executed, if the Court should think themselves bound down by the case of *Rex v. Hill* (in 2 Ld. Raym. 1415).

3dly. As to the third exception—

But Lord Mansfield stopped him from proceeding, and also Mr. Gould from replying: for he said it was needless to enter into many reasons for quashing this conviction, when one alone is fully sufficient.

[153] It is now settled, by the uniform course of authorities, that the qualifications must be all negatively set out: otherwise, the justices have no jurisdiction over the persons killing game, or keeping dogs or engines for the destruction of it.

The obiter saying in 10 Mod. (if it was a book of better authority than it is,) would signify nothing, when the determinations are the other way.

There is a great difference between the purview of an Act of Parliament, and a proviso in an Act of Parliament.

In the case of *Rex v. Marriot*, Mich. 4 G. 1, B. R. (1 Strange, 66,) where the witness swears only generally; it was holden insufficient: (a) and the justices who convict upon the evidence of the witness, can have no other or further ground to go upon than what the witness swears.

In the case of *Rex v. Hill*, 2 Ld. Raym. 1415, in this Court, H. 12 G. 1, it is the very point established and settled, "that the general averment is not sufficient; and that it must be averred that the defendant had not the particular qualifications mentioned in the statute, as to degree, estate, &c."

In the case of *Bluet, qui tam, v. Needs*, Comyns, 525, the general averment of the defendant's not being qualified, was holden to be sufficient upon an action; though insufficient upon a conviction.

The distinction is obvious between an action and a conviction. And there it was agreed, (and it is given as the reason why it is not good upon a conviction,) "that it must be made out, before the justice, that the party had no such qualifications as the law requires," before the justice can convict him: and the justice must return "that he had no manner of qualification."

Here, the witness swears only generally, "that the defendant was not qualified, &c." The justices adjudge it generally, only. The stream can go no higher than the spring-head. So the conclusion which the justices draw from the testimony of the witness must be as general as that testimony.

In the case of *Rex v. Pickles*, it was laid down as a rule, "that the want of the particular qualifications required by 22 & 23 C. 2, c. 25, ought to be negatively set out in convictions:" and the only question there was, whether it was necessary to add—"nor lord of the manor." *Exceptio probat regulam*: nor was the general rule at all doubted or disputed, in that case.

[154] In indictments upon 8, 9 W. 3, c. 26, for having a coining-press, every thing which shews that the defendant had no authority, must be negatively set out. And so it was done, in the indictment of Bell, which was lately argued before all the Judges.

I take the point to be settled by the constant tenor of all the authorities; and I

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(a) The case in Strange, 66, was in substance this; "Conviction reciting that one W. T. informed that the defendant being a person not qualified to keep a greyhound, did nevertheless keep one at A. and killed an hare at A. and being summoned, did appear, and being asked what he had to say, offered nothing in excuse, and ideo the justice convicted him. The Ch. J. seemed to think the conviction would be good, having followed the words of 5 Ann. and that if the defendant was qualified, he ought to have shewn it before the justice, being summoned for that purpose; but then Eyre, J. started an objection that it was not the justice that had taken upon him to say the defendant was not qualified, but only the witness: so that he takes upon himself to judge of the defendant's qualifications, and the justice is only made an instrument to reduce the opinion of the witness into a conviction. C. J. The existens, &c. should be the conclusion of the justice, and not the words of the witness, for he ought not to swear generally a man is not qualified; and such a general proof will not be good: this is only an invention to support a conviction in general terms which would be bad, if the particular facts were alledged. And this conviction was quashed, and the principal reason declared to be because the witnesses had taken upon themselves to judge of the qualifications."

think, upon very good reason, (if there was need to enter into the reason at large, after it has been fully settled already).

Therefore I am of opinion that the conviction ought to be quashed.

Mr. Just. Denison concurred with Lord Mansfield.

He said it was a clear case; and that it was fully settled and established, "that in these convictions, the want of the particular qualifications mentioned in the Act of 22 & 23 C. 2, ought to be negatively set out:" if not, the justices have no jurisdiction to convict the defendant as an offender. And the evidence and adjudication ought, both of them, to be, "that he has not these qualifications, which are specified in that Act; nor any of them."

Indeed you are not obliged to go further than the words of this Act of Parliament of 22 & 23 C. 2, and that was the case of *Rex v. Pickles*. But however, in that case, the present point was established, and taken to be indisputable.

It is said, that "it is sufficient to lay the offence in the words of the Act of Parliament."<sup>(a)</sup><sup>1</sup>

But that is not always sufficient: it may be necessary to go further. P. 28 G. 2, B. R. *Rex v. Chapman*, about robbing an orchard, was a case where the mere pursuing the words of the statute was not sufficient.

But this point now before us is a settled case: and therefore there is no need to enter into arguments about it.

The conviction ought to be quashed.

Mr. Just. Foster concurred.

[155] On negative Acts of Parliament, the point is fully settled and established, "that the particular qualifications mentioned in the purview of them, must be negatively specified in convictions made upon them."

By the Court unanimously,

Conviction quashed.

ROYAL-EXCHANGE ASSURANCE COMPANY *versus* VAUGHAN. Tuesday, 1st Feb. 1757.  
Royal Exchange Assurance Company assessable to the land tax.

This case was just mentioned to the Court on 18th November 1755; and again, on 3d February 1756: but was first argued on 7th May 1756: and now, lastly, on this day.

It was an action of trespass, brought by the company: and the question (upon a special verdict) was, "whether this company are at all, or how far they are liable to be assessed to the land tax."<sup>(a)</sup><sup>2</sup>

The special verdict was very long. In it were found, at large, the statute of 6 G. 1, c. 18, which gave rise and establishment to this company; and the several charters from the Crown which increased its fund, and enlarged its powers beyond what they were originally intended (or at least explicitly established) by that Act of Parliament; the original foundation of it being only for insurance of ships\* with a smaller fund: but the subsequent charters extended their powers, to insurances of houses and goods from fire, and upon lives; and also increased their fund.

(a)<sup>1</sup> It doth not seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly alledge the fact, in the doing or not doing whereof, the offence consists, without any the least uncertainty or ambiguity. 2 Hawk. P. C. 249, sec. 3.

A conviction for deer-stealing, by a justice of peace, was removed by certiorari, and exceptions argued and overruled; and Holt, pronouncing the opinion of the Court, said that "in these convictions by justices of the peace in a summary way, where the ancient course of proceeding by indictment, and trial by jury is dispensed with, the Court may more easily dispense with forms; and it is sufficient for the justices in the description of the offence to pursue the words of the statute." *Rex v. Chandler*, 1 Ld. Raym. 581.

(a)<sup>2</sup> Qu. if that does not afford an argument that they were not liable to the land tax?

\* [And goods at sea, or going to sea, and lading on bottomry.]



In the above-mentioned Act of Parliament (*b*), the original fund was expressly exempted from being taxed.

Several facts were also found: particularly, the manner in which this company have carried on their business under all these powers jointly, and not under each separately.

The present assessment is for their whole stock, and in their corporate capacity.

They never had been taxed at all, till now. And they were now taxed, in their corporate capacity, under the Land-Tax Act of 27 G. 2, c. 4: (of which, see pages 48, 64 & 75).(*c*)

By the Act of 6 G. 1, c. 18, their capital was 1,500,000*l*.: and they were thereby exempted from all Parliamentary taxes. This was only a power to insure ships and goods at sea.

[156] A few years after, the very same persons obtained a charter to extend their power to insure houses and goods at land, and upon lives; and also to extend their capital 500,000*l*. farther than the former sum.

Upon the first argument—

The Court seemed, all of them, to see this matter pretty much in the same light: and they all made two questions; into which, they divided the whole of this case; viz.

1st, whether the original capital that was raised under the Act of Parliament of 6 G. 1, c. 18 (§ 2), and was now become part of the fund of the present charter (*a*) corporation, was exempted from Parliamentary taxes, by virtue of the exempting clause contained in 6 G. 1, c. 17 (§ 10), which Act of Parliament related only to the original company for insurance of ships; but did not extend to the present corporation established by charter; which charter has extended their power and enlarged their capital.

2dly, whether this original capital was the personal estate of the company; and liable to be taxed as the company's personal estate, in their corporate capacity: or whether the tax ought to have been laid upon each individual member of the company, for his respective share, in his own proper ward.

As to the first question—the Court were unanimous and clear, that the exemption under the Act of Parliament of 6 G. 1, was confined to the original fund and company established by that Act; and could not be extended to the present corporation, which was founded upon a subsequent charter of the Crown, which neither did nor could give any such exemption.

And they thought that this original capital having been part of the statute-company's fund, and only continued by the charter-corporation, made no difference in the case.

As to the 2d question, they thought it a point of importance and extensive consequence, and therefore desired a further argument: though they seemed inclined to think that it was properly taxed, as part of the company's personal estate, in their corporate capacity, by virtue of the clauses in fo. 48 & 64 of 27 G. 2, c. 4. It therefore stood over, for an

Ulterius concilium.

Upon which further argument, Lord Mansfield was so extremely clear, that he said he had been endeavouring (to the utmost of his power) to raise a doubt; but could not.

[157] In 4, 5 W. & M. the districts and divisions were allotted. So that the question here is only between the divisions: not between the city, and the company.

(*b*) Sec. 10.; by which the stock of the corporation to be established pursuant to this Act, and the shares of the members in the same, are exempted from all taxes, rates, and impositions whatsoever by Act of Parliament or otherwise.

(*c*) Vide sections 3, 21, and 54.

(*a*) As the subsequent charter departed from the original institution, by extending the powers of the corporation to insurances from fire, and on lives as mentioned by Burrows (which charters Mr. Serj. Hill said he had not seen;) and the exemption was not confined by the above-mentioned 10th sec. to the corporation to be established pursuant to the Act, and to the stock to be raised for the purposes in the Acts; and by the latter charters the corporation was not pursuant to the statute, nor the stock for the same purposes as before, the exemptions ought to cease; and the sections of the Land Tax Act as above, seem to have been particularly introduced with a view hereto.

And this special verdict was only meant, (as it is plain by the finding,) to try the first point. Nothing is found about shares of proprietors : nor was this second point then thought of.

It is plain they are to be rated as a corporate body, by fo. 76. And to rate the individuals, would be almost impossible. The argument would prove too much : viz. that no corporation could be taxed.

The Hudson's Bay Company are said to be rated for their stock : and there is a particular direction given, where the Bank of England are to be rated.

Mr. Just. Denison concurred.

The original capital raised under 6 G. 1, c. 18, was intended for another purpose. The question was certainly made upon the first point : and this second point was not, I dare say, at that time, thought of. And here is nothing stated, to bring this second point within the clause in fo. 75 & 76 of the Act of 27 G. 2, c. 4. Therefore we cannot take this to be any more than the common case. They are taxed as a corporate body, within the clause in fo. 48 : and I do not see how they could have been taxed otherwise.

Therefore judgment ought to be for the defendant.

Mr. Just. Foster was of the same opinion.

The first point, he observed, was determined before the present argument, and rightly. The company had imposed both upon the Crown, and upon the adventurers, by blending their different stocks together.

As to this second point, it cannot bear a question "whether they should be taxed in their corporate capacity, or as individuals." It was intended, and it is the natural and proper way, to tax the corporation, in their corporate capacity. And this is what the Act manifestly meant : the tax is to be paid out of the stock ; and this will occasion a proportionable deduction out of the dividends.

By the Court unanimously, (except that Lord Commissioner Wilmot was, at the time of the second argument, absent in Chancery),

Judgment for the defendant.

[158] MASTER AND SENIOR FELLOWS OF JOHN'S COLLEGE, CAMBRIDGE, *versus* TODINGTON, CLERK. Thursday, 3d Feb. 1757. Visitor of an ancient college is visitor also of engrafted foundations, unless a special visitor is appointed. [S. C. 1 Bl. 71, 81. 2 Vez. 78. See also 2 Durn. 310, 312. 4 Durn. 238. 2 Ves. jun. 617.]

[See *Worthington v. Jeffries*, 1875, L. R. 10 C. P. 386 ; *R. v. Hertford College*, 1878, 3 Q. B. D. 702.]

A prohibition had been prayed by the college, to be directed to the Bishop of Ely, to prohibit him from proceeding upon a monition issued by him against them, upon Mr. Todington's application and appeal to him, as visitor of the college : and the college had thereupon obtained a rule to shew cause why a prohibition should not go. Which rule to shew cause was made upon a suggestion "that the bishop was not visitor of the college, as to elections into fellowships and other offices ;" and also, "that admitting him to be so, yet the present matter (which related to a Southwell-fellowship) was not within his jurisdiction : " for, the suggestion set forth a deed of covenants (all on the part of the college,) relating to a foundation of two fellowships and two scholarships by Dr. Keton : in which deed and covenants, a power is reserved to Dr. Keton, to make statutes (to which his fellows and scholars were to be sworn,) so as they should be conformable to the statutes of the foundress of the college. And there is also a penalty and forfeiture given to Dr. Keton and his trustees, and also to the church of Southwell ; and a clause of distress, for the said forfeiture or penalty, upon two of the college manors, in case the college should break the covenants. The suggestion adds "that Dr. Keton, in fact, never gave any statutes, or made any declaration, in relation to these fellowships."

The gravamen complained of, is a citation from the Bishop of Ely to the master and senior fellows, upon the complaint of the said Tho. Todington, clerk, on his being refused an election into one of these two Southwell-Fellowships ; shewing, "that he was within the description of the endowment ; whereas they had chosen one William Craven, who (as Mr. Todington alledged) was not so ; and that the bishop had also

cited the said William Craven, as well as the said master and senior fellows, to appear before him at Ely-House, &c."

In order to have a clear and full conception of this case, it may be necessary to specify this suggestion at large ; and also to premise some other particulars which are requisite to be known : which are, 1st. The deed between the executors of Margaret Countess of Richmond (the foundress) and Bishop Fisher, confirmed by the Prior and Convent of Ely ; 2dly, Some extracts from Bishop Fisher's statutes ; and 3dly, Some extracts from those statutes which Queen Elizabeth afterwards gave to this college, and under which the college have ever since acted.

[159] THE SUGGESTION, (at large—)

Hilary term in the 29th year of the reign of King George the Second.

England, to wit.—Be it remembered that on the eleventh day of February in this same term, come into Court here John Newcome Doctor in Divinity Master of the College of St. John the Evangelist in the University of Cambridge, and the senior fellows of the said college ; and give the Court here to understand and be informed, that whereas all pleas of and concerning any lands and tenements, and of and concerning any estate or interest of freehold, and also of and concerning the construction and operation of deeds and writings under seal, and of debts arising thereby, and the cognizance of the same pleas, to the lord the King and his Royal Crown especially appertain and belong, and at the common law in the Courts of Record of our lord the King, and not in the Ecclesiastical Court, nor by any Ecclesiastical Judge, ought to be tried, discussed and determined, and always hitherto have been so accustomed to be tried, discussed and determined ; and whereas the Bishop of Ely for the time being is not visitor of the said college, as to elections into fellowships or other offices in the said college, nor hath any visitatorial power or jurisdiction whatsoever over the master and fellows of the said college, or any of them in that respect : and whereas by an indenture tripartite made the twenty-seventh day of October, in the twenty-second year of the reign of our Sovereign Lord King Henry the Eighth, between Sir Anthony Fitzherbert, Knight, then one of the King's Justices of his Common Pleas and John Keton Doctor of Divinity and Canon of the Cathedral Church of Salisbury upon the one part, the Chapter of Southwell within the county of Nottingham upon the second part, and the then Master, Fellows, and Scholars of the College of Saint John the Evangelist, in the University of Cambridge upon the third part, it was covenanted, condescended, and agreed between the said parties for them their heirs and their successors for ever in the form following that is to wit, first, the same Master, Fellows, and Scholars of the College of Saint John aforesaid had granted, for them and their successors for ever, unto the aforesaid Dr. Keton, that he for himself, at the nomination and appointment as thereafter expressed, should have two fellows and two disciples founded and sustained at the costs only of the said Master, Fellows and Scholars within the College of Saint John aforesaid, there to continue for ever of his foundation, over and above other [160] fellows, scholars or disciples then founded or thereafter to be founded by the foundress of the said college or any other person or persons that then had given or thereafter should give lands or goods to such purpose and intent ; and the said master, fellows and scholars of the said college thereby covenanted and granted unto the said Sir Anthony Fitzherbert, Doctor Keton and to the said chapter, and to their heirs and successors, that the said fellows and scholars or disciples of the foundation of the said Doctor Keton should have and enjoy all manner of profits, as well meat, drink, and wage, as all other commodities, easements, and liberties, like and in as large manner as other fellows and scholars of the same college by the foundress' foundation of the same college then had or in time then coming should have in any manner of wise, at the proper costs and charges of the same Master, Fellows and Scholars of the College of Saint John the Evangelist aforesaid and of their successors for ever ; and the same master, fellows and scholars by the said indenture covenanted and agree unto the said Sir Anthony Fitzherbert, Doctor Keton and chapter of Southwell and to their heirs and successors, that the same two fellows of the foundation of the said Doctor Keton should have, receive and perceive of the said master, fellows and scholars and their successors every year twenty-six shillings and eight pence sterling over and above the wage limited to other fellows of the foundress'



foundation, that is to say, to either of them eight shillings and four pence sterling, at the Feasts of Easter and Saint Michael yearly, by even portions: furthermore, the said Master, Fellows, and Scholars of Saint John aforesaid thereby covenanted and granted for them and their successors unto the said Sir Anthony Fitzherbert and Doctor Keton or the longer liver of them, that they from thenceforth should have the nomination and election of the said fellows and scholars or disciples during their lives naturally, and after the decease of the said Sir Anthony Fitzherbert, and Doctor Keton, then the said fellows and scholars or disciples should be at the nomination and election of the said Master, Fellows and Scholars of the College of Saint John aforesaid, and of their successors for ever after and according to such ordinance and writing as the said Doctor Keton should thereof make and declare by his last will or otherwise; provided alway that the said fellows and scholars or disciples should be elect and chosen of those persons that be or had been queristers of the Chapter of Southwell aforesaid, if any such able person in manners and learning could be found in Southwell beforesaid; and in default of such persons there, then of such persons as had been choristers of the said Chapter of Southwell, which persons should be then inhabitant or abiding in the said University of Cambridge; and if none such should be found able in the university aforesaid, then the same fellows and scholars or disciples to be elected and chosen of such persons that should be most singular in manners and learning, of what country soever they should be, that should be then abiding in the same university. Furthermore the same master, fellows and scholars covenanted and granted by the said [161] indenture unto the abovenamed Sir Anthony Fitzherbert and Doctor Keton and to the said chapter their heirs and successors, that when the said two fellows and two scholars or disciples of the foundation of the said Doctor Keton or any of them should chance to die or otherwise depart from the said college and leaved or leased his or their title or profits of the same, that then immediately after that leasing, leaving, departing, or ceasing, at the then next time of election of fellows or disciples of the said college limited by the statutes of the College of Saint John aforesaid, other fellow or fellows, disciple or disciples, as the case should require, should be elected, named and chosen by the said master, fellows and scholars according to those then present covenants and agreements, according to such ordinances or will as the same Doctor Keton should thereof make and declare. And also it was covenanted and agreed by the said indenture, that the said Master, Fellows and Scholars of Saint John aforesaid, and also the fellows and scholars of the foundation of the said Doctor Keton, at the time of their admission should be sworn to observe and keep the statutes and ordinances that then were made or thereafter should be ordained and made by the said Doctor Keton for the foundation of the said fellows and scholars; so that the said statutes should be conformable with the statutes of the foundress of the said college. For the which all and singular the premises well and truly to be observed and kept by the said master, fellows and scholars and their successors in manner and form as is aforesaid, that is to say, as well for the elections and admissions of the said fellows and scholars and for their finding, as for wages yearly to be paid to the same, with all other liberties, commodities and profits likewise pertaining unto them, as for all other covenants and agreements with all and singular the premises according to the ordinances above rehearsed, the said Doctor Keton had contented given and paid to the said master, fellows and scholars, in money, plate, and other jewels, the value of four hundred pounds sterling. Further it was covenanted and agreed by the said indenture, between the said parties, for them and their successors, that if the said master, fellows and scholars and their successors did fail in taking, admitting or receiving of the said fellows and scholars in any time of election next after the avoidance, and \* not chosen or admitted into the said college according to the ordinances and agreements above rehearsed, or had not nor enjoyed not their full commodities and profits as is aforesaid, then the aforesaid master, fellows and scholars and their successors should forfeit as well to the said Sir Anthony Fitzherbert and Doctor Keton as to the Chapter of Southwell, and to their heirs and successors, in the name of a penalty or pain for every default made or no due election of the said fellows and [162] scholars or any of them, twenty shillings for every month that it should happen the said fellows and scholars not to be chosen nor admitted into the said college as is aforesaid, or restrained of any profits, commodities or easements

\* Here seems to be an omission or mistake of some words.

as is aforesaid; and that then it should be lawful as well to the said Sir Anthony Fitzherbert and Doctor Keton on their party, as to the Chapter of Southwell, and to their heirs and successors for their party, into the manors of Marflete and Millington in the county of York, and into the manor of Little Markham in the county of Nottingham, to enter, and distrain for the same twenty shillings, and the arrears of the same for every time or times of forfeiture, and the distress to withhold until the said twenty shillings with the arrearages of the same should be to them well and truly satisfied, contented, and paid. Also the said master, fellows and scholars by the said indenture covenanted and granted unto the said Sir Anthony Fitzherbert and Doctor Keton, that they the said master, fellows and scholars and the successors, at every time and times during the life natural of the said Sir Anthony Fitzherbert and Doctor Keton, should give notice and knowledge to the said Sir Anthony Fitzherbert and Doctor Keton or to the longer liver of them, within six days, when and as often as it should fortune any of the said fellowships or discipleships to be void or vacant; so that the said Sir Anthony Fitzherbert and Doctor Keton or the longer liver of them might nominate and appoint other fellow or fellows disciple or disciples apt and able to have, receive and take the said fellowships or discipleships so then being void. And whereas the said Doctor Keton did not at any time, by his last will or otherwise, make or declare any statute or ordinance, other than what was contained in said above recited indenture, of or concerning the said fellowships called Southwell Fellowships, or of or concerning either of them; nevertheless the Right Reverend Matthias by divine permission Lord Bishop of Ely, well knowing the premises, but contriving and intending to aggrieve and oppress the said master and senior fellows of the college aforesaid, against the due course of the law of this realm, and to disinherit our lord the King and his Crown, and to draw the cognizance of a plea which belongs to His Majesty's Temporal Courts and ought there to be tried, discussed and determined, to another trial before the said lord bishop, hath lately drawn into a plea the said master and senior fellows of the college aforesaid, before the said lord bishop, by a certain inhibition, citation and monition bearing date the twenty-ninth day of January in the year of our Lord one thousand seven hundred and fifty-six, reciting that "whereas on the part and behalf of the Reverend Thomas Todington, clerk, of the same college, Bachelor of Arts, it had been (with grievous complaint) alledged and shewn to the said lord bishop, that the [163] Reverend John Newcome, Doctor in Divinity, master of the said college, and the senior fellows of the same unjustly and unduly proceeding in the election of fellows of the said college, did on or about the seventeenth day of March last choose and elect the Reverend William Craven, Bachelor of Arts, into a fellowship in the said college commonly called a Southwell Fellowship, founded by the Reverend John Keton, Doctor in Divinity, vacant by the resignation of the Reverend Theophilus Lindsey Bachelor of Arts late one of the Southwell fellows of the said college as aforesaid, and did refuse to elect and admit, at least did not admit and elect the said Thomas Todington into the said vacant Southwell Fellowship, notwithstanding the said Thomas Todington who was an inhabitant abiding within the said college and had been chorister of the church of Southwell in the county of Nottingham several years offered himself a candidate and prayed to be elected and admitted into the said fellowship, and no other chorister of the said church of Southwell offered himself a candidate for the said vacant fellowship; and that he the said Thomas Todington, apprehending himself to be greatly injured and aggrieved by the pretended election aforesaid and other pretended proceedings of the said master and senior fellows, as well by virtue of their pretended office as at the unjust instigation, solicitation, procurement, and petition of the said William Craven, and justly fearing that he might be further injured and aggrieved thereby, had from the same and every of them, and especially from the said pretended choice and election of the person of the said William Craven into the aforementioned vacant fellowship in the said college, so made or pretended to be made by the said master and senior fellows, notwithstanding the said Thomas Todington offered himself a candidate and prayed to be elected and admitted into the said vacant fellowship, and no other chorister of Southwell offered himself a candidate for the same; and from their refusing to elect and admit at least not electing and admitting the said Thomas Todington into the said vacant fellowship; and from all and every thing that did or might follow therefrom: and from all and singular other grievances, nullities, iniquities, and errors in proceeding; and from all other acts, facts, and things illegally



done, that might be collected from the pretended proceedings of the said master and senior fellows in the said pretended election; to the said lord bishop, visitor of the said college, rightly and duly appealed, and of and concerning the nullity and iniquity of all and singular the premises aforesaid had equally and alike principally alledged and complained;” and also reciting that “whereas the said lord bishop, rightly and duly proceeding, had at the petition of the proctor of the said Thomas Todington (justice so requiring,) decreed the inhibition, citation and monition thereunder written, the said lord bishop did there-[164]-fore thereby authorize, empower and strictly injoin and command all and singular clerks and literate persons, whomsoever and wheresoever, jointly and severally, that they should inhibit or cause to be inhibited, personally, if they conveniently could so do otherwise, by publicly affixing the said monition for some time on the outward door of the chapel belonging to the said college, and by leaving there affixed a true copy thereof the said master and senior fellows, and also the said William Craven, in special, and all others in general who by law were required to be inhibited in that behalf; all and every of whom, the said lord bishop also by the tenor of the said monition did inhibit and injoin that they nor any or either of them should innovate or attempt or cause or procure to be done, innovated or attempted any thing to the prejudice of the said Thomas Todington or his said cause of appeal or the authority or jurisdiction aforesaid of the said lord bishop, pending the said cause of appeal and complaint, and so long as the same should remain undecided before the said lord bishop, so that the said Thomas Todington the appellant might have free liberty and power (as in justice he ought) to prosecute that his said cause of appeal and complaint, under pain of the law and their contempt; and also that they should in like manner cite the said master and senior fellows and also the said William Craven, or cause them to be peremptorily cited to appear before the said lord bishop at his mansion house commonly called Ely House situate in the parish of Saint Andrew Holborn in the county of Middlesex, on Monday the ninth day of February then next ensuing, between the hours of three and six in the afternoon of the same day, then and there to answer to the said Thomas Todington in his said business of complaint; and further to do and receive as to law and justice should appertain, under pain of the law and their contempt: and moreover that they should monish or cause to be monished peremptorily, in like manner, the said master and senior fellows and officers of the said college in special, and all others in general, that they some or one of them should transmit or cause to be transmitted to the said lord bishop at the time and place aforesaid, all and singular the statutes, Acts, original exhibits, books, indentures, miniments, instruments and proceedings in or any wise concerning the said pretended election or the said cause of appeal and complaint, and more especially the statutes, books and indentures in the thereunder written schedule mentioned, under pain of the law and their contempt; and what they should do in the premises, they should duly certify to the said lord bishop, together with the said monition, and the said lord bishop hath annexed the following schedule to the said monition, (to wit) the original statutes of the college given by Queen Elizabeth or an authentic copy thereof, the indenture [165] bearing date the twenty-seventh day of October in the twenty second year of the reign of King Henry the Eighth relating to Doctor Keton's or the Southwell Fellowships founded in the said college, the book or books wherein the election of fellows and the proceedings thereon are entered, the book of battles or buttery book for the months of February and March last;” as by a copy of the said monition, and schedule thereto annexed, here in this Court read, more fully appears. And although the said master and senior fellows of the said college have pleaded and alledged all and singular the matters aforesaid by them above suggested and alledged, before the said lord bishop, in their discharge of and from the premises aforesaid; and have offered to prove the same by undeniable testimony and proof; yet the said lord bishop hath wholly refused to receive or admit the said plea, allegation and proof, and then by definitive sentence of the said lord bishop, in the said premises, with all his might doth endeavour and daily labour to condemn; in great contempt of our lord the now King and his laws, and to the great damage and injury of the said master and senior fellows of the said college: all which said premises the said master and senior fellows of the said college are ready to verify and prove, as this Court here shall direct. Wherefore the said master and senior fellows of the said college, imploring the aid and munificence of this Court here, pray relief and His Majesty's writ of prohibition to be directed to



the said lord bishop in this behalf, to prohibit him that he do not any further hold plea before him, touching the premises aforesaid or any part thereof. And it is granted to them, &c.

### THE DEED.

#### *Suppressio Domûs Sancti Johannis in Cantab.*

This indenture made the twelfth day of December in the second year of the reign of our Sovereign Lord King Henry the Eighth, between the reverend father in God Richard Bishop of Winchester, John Bishop of Rochester, Sir Charles Somerset, Knt. Lord Herbert, Sir Thomas Lovell Knight, Sir Henry Marney Knt. Sir John Saint John, Knight, Henry Hornby clerk, and Hugh Asheton clerk, executors of the testament of the excellent Princess Margaret late Countess of Richmond and Derby and grand-dame to our said Sovereign Lord King Henry the Eighth, on the one party, and the reverend father in God James Bishop of Ely and Ordinary of the house or priory of Saint John in Cambridge, on the other party, witnesseth, that whereas our holy father the Pope by his bulls under ledd, for the increase of virtue learning and doctrine and preaching of the word of God, and to the establishing of Christ's [166] faith, and for divers considerations expressed in the said bull, hath suppressed extinguished and determined the foundation and religion of the said house and priory, by the Royal assent of our said Sovereign Lord the King that now is, by his letters patents under his Great Seal, and also by the assent and agreement of the said reverend father James Bishop of Ely, confirmed by the prior and convent of the cathedral church of Ely, as in the said bulls letters patents and other writings thereof made, more plainly appeareth; it is now covenanted betwixt the said parties and fully concluded, and by the said reverend father Bishop of Ely granted, that he for the better execution and assurance of the premises, shall before the sixteenth day of January next ensuing after the date of these presents, avoid and cause to be avoided and removed out of the said house and priory, all such and as many religious persons as now be incorporated and possessed in the said house and priory of Saint John, or that can or may pretend or claim any right title or interest in or to the said house or priory or to the possessions thereof by reason of their profession or incorporation within the same; and utterly make void and dispose the said religious persons from the said house and priory, and all such right title claim and interest as they or any of them have pretended or claim to have within the same house and priory or to the possessions or to any thing thereunto belonging; and also cause the same religious persons and every of them, by authentic instrument, in sure and sufficient form to be made, to resign and renounce all such right title claim and interest as they or any of them have or in any manner of wise may have to the said house or priory or to the possessions or to any thing thereunto appertaining; and that the same bishop shall translate or cause to be translated all the same religious persons into other house or houses of the same religion, and cause them and every of them clearly to renounce relinquish and leave the same house and priory and all the possessions thereof, and clearly to depart and to be utterly excluded from the same for ever, and to be really and effectually accept and incorporate in some other house or houses of the same religion: and cause the said house and priory of Saint John and the foundation and corporation thereof to be clearly dissolved and determined for ever, before the said sixteenth day of January next ensuing. And also the said Bishop of Ely covenanteth and granteth to the said executors, by these presents, that he, before the Feast of the Purification of our Lady next ensuing, and at all times after, when he shall be reasonably required by the said executors or any of them, shall make and cause to be made all such grants and assurances to the said executors their heirs and assigns, of the said house and priory of Saint John, and of all the manors lands tenements and possession and all other that belongeth and at any time belonged thereunto, to have and hold to the same executors their heirs and assigns, [167] as shall be advised by the learned counsel of the same executors, their heirs and assigns or any of them, at their costs and charges; and cause all the same grants and assurances to be confirmed by the prior and convent of the said cathedral church of Ely, by their deed and deeds sealed with the common seal, in such wise as shall be advised by the said executors or any of them; so that the said executors or some of them, by reason and authority of the said bulls and of the said letters patents and other premises, may make lawful perfect and sure translation of the said

house and priory of Saint John and the possessions thereof, unto a perpetual college, of a perpetual master and fellows, and there erect found and establish a perpetual college, of a perpetual master and fellows, according to the will mind and intent of the said prince, and according to the ordinances and statutes of the said executors, thereof to be made by virtue and authority of the said bulls and letters patents, there perpetually to endure: and on this, the said Bishop of Ely covenanteth and granted to the said executors, by these presents, that the same bishop and his successors, and also the said prior and convent of the said cathedral church of Ely and their successors, shall at all times do and cause and suffer to be done all things necessary and requisite for the said translation and for the foundation and establishing of the said college for ever to endure, as by the learned counsel of the said executors or any of them shall be advised, at the costs and charges of the said executors. And the said executors, by these presents, permit and grant to the said reverend father Bishop of Ely, that the said master and fellows, within one month next after that they shall be founded and have real and corporal possession of the same house and priory and of the manors lands and tenements and possessions of the same, shall grant, by their sufficient writing under their common seal, for the exhibition and finding of the said religious persons during their lives, to every of them or to other persons at their nomination, an annuity of 6l. 13s. 4d. by the year, to be had and perceived to every of them during their lives, out of the said houses manors lands and tenements, at two feasts of the year, that is to say Easter and Michaelmas, by even portions, with a sufficient clause of distress in the same house and in all the said manors lands and tenements, for sake of payment of the same. And the said executors covenant and grant to the said reverend father in God Bishop of Ely, by these presents, that after the said translation of the said house and priory and foundation of the said college, the same executors, in their statutes and ordinances thereupon to be made and ordained for the ordering and continuance of the same college, shall ordain and establish (among other things) that the jurisdiction ordinary of the same college and of the said churches and chapels thereunto belonging shall appertain and belong to the same bishop and his successors for ever-[168]-more, and that the master and fellows shall pray for the good estate of the said bishop during his life, and for his soul after his decease, as the secondary founder benefactor and partner in the said holy and meritorious work, and also for the good estate of all his successors in time to come Bishops of Ely, during their lives, and for the souls of his predecessors patrons and founders of the said house and priory, and for the souls of his successors as secondary founders of the said college; and on that, the said executors shall provide and make statutes and ordinances of the said college, in such manner that there shall not be any ambiguity in the elections of the masters and fellows of the said college. And also the same executors granted to the said reverend father in God Bishop of Ely, by these presents, that the same reverend father in God, during his life, shall name and choose three apt and able persons, scholars; and his successors, after his decease, one apt and able person, scholar; to be made fellows of and in the said college, and there to be accepted and admitted fellows of the same college, at their nomination and election; and that to be renewed and used, as oft as the place of any of them shall happen to be void: and on that, the said executors granten to the said reverend father in God Bishop of Ely, that they shall ordain and provide in the said statutes, that the master and fellows of the said college shall be bounden to pray for all singular persons as well alive as dead, for the which the said religious brethren of the said house and priory were bound to pray, in like wise as the said executors have before this time promised and covenanted with the same reverend father in God to be done. In witness whereof the said parties to these present indentures interchangeably have set their hands and seals, the day and year abovewritten.

The Confirmation of the above Indenture, by the Prior and Convent of the Cathedral Church of Ely.

And we the prior and convent of the cathedral church of Ely, having and taking these present indentures and all and singular premises contained therein, freely agreed accept and approve; and the indenture, and all the same premisses contained and specified therein, unto the said executors their heirs and assigns, for us and our successors, ratify approve and confirm, by these presents; (rents consuetudes and all



other rights of our monastery and priory of Ely, to us and our successors, in all things, always saved and reserved). In witness whereof, we the said prior and convent to these presents have set our common seal. Given in our Chapter House, the fifth day of January in the year of our Lord God 1510.

[169] EXTRACTS from Bishop Fisher's Statutes.

Statuta pro Collegio Divi Johis Evangelistæ infra Gimnasium Cantabrigiense sito.

Preamble—

Ut constet universis qui statuta præsentia lecturi sunt, quânam auctoritate sancita fuerint, hoc frontispicio locandum censuimus instrumentum quoddam sigillis et subscriptionibus omnium executorum præstantissimæ Viraginis Domine Margarete Richmondie, fundatricis collegij divi Johannis Evangelistæ in Cantabrigia: quo instrumento per eosdem executores confecto, planè constat plenariam auctoritatem mihi Johanni Episcopo Roffensi traditam, pro condendis legibus et statutis, quibus tam magister quam socij et scholares pariter et discipuli teneantur obedire. Cujus quidem instrumenti tenoris est, qui sequitur.

“Universis Christi fidelibus præsentis literas inspecturis, Ricardus Winton. Episcopus Carolus Somerset Comes Wigornie Thomas Lovel Miles Henricus Verney Miles Johannis Seynt John Miles Henricus Horneby et Hugo Assheton Clerici, executores testamenti et ultimæ voluntatis nuper excellentissimæ principissæ Margarete Comitissæ Richmondie et Derbie, matrisque et aviæ duorum regum nimirum Henrici septimi et octavi, salutem in domino, et fidem indubiam præsentibus adhibere. Quum sit optandum potius ut non erigerentur collegia, quam ut erecta malè gubernarentur, nos executores antedicti, qui sumptibus et impensis præfatæ principissæ collegium Sancti Johannis in Cantabrigia extrui curavimus, simul et dotari, magno affectu cupimus id ipsum justis legibus sanctisque administrari, sanctionibus. Verum quoniam omnes nos unâ adesse commode non possumus, ut vel novam electionem sociorum in collegio prædicto faciamus vel sociis ita electis leges et sanctiones justas ac sanctas exhibeamus, denique juramentum ab eisdem exigamus pro legibus hmoi inviolabiliter observandis; ideo nostras vices committimus reverendæ patri Johanni Roffen Episcopo, ut ille tam nostrâ quàm suâ auctoritate possit numerum sociorum ibidem augere, magistroq; et sociis omnibus statuta salubria nostro nomine exhibere, atque ab eisdem juramenta exigere pro eorundem inviolabili observatione, recusantes verò (si qui fuerint) amovere, violantes corrigere, ac cætera omnia et singula peragere quæ pro salubri gubernatione ejusdem collegij sibi opportuna visa fuerint, æquè ac si nos illic omnes præsentem essemus: quæ omnia et singula universitati significamus per præsentem. In quorum omnium et singulorum fidem ac testimonium, sigilla nostra præsentibus apposimus. Dat. vigesimo die [170] mensis Martij, anno Domini millesimo quingentesimo quinto decimo.”

Ad cultum optimi maximi Dei ad honorem divi Johannis Evangelistæ, ac mox ad fidei Christianæ incrementum, nos Johannes Roffen. Episcopus, unus executorum ultimæ voluntatis nobilissimæ viraginis Domine Margarete Richmondie Derbieque Comitissæ genitricis et aviæ duorum Regum Henrici septimi pariter et octavi, nomine et auctoritate cæterorum co-executorum ejusdem comitissæ, nempe Ricardi Wintoniensis Episcopi Caroli Somerset Comititis Wigornie Thomæ Lovell Henrici Verney Johannis Seynt John Equitum Henrici Horneby Hugonis Ashton clericorum, leges et statuta quæ sequuntur Edidimus, magistroq; et sociis ac scholaribus collegij divi Johannis Cantabrigie tradidimus, quatenus eisdem omnino se conforment, tam hi qui jam sunt magister socij et scholares, quam eorum successores quotquot futuri sint in perpetuum.

De Electione Magistri.

Qd si tunc per \* viam spiritus sancti concordibus animis, nemine dissidente, in quempiam ejusmodi virum consenserint, qualis in statuto ante lecto descriptus est: aut si major pars omnium super aliquo ejusmodi consenserit; volumus et statuimus † qvis absque mora, (nulla prorsus licentia patroni ordinarij visitoris aut alterius cujus-cunque jurisdictionem ordinariam prætendentis, nec cessionis aut resignationis hujus-

\* Vim. qu.

† Qu. (forsitan, quodis).



modi eis vel eorum alicui † exhibeasne, aut ab eorum aliquo ejusdem approbatione expectata aut requisita,) per præsidem magister collegij pronuncietur, his verbis—

### De juramento Magistri.

Ego N. in magistrum collegij Sancti Johannis Evangelistæ in universitate Cantabrigiæ nominatus electus et præfectus juro, tactis et inspectis per me hiis sacro-sanctis evangelii, dictum collegium omnia beneficia terras tenementa possessiones redditus spirituales et temporales jura libertates privilegia et bona quaecunq; ejusdem nec non omnes et singulos socios et scholares et discipulos ipsius collegij, juxta statuta et ordinationes dicti reverendi patris Domini Johannis Fisher Roffen. Episcopi, absque personarum scientiarum facultatum generis et patriæ acceptione quacunque, pro mea virili regam custodiam dirigam et gubernabo, et per alios regi custodiri dirigi et gubernari faciam; nec ero factiosus, magis favens uni quam alii, contra justitiam et fraternitatis amorem; nec eorum alicui gravamina vel molestias injustè inferam; correc-[171]-tiones quoq; punitiones et reformationes debitas justas rationabiles de quibuscunq; delictis criminibus et excessibus sociorum et scholarum et discipulorum dicti collegij, quoties ubi et quando opus fuerit, secundum rei qualitatem et quantitatem omnemq; vim formam et effectum ordinationum et statutorum per dictum reverendum patrem editorum, absq; favore aut odio affectione consanguinitatis affinitatis aut aliâ quacunq;, diligenter et indifferenter faciam et procurabo: et si hujusmodi correctiones punitiones et reformationes ut præfertur debite et justè exequi non potero, propter metum et potentiam seu multitudinem delinquentium, ipsorum nomina et cognomina, cum qualitate et quantitate delictorum et excessuum hujusmodi, quam citò potero, intra mensem, domino Episcopo Eliensi qui pro tempore fuerit, aut domino cancellario universitatis vel ejus vicem-gerenti, denuntiabo et revelabo, et per eos hujusmodi correctiones punitiones et reformationes juxta statuta et ordinationes collegij in omnibus solenter et celeriter fieri procurabo.

Item quoties electio vel assumptio alicujus socij ac scholaris vel discipuli in collegium prædictum fuerit facienda, intendam et enitar ut solum tales eligantur et assumantur quos secundum conditiones et qualitates in statutis dicti collegij expressas habiles et idoneos reputaverim, et quos in virtutibus et scientiis ad honorem et utilitatem collegij prædicti plus posse proficere et profecturos crediderim, sine personarum vel patriæ acceptione, amore favore odio invidia timore prece et pretio post positos quibuscunq;. Item si ab officio meo amovear, aut si spontè cessero, bona collegij per me recepta aut apud me remanentia præsidenti et thesaurariis collegij aut (precidente absente) socio maximè seniori in universitate præsenti et dictis thesaurariis, si commode potero continuo sin minus saltem infra quindecim dies ex tunc prox. sequen. sine contradictione seu diminutione, per inventarium inde inter me et illos sub testimonio et subscriptione eorundem et meâ, restituum.

Item, si per me seu occasione meâ, aliqua materia dissensionis iræ vel discordiæ in dicto collegio (quod absit) suscitata fuerit, et per præsidem decanos vel thesaurarios et duos alios ex septem collegij senioribus finis rationabilis seu placabilis infra quinq; dies factus non fuerit, tunc cancellarii universitatis Cantabrigiæ qui pro tempore fuerit præpositus collegii regalis, ac magistri collegii Christi in eadem universitate, si tunc infra eandem præsentes fuerint, ac, dicto cancellario præposito aut magistro extra universitatem agentibus, absentis aut absentium vices universitate gerentium, unâ cum totidem ex prænominatis quot in universitate præsentes fuerint, ordinationi, arbitrio decreto et auctoritati personaliter et effectualiter me submittam: et quicquid duo ex illis pro tempore, secundum formam infra limitatam pro tempore consulti, arbitrati fuerint statuerint [172] ordinaverint vel diffinierint in eâ parte, id omne fideliter observabo et iisdem cum effectu parebo, sine contradictione quacunque, cessantibus, provocationibus appellationibus querelis exceptionibus et aliis juris et facti remediis quibuscunq; quibus omnibus et singulis in vim pacti renuncio in his scriptis.

Item, omnia et singula statuta et ordinationes dicti collegij per dictum reverendum patrem Dominum Johannem Roffen. episcopum, executorem ultimæ voluntatis domine Margarette Comitissæ Richmondiæ et Derbiæ, edita, et per eum dum superstes fuerit edenda, quantum, me concernunt, secundum literalem et grammaticalem, sensum et intellectum inviolabiliter tenebo exequar et observabo, et quantum in me fuerit faciam ab aliis observari.

† Qu. Vide post, p. 282, cap. 2, reginæ Elizabethæ, de electione magistri.

Itemque nulla statuta seu ordinationes interpretationes mutationes injunctiones declarationes aut expositiones vel glossas aliquas, præsentibus ordinationibus et statutis vel qualitercunq; vero sensui et intellectui eorundem repugnantes vel repugnantia derogantes vel derogantia contrarias vel contraria, per quemcunq; seu quoscunq; alium vel alios quam per reverendum patrem Dominum Johannem Roffen. episcopum prædictum faciendas vel facienda, quomodo libet scienter acceptabo, vel ad ea consentiam, aut ipsa aliqualiter admittam, nec eisdem parebo ullo tempore, vel intendam, nec illis vel illorum aliquo ullo modo utar in collegio prædicto vel extra, tacite vel expressè; sed eis et eorum cuilibet contradicam et etiam resistam expressè, ipsaq; fieri viis et modis omnibus quibus potero obstabo et impediam.

Item, juroque, quantum in me fuerit et quatenus meam personam concernat aut concernere poterit, me laudatas ac probas hujus collegij consuetudines observaturum, unà cum aliis ordinationibus per magistrum et socios ac scholares editis pro sustentatione quorundam sociorum ac discipulorum, juxta tenorem cujusdam juramenti quo magister olim et socij se devinxerunt oraturos tam pro dicto domino Johanne Roffen. episcopo quam Henrico Ediall Archidiacono Roffen. Hugone Ashton Archidiacono Eboracensi Johanne Ripplingham in sacrâ theologia doctore et Roberto Dokket in eadem Baccalaureo ac Marmaduco Constable Equite aurato et Roberto Symson in artibus magistro cæterisq; qui privatas aliquas aut sociorum aut discipulorum fundationes fecerint aut in posterum facturi sint; simulq; et curabo, quantum in me fuerit, à cæteris omnibus tam sociis quam discipulis idem fieri; neque extortas eorundem interpretationes (per quemcunq; factas) admittam, aliter quam sensus eorum apertus patitur et mea conscientia magis conformem indicabit animo conditoris.

### [173] De Sociorum Qualitatibus.

Nuc itidem et leges dabimus residuo corpori; quod nimirum ex sociis, quocunq; numero eos fore contigerit, tanquam ex potioribus et solidioribus membris, volumus integrari. Pro fundatrice verò, tametsi rex illustrissimus, in carta licentiæ suæ quam aviæ suæ, dominæ fundatrici, concessit, mentionem fecerit de quinquaginta sociis ac scholaribus, nos tamen, qui ob subtractionem reddituum annuorum ad valorem quadringarum librarum, ipsum numerum implere non possumus, quantum ad præsentem ordinationem spectat (si fieri potest) octo super viginti deputari volumus et ordinamus.

### De Sociorum Electione, ac ipsius Circumstantiis.

Et quò possit exactior fieri sociorum delectus, convocari volumus et statuimus, (per magistrum vel ipso absente) præsentem, cunctos socios in universitate presentes, primo die Lunæ cujusq; quadragesimæ, simul et comonefieri "quatenus quisq; solitam inquisitionem faciet de juvenibus quibusdam, tam moribus quam eruditione magis idoneis, qui in sociorum numerum cooptentur; et ut repertorum nomina, simul cum nomine comitatûs quo quisq; fuit oriundus, in scedula conscribatur, unâ cum aliis dotibus quibus ipse juvenis fuerit præditus;" ad quam inquisitionem teneri singulos volumus, in vim juramenti sui: cujus autem nomenclatura non ante septem dies electionis futuræ, tradita magistro fuerit aut ejus vice-gerenti quando magister aberit, hunc, pro eâ vice, ineligibilem pronunciamus. Porro, delectum hunc quoties eveniet, celebrari volumus et ordinamus quâq; die Lunæ quæ proximè sequitur Dominicam Passionis: quo die magister et socij cuncti præsentés conveniant in sacellum, quum horologium insonuerit octavam; et illic, primùm lecto statuto de cooptandorum qualitatibus, magister primùm, deinde reliqui per ordinem socij jusjurandum quod sequitur, tactis sacris evangeliiis præstabunt. "Ego N. N. deum testor et hæc sancta ipsius evangelia, me neminem in socium hujus collegij electurum, nisi quem juxta statutum antelectum me conscientia magis idoneum indicabit; neq; istud faciam pretio vel mercede quâvis, à quopiam aut data aut expectata." Juratis itaq; singulis fiat è vestigio scrutinium, per magistrum et duos è sociis maxime senioribus, (sic tamen ut hi non fuerint de numero septem seniorum conscriptorum,) qui prius etiam tactis sanctis dei evangeliiis promittant "se veraciter et absq; dolo scrutiniam [174] ipsam pro futura sociorum electione tractaturos, et secretum penitus habituros, neq; signo aut nutû aut alio quovis pacto rem indicaturos." Auditis ergò singulorum votis et suffragiis, illum vel illos in socium vel socios dicti collegij magister pronuntiabit, in quem vel in quos ipse magister, cum majori aut æquali parte sociorum, consenserit.



Et si magister, cum majori aut æquali parte sociorum, in aliquem aut aliquos eligendum vel eligendos haudquaquæ convenerint, sed in eâ dissensione triduum ab incepto delectu perseverarint, tum volumus ut hujus negotij diffinitio, pro hac vice, ad septem conscriptos seniores referatur; itaque pro his de quibus non est consensus factus, electio septem illis senioribus deferenda sit, ad hunc modum ut sequitur. Quarto igitur die post inchoatam electionem conveniant iterum omnes in sacellum et primitus, per septem ipsos seniores juramento præstito "quòd illum vel illos, de quibus fit dissidium, in socium vel socios cooptabunt, qui suis conscientiis magis videbitur aut videbuntur idonei;" præstito igitur hoc juramento, fiat alterum iteratò scrutinium, in quo magister et duo prædicti scrutatores suffragia septem illorum seniorum scrutabuntur: et is vel ij in quem vel quos major septem seniorum pars consenserit, pro electo vel electis habeantur, atq; ita a cæteris acceptentur. Quòd si forte conscientiis eorum septem seniorum non videatur inter eligendos aliqua disparitas, aut forsitan inter se major eorum pars haudquaquàm consenserit, tum volumus ut is vel ij qui à magistro prius nominatus aut nominati fuerant, pro socio vel sociis protinùs declarabitur aut declarabuntur. Proviso ut neque in hac electione neq; alià quacunq; cujuscunq; personæ infra dictum collegium faciendâ, \* suam vocem aut suffragium alterius personæ cujuscunq; arbitrio et dispositioni quovis modo committat, aut incertam personam aut pro incerto comitatu vel diocesi sub disjunctione vel conditione quovis modo nominet aut eligat: contra faciens, et suffragium deinde suum et etiam dicti collegij societatem, ipso facto, ex tunc imperpetuum amittat. Nec liceat, sub poena perjurij, cuique ex illis scrutatoribus, nomina aliorum eligentium, alii cuipiam, quovis modo per se vel per interpositam personam nutu verbo signo vel scripto, ante completam et publicatam socij electionem, ostendere.

#### De Morum Honestate servandâ, et Dissentionibus sedandis.

Quòd si inter magistrum et alium aut alios hujus collegii socios, aut illius causa, aliqua materia dissensionis iræ rixæ vel discordiæ in dicto collegio suscitata fuerit, et per magistrum decanos et majorem partem septem seniorum finis rationabilis seu placabilis infra octo dies proximè sequentes factus non fuerit, tunc volumus ut [175] partes dissentientes, virtute juramenti sui, triduum post illos octo dies, duos socios eligant, qui electi, in sui virtute juramenti, infra biduum post eorum ad hoc electionem et deputationem, præfectum collegij regalis, et magistrum collegij Christi, et magistrum sive custodem collegij divi Michaelis, aut dictis præfecto magistro et custode vel eorum aliquo extra universitate agentibus, tunc eorum vices absentium in dictis officiis infra universitatem gerentes, ac etiam reliquos prænominatos siqui fuerint in universitate præsentés, adeant; et eisdem hujusmodi dissensionis causam sive materiam, in scriptis significant et referant: et quicquid duo ex illis, pro tempore consulti, arbitrati fuerint et decreverint, illi omnes pareant et in sui virtute juramenti obediant.

#### De Modo procedendi contra Magistrum, &c.

His ordine dispositis, ad errata quæ accedere possunt pervenimus, adhibitori quæ poterimus, remedia, incipientes a magistro ut duce et principe, quo bono et provido ut nihil est utilius, ita imprudenti inepto indigno criminoso nihil est detestabilius. Quo circa statuimus ut magister quicunq; propter terrarum tenementorum reddituum possessionum spiritualium seu temporalium sua culpa diminutionem seu alienationem, vel propter detractionem oblationum alienationem illicitam bonorum et rerum ipsius collegij infamiam incontinentiamq; notabilem negligentiam intolerabilem homicidium voluntarium aliamve causam enormem ipsum magistrum omninò reddentem criminaliter irregularem vel aliter inhabilem, nec non propter infirmitatem infectivam et contagiosam perpetuam, cujus occasione non poterit absque scandalo hujusmodi officium exercere, ab eo penitus amoveatur: ad cujus amotionem hoc modo procedatur; videlicet, ut statim, vel saltem infra quindecim dies postquam; aliquod præmissorum commiserit vel in eorum aliquod inciderit, primò per præsentem, assistentibus ei aliis duobus officiariis clavigeris et quatuor aliis sociis ex septem senioribus dicti collegij vel saltem cum assensu et assistentia duarum tertiarum

\* Here is an omission of the nominative case to committat; viz. "Aliquis socius" or "Aliquis ex electoribus."

partium omnium sociorum dicti collegij (sic quòd inter eos sint quatuor seniores ex septem electi,) vel, præsidente nolente aut negligente, per decanum theologiæ cum prædictorum assistentia, moveatur magister ut suadeatur ad voluntariè recedendum ab officio. Quod si sponte infra triduum cedere noluerit, tunc infra octo dies post hujusmodi monitionem, præsidentem, assensu et testimonio omnium sociorum dicti collegij vel saltem omnium prædictorum modo aliquo prædicto sibi in magistri monitione assistentium, vel, ipso nolente aut negligente, dictus decanus theologiæ, cum assensu et testimonio prædictorum, denunciabit Domino Episcopo Eliensi, aut, eo in remotis agente, vicario in spiritualibus generali, seu (sede vacante) custodi in spiritualibus, [176] ejusdem, per duos aut tres socios ipsius collegij seniores, cum literis aliquo sigillo authentico ac signo et subscriptione alicujus notarij publici signatis, vel saltem loco sigilli authentici subscriptione dicti præsidentis vel theologiæ decani et prædictorum assistentium ac notarii publici signo communis, causas defectus crimina excessus vel enormia magistri continentibus. Proviso quòd omnes hujusmodi assistentes et testimonium peribentes, prius, tactis sacro sanctis Dei Evangelii, coram præsidente aut decano theologiæ, ipso primum id coram eis præstante ac deinde à singulis illorum exigente, jurabunt, "quòd non per invidiam malitiam odium vel timorem ipsius magistri, amorem vel honorem alicujus promovendi ad illud officium, nec per conspirationem æmulatorum aut confederationem, nec per procuracionem alicujus vel aliquorum, nec prece aut pretio aut alio quocunq; modo illicito inducti, sed pro bono zelo et utilitate prædicti collegij et pro utiliori et convenientiori regimine ejusdem et honore, testimonium illud perhibuisse." Episcopus vero Eliensis, vel, ipso in remotis agente, suus vicarius in spiritualibus generalis, aut (sede Eliensi vacante) custos spiritualitatis ejusdem, de causis criminosis criminibus excessibus et defectibus contradictum magistrum expositis, summarie et de plano et extra-judicialiter cognoscat: et si, per informationis sufficientes ministratas, hujusmodi suggesta quæ ad dicti magistri amotionem sufficere debeant, recipiat esse vera, statim, aut saltem infra triduum proximè sequuturum, ipsum ab officio suo et ab administratione suâ amoveat sine ulteriori dilatione, dicti quodq; collegij sociis denunciet et injungat ut ad electionem novi magistri liberè procedere valeant et debeant, juxta formam in statuto superius expressam; cessantibus appellationis recusationis querelæ aut cujuscunque alterius juris aut facti remediis, quibus hujusmodi amotio valeat impediri aut differri; quæ omnia irrita esse, volumus statuimus et decernimus.

De Modo procedendi contra Socios Scholares et Discipulos, in majoribus Criminibus.

—Et præmissa, vel eorum aliquod in præsentī statuto contentorum, coram magistro assistentibus et præsidente decanis et thesaurariis, vel saltem uno decano thesaurario et aliis, quatuor ex septem senioribus, publicè confessus fuerit, vel per testes idoneos prædictorum judicio comprobandos, aut per facti coram eis evidentiam, manifeste reus eorum judicio et sententia convictus fuerit; eum statim à dicto collegio, præsentis vigore statuti nullâ aliâ monitione præmissâ, exclusum et privatum fore ipso facto decernimus, absq; cujuscunq; appellationis vel querelæ remedio.

### [177] De ambiguis et obscuris interpretandis.

Distribuisse igitur jam universis collegij membris officia simul et officiorum leges nobis videtur, et exactè quidem: quæ si servantur ad amussim et inviolatè, (quod utiq; vehementer optamus) ex eodem viros haud dubiè speramus prodituros, qui magnæ tum utilitati tum honori non solum huic collegio, verum etiam toti regno futuri sint. Provisum etiam est, quoad fieri potest per uniuscujusq; juramentum, quo nihil apud christianos firmitus aut antiquius haberi debet, ut statuta hæc per nos jam tradita et auctoritate sedis apostolicæ corroborata, exactissimè servantur à singulis, quatenus unum quemque concernans. Cæterum quia mihi Johanni Roffensi, per quem hæc edita sunt, tam à summo pontifice Julie secundo, quàm a fundatrice cæterisq; omnibus co-executoribus, auctoritas est tributa non solum condendi statuta quæ mihi viderentur huic collegio conducibilia, verum etiam magistro simul et sociis eadem exhibendi, juramentaq; à singulis tam sociis quam discipulis pro illorum inviolabili observacione districtius exigendi, sed et cætera cuncta peragendi quæcunq; pro salubri collegij hujus moderamine mihi visa fuerint opportuna, atq; id tam efficaciter quam



si cuncti simul hic essemus præsentes; ego igitur, horum omnium pariter et meo ipsius nomine, cassatis aliis quibusvis statutis prius excogitatis, quatenus præsentibus adversantur, hæc præsentia ceu vera et salubri pronuncio: quibus observandis, tam magistrum quàm socios et discipulos adstringi volo; reservatâ mihi nihilominus protestate quoad vixero, vel adjiciendi vel minuendi seu reformandi interpretandi declarandi mutandi derogandi tollendi dispensandi novaq; rursum alia (si licebit) statuendi simul et edendi, non obstantibus his statutis factis et juramento firmatis; cæteris autem omnibus, cujusvis dignitatis auctoritatis statûs gradûs aut conditionis existant, ac magistro quoq; et scholaribus tam sociis quam discipulis omnibus hujus collegij, prorsus inhibens ne cum aliquo dictorum statutorum dispensent, aut quævis nova statuta sive pro collegio seu pro quovis ejusdem membro, quæ dictorum statutorum alicui repugnabunt, condant aut decernant. Quod si fortè cancellarius aut vice-cancellarius aut reverendus pater Eliensis episcopus aut demùm quivis alius contrarium attemptaverit, et novum aliquod statutum aliud à prædictis adhibere molitus fuerit, ab ejus obligatione, per hanc auctoritatem ab executoribus aliis mihi commissam, magistrum et cæteros omnes tam socios quam discipulos penitèns absolvo, eisque omnibus et singulis interdicto ne cuivis hujusmodi statuto aut ordinationi pareant admittantve quovis pacto, sub pœna perjurij atq; etiam amotionis perpetuæ à dicto collegio ipso fac-[178]-to. Cæterum quia nihil est usq; adeò luculentum quod non à captiosis verti poterit in questionem, obeam rem volumus quòd si quicquam in aliquo statutorum prædictorum aut obscuritatis aut ambiguitatis magistro et majori parti sociorum occurrat quoad nos vixerimus, eorum singulos in Christi visceribus obtestamur ut ea dubia nobis proponant quoties oriantur, quemadmodum et hactenus fecerunt; nosq; libentur (ut et ante non semel fecimus) illorum dubiorum obscuritatem excutiemus: quòd si postquam nos ab hac luce migraverimus, novi quidem scrupuli reperti fuerint aut de novo suscitati, volumus et ordinamus ut rectus et laudabilis statutorum usus interea juxta mentem nostram observatus et qui maximè congruat instituto pientissimæ fundatricis, sit magistro pariter et sociis norma quædam et regula quam cum puritate conscentiarum suarum sequantur in ejusmodi scrupulis et ambiguitatibus omnibus. Neque tamen per hoc intendimus, ut si prætur notitiam nostram quispiam abusus in statutis ipsis, aut in quavis eorundem parte, per magistrum aut officarios aut quemlibet cæterorum in cursu fuerit, qd is pro recto et laudabili statutorum usu recipiatur; aut si nos cum ipso magistro qui nunc est, aut cum alio quovis sociorum, in ulla statutorum parte dispensaverimus, nolumus tamen ut hoc privilegium, uni aut alteri ex causis nos moventibus concessum, pro communi quada licentia teneatur: sed et cunctos oramus et per Christi vulnera precamur, ut juramentorum suorum meminerint, atq; nostram mentem in ipsis statutis respiciant, magis quàm aliquem qui præter assensum nostrum clam irrepsit eorundem statutorum abusum; nam omnino prohibemus, ne per aliquam declarationem aut consuetudinem ullam aut diuturnum quemlibet abusum vel demùm actum aliquem, verbis aut intentioni dictorum statutorum in aliquo derogetur. Visitationem autem hujus collegij reverendis in Christo patribus episcopis Eliensibus commendamus; quibus et concessimus ejusdam idonei præsentationem, qui sit futurus in hoc collegio socius. Idoneum autem intelligimus, qui qualitates habeat eas quæ describuntur in statuto de qualitate sociorum: neq; enim alium quempiam recipi volumus à collegio. Eosdem etiam a mus et per Dominum Jesum obsecramus, ne quenquam præsentent nisi talem qui pro suis meritis hoc sodalitio dignus fuerit, et cui cum statutis per omnia conveniat.

#### De Visitatore.

Nihil adeò bonis legibus firmari muniriq; potest, quin ab his qui licenter vivere et luxui libidiniq; fræna laxare student, aliquo fraudis commento facilè queat eludi. Nos igitur fiducia benignitatis reverendissimorum patrum episcoporum eliensem freti, et cum primis amatissimi domini dni Nicolai West qui sedem episcopalem jam suis [179] meritis, obtinet, nempe quòd tam ipse quàm successores ejus, pro zelo quem ergà rem publicam christianam gerunt, nullis futuris temporibus patientur hæc statuta contra nostram mentem et contra sanctissimum pientissimæ fundatricis institutum violari, statuimus ordinamus et volumus quòd episcopo cuivis eliensi qui pro tempore fuerit, quoties per magistrum et præsidem decanosq; et thesaurarios, sive per magistrum et quatuor septem senioribus deputatis, sive per quinq; ex eisdem senioribus reluctante magistro aut præsidente, seu per duas tertias sociorum partes, requisitus

fuerit, sed et citra quamvis requisitionem, de triennio in triennium semel ad collegium accedere liceat, per se, vel per commissarium suum specialem quem duxerit deputandum, præterquam per cancellarium universitatis Cantabrigiæ seu vice-cancellarium aut procuratores universitatis ejusdem, et præterquam per alios qui ex dicto collegio pro aliquo crimine aut delicto amoti sint aut amotionem hujusmodi fugientes recesserunt, ac præterquam per magistrum aut aliquam aliam personam dicti collegij aut alios quoscunq; in universitate per unam quindenam anno proximo eam visitationem præcedenti studentes, et præterquam per religiosos qualescunq; prædictorumve aliquem aut consanguinem alicujus socij dicti collegij; liceat inquam, ad ejus visitationem libere accedere, magistrumq; ac alios singulos socios scholares ac discipulos ejusdem collegij in sacellum ejusdem convocare: cui quidem reverendo patri aut ejus commissario, vigore præsentis statuti, plenam concedimus potestatem, ut super omnibus et singulis particulis et articulis in nostris statutis contentis, ac de quibuscunq; articulis statum commodum aut honorem dicti collegij concernentibus, aut quæ in dicto collegio aut aliqua illius persona fuerint reformanda aut corrigenda, præterquam de secretis et occultis, magistrum socios scholares et discipulos interroget et inquirat, cogatque eorum unumquemq; in virtute juramenti et per censuras si opus fuerit, ad dicend. Veritatem de præmissis omnibus et singulis, præterquam (ut predictum est) de secretis et occultis; excessusq; ac negligentias crimina et delicta quorumcunq; dicti collegij qualitercunq; commissa, in ea visitatione comperta, secundum excessus exigentiam et criminis aut delicti qualitatem debite puniat et reformet; cæteraque omnia et singula faciat et exerceat quæ ad orum correctionem et reformationem sint necessarij aut quovismodo opportuna, etiam si ad privationem aut amotionem magistri aut præsentis aut alterius cujuscunq; ab administratione suâ vel officio, seu si ad amotionem alicujus socij scholaris vel discipuli ab eo collegio, si tamen hoc ipsum statuta et ordinationes exigent, procedere contingat. Quos quidem magistrum socios et scholares discipulos, ac præterea ministros quoscunq; etiam famulos, prædicto domino episcopo et hujus commissario, quoad omnia et singula præmissa, volumus et præcipimus effectualiter intendere et parere; statuentes insuper ut nullus in visitationibus prædictis seu aliis scrutiniis faciendis in dicto collegio, contra [180] magistrum aut aliquem alium ipsius collegij quicquam dicat deponat seu-denunciet, nisi quod verum crediderit, seu de quo publica vox et fama laboraverit contra eundem, in virtute juramenti ab eis collegio præstiti; ordinantes præterea dominus episcopus Eliensis cum in personâ propriâ visitare et præmissa facere dignetur, magister et thesaurarij unicam ei intra collegium refectionem faciant; si verò per commissarium episcopus visitaverit, commissario duæ refectiones intra collegium exhibeantur: quibus tam reverendum ipsum patrem quam ejus commissarium oramus ut contenti sint. Cæterum inceptam aliquam visitationem ultra duos dies proximè sequentes, aut ex causis urgentissimis et rarissimis ultra quinq; dies, prorogar aut continuari nullo pacto volumus; sed lapso et exacto illo triduo, et quando ex causis prædictis ulterius prorogatur sexto die transacto, eo ipso visitatio illa pro terminatâ et dissolutâ habeatur. Et si que in ea parte compererit corrigenda et reformanda, que brevitate temporis corrigere et reformare non potuerit, ea magistro in scriptis tradat: qui ea omnia, secundum formam et exigentiam statutorum, quam primum corrigere et reformare, in virtute juramenti et sub pœna privationis ab officio suo ipso facto, teneatur. Prædictorum quoq; reverendorum patrum Eliensium episcoporum et commissariorum suorum quorumcunq; conscientias, apud altissimum (quantum possumus) gravius oneramus, ac in visceribus Domini nostri Jesu Christi hortamur et obsecramus, ut in faciendo et exequendo præmissa, secundum apostoli doctrinam "non querant quæ sua sunt sed quæ Jesu Christi," solumq; deum habentes præ oculis mentis, favore timore odio prece et pretio coloribus occasionibus post positis quibuscunq; inquisitionis correctionis et reformationis officium diligenter impendant et fideliter in omnibus exequantur, sicut coram Deo in ejus extremo judicio in hoc casu voluerint reddere rationem; statuentes præterea ut magister socius scholaris aut alius quispiam hujus collegij, super excessibus vel delictis, in visitationibus et inquisitionibus per dictum reverendum patrem vel ejus commissarium ut premittitur faciendis, accusatus vel detectus, copiam compertorum vel detectorum hujusmodi sibi tradi dedi dari ostendi, ac nomina detegentium vel denunciantium sibi exponi aut declarari, nulla modo petat; neq; ipsa comperta et detecta, aut nomina detegentium, tradantur eidem aut ostendatur; sed super eisdem compertis et detectis, statim coram ipso domino episcopo vel ejus commissario per-



sonaliter respondeat, ac correctionem debitam subeat pro eisdem, secundum nostrarum ordinationum et statutorum exigentiam et tenorem, cessantibus quibuscumque; provocationibus appellationibus querelis et aliis juris et facti remediis, per quæ ipsius correctio et punitio differri valeat seu alias quovismodo impediri. Si tamen ad privationem aut inhabilitatem magistri aut expulsionem socij aut scholaris per episcopum aut ejus [181] commissarium agatur, tunc ostendantur ei detecta: quæ si non poterit rationabiliter et probabiliter evitare, et justa defensione propulsare, amoveatur sine appellatione aut ulteriori remedio; dummodo ad ejus expulsionem concurrat consensus quatuor è septem deputatis senioribus tunc in universitate presentibus; sine quorum consensu irritata sit hujusmodi expulsio, et nulla ipso facto. Et insuper si contra magistrum, ad amotionem ab officio, per hujusmodi domini episcopi commissarium, etiam consentientibus ut præfertur quatuor illis senioribus, procedatur, non negamus ei omnes querelas et defensiones justas et honestas apud ipsum dominum episcopum Eliensen, dummodo ulterius non appellet; non obstante nostra ordinatione prædicta, aut aliis quibuscumque. Præter hunc visitationis modum, nos alium nullum Eliensibus episcopus concedimus; sed nec a sociis tolerari permittimus, aliquo pacto: quod etiam eis mandamus, in vim juramenti sui. Scimus enim quod eximia virago domina fundatrix dum in humanis egit, impetravit ab Eliensi episcopo qui tunc fuerat, jus foundationis, eâ quidem ratione ut ex desolatis ædiculis tam illustre collegium erigerit: quod cum effecerit et consummaverit magno suo sumptu, par est et Elienses episcopi Nihilo \* Majorem in hoc collegio sibi vindicent autoritatem quam in cæteris academiæ collegiis ubi non sunt fundatores. His itaque dictis legibus quas tum salubres tum justas existimamus, magistrum et scholares omnes tam socios quam discipulos collegij divi Johannis in Cantabrigia, regi volumus et gubernari: quibus si sese diligenter attemperent, nihil dubitamus quin afflatus aderit divini spiritus, qui rectâ perducet obsequentes ad magnam eruditionem cum pari conjunctâ sanctimonia. Neque enim fas est ambigere, quin sacer ille spiritus qui in quavis congregatione christianorum residet, præsto sit adjuturus cunctos qui cum fide et purâ conscientia conversari conantur, justique; et salubribus monitis obtemperant; præcipue tamen eos qui studio sacrarum literarum insudant. Nam ob has potissimum reserandas ille missus fuit; "quum," inquit, "venerit ille qui est spiritus veritatis, ducet vos in omnem veritatem." At quos ducet? nimirum, humiles et obsequentes. Super hujusmodi requiescit, fovens eos, et indicibilibus eos consolationibus reficiens: sed et istis quum sit ostiarius, aperit ac reserat arcana scripturarum. Nihil igitur vobis hæsitandum est, fratres, quin si studueritis has leges observare, pariter et unanimes in charitate jugiter conversari, patri nostro complacitum erit suo vos tandem affiare spiritu; quod ut faciat, ipse, tamet si peccator sim, assidue precabor; et vos vicissim, quæso, pro me precimini.

[182] De quatuor sociis et duobus discipulis per Johannem Roffensem Episcopum fundatis.

Quinetiam decerno quod ad exercitamenta scholastica, et ad ea quæ per statuta collegij cæteri socii perimplere tenentur, similiter obstringantur: et ad ea perimplenda, pariter et ad has meas ordinationes fideliter observandas, protinus ut electi fuerint, juramentum præstent corporale, et cætera faciant quæ ad hunc effectum exiguntur; et si deliquerint, simili modo per omnia subjaceant correctioni: et idem etiam, quantum ad duos illos discipulos attinet, fiat, juxta modum et formam quâ cæteri tractantur discipuli. Postremò volo quod ad has meas ordinationes citra fraudem observandas, tam magister quam cæteri socij, mox ut electi fuerint, jurejurando sint obstricti; ne fortè per negligentiam et incuriam suam, ob indenturarum inter nos confectarum violationem, collegio gravis inferatur jactura.

EXTRACTS from Queen Elizabeth's Statutes.

Preamble—

Elizabetha Dei Gratia.

Itaque multis superioribus statutis abrogatis, multis mutatis et emendatis, nonnullisque novis additis, hæc, autoritate nostra, inviolabiliter ab omnibus qui in hoc collegio commorantur et commoraturi sunt, custodiri et observari volumus, quem ad

\* Vide post 195, 196, 202.

modum uniuscujusq; officium in statutis sequentibus descriptum designatumq; fuerit \* reservat. semper nobis et successoribus nostris, &c.

\* Note, this clause of reservation is not complete, in the original : but it is more fully expressed in the 50th chapter.

#### Chap. 2d. De electione Magistri.

Quod si tunc per \* viam spiritûs sancti concordibus animis, nemine dissentiente, in unum quempiam ejusmodi virum consenserint, qualis in statuto antelecto descriptus est ; aut si major pars præsentium super uno aliquo hujusmodi consenserint ; volumus et statuimus absq; morâ (nullâ prorsus licentia, ordinarij visitoris aut alterius cujuscunq; jurisdictionem ordinariam prætendentis expectatâ) magister collegii pronuncietur : [183] quòd si quinq; illorum de uno aliquo non consenserint, tum ad collegii visitorem veniatur ; et ille pro magistro habeatur, quem solus visitor duxerit præficiendum, modò is statuto de qualitate et officio magistri in omnibus respondeat.

#### Chap. 11th. De Electione Præsidis.

Quòd si post tria aperta scrutinia, ipse magister cum quatuor de uno non venerint, tùm is electus erit in quem ipse magister cum tribus maximè senioribus, ex dictis octo senioribus sociis domi præsentibus aut majori eorundem parte, consenserint. Quod si ne ii quidem ante horam tertiam ejusdem diei de uno cooptando (ut dictum est) concordare possint, omnes tamen octo seniores vel septem ex his de uno eligendo unanimiter consenserint, eo casu volumus magistrum illis octo vel septem sic consentientibus assensum suum accommodare. Quod si ne septem quidem sic ut prædictum est unanimiter consenserint, tùm is pro electo habeatur quem ipse magister solus nominaverit.

#### Chap. 13th. De Sociorum Electione, ac ipsius Circumstantiis.

Porrò, delectum hunc, quoties eveniet, celebrari volumus et ordinamus quâq; die Lunæ quæ proximè sequitur Dominicam quintam quadragesimæ : quo die magister et octo seniores convenient in sacellum, cum horologium insonuerit octavam ; et illic, primum lecto statuto de cooptandorum qualitatibus, magister primum, deinde reliqui per ordinem seniores, jusjurandum quod sequitur, tactis sacris evangeliiis, præstabunt. "Ego N. N. Deum testor, et sancta ipsius evangelia, me neminem in socium hujus collegij electurum, nisi quem juxta statutum antelectum mea conscientia magis idoneum judicabit ; neq; illud faciam, pretio vel mercede aliquâ à quopiam aut datâ aut expectatâ, neq; ullâ aliâ sinistrâ aut pravâ affectione." Juratis singulis, fiat statim apertum scrutinium. Seniores vero, ut simulatio promittendi et spes decipiendi è medio tollatur juxta senioritatis ordinem, publice et ut cæteri exaudire possint, suffragia conferant ; et de quo magister et quatuor ex dictis senioribus consenserint, is pro socio habeatur : quòd si post alterum aut tertium scrutinium, de uno, quatuor cum magistro non consenserint, tùm eodem modo procedatur, quo in electione præsidis et lectorum et aliorum officiarium dictum est ; et is socius habeatur, qui eo modo electus fuerit.

#### [184] Chap. 14th. Jusjurandum electi Socii.

"Quod si contingat me posthac propter contemptum, rebellionem, inobedientiam, malos mores, vel alia merita, vel propter causas in præsentibus statutis contentas, per magistrum vel alios in hujusmodi negotiis habentes interesse, corrigi aut puniri aut à dicti collegij sustentatione et societate secundum formam statutorum excludi expelli vel amoveri, ipsum magistrum aut aliam personam ullam, occasione expulsionis aut amotionis hujusmodi nunquam persequar seu inquietabo, per me, alium, vel alios : nec ab aliis molestari, vexari seu inquietari procurabo in foro ecclesiastico, seu seculari, seu alio quocunq; modo : sed contra, ex certa meâ scientiâ purè, sponte, simpliciter et absolutè omni actioni, occasione correctionis, punitionis, exclusionis, seu amotionis hujusmodi, adversus magistrum, seu alios dicti collegii socios et scholares, mihi quomo-

\* Vim, (forsitan,) vide ante p. 170.



dolibet conjunctim sive divisim competenti, appellationi quoque et querelæ in ea parte faciendis, ac quarumcunq; literarum impetrationi, etiam precibus principum procerum, magnatum, prælatorum et aliorum quorumcunq; (quantumcunq; mihi alias probitatis et vitæ merita suffragabuntur,) in vim pacti renuntio."

Chap. 50th. De ambiguis et obscuris interpretandis.

Distribuimus jam universis collegii membris officia simul et officiorum leges: quæ si servantur ad amussim et inviolata, (quod utiq; vehementer optamus,) ex eodem viros haud dubio speramus prodituros, qui magnæ tum utilitati tum honori, non solum huic collegio, verum etiam toti regno futuri sunt: provisum etiam est, quoad fieri potest per uniuscujusq; juramentum, (quo nihil apud Christianos firmitus aut antiquius haberi debet) ut statuta hæc per nos jam tradita exactissimè servantur a singulis, quatenus unumquemq; concernant.

Abrogatis igitur quibusvis aliis statutis pro hujus collegii gubernatione priùs excogitatis, hæc præsentia cum vera tum salubria pronunciamus; quibus observandis, tam magistrum quam socios et discipulos astringi volumus; reservata nobis nihilominus potestate vel adjiciendi vel minuendi, seu reformandi, interpretandi, declarandi, mutandi, derogandi, tollendi, dispensandi, novaq; rursus alia, si opus erit, statuendi et edendi, non obstantibus his statutis factis et juramento firmatis; cæteris autem omnibus, cujuscunq; dignitatis, autoritatis, statûs, gra-[185]-dûs, aut conditionis existant, ac magistro quoq; ac scholaribus tam sociis quam discipulis omnibus hujus collegii inhibentes, ne cum aliquo dictorum statutorum dispensent, aut ulla nova statuta sive pro collegio sive pro quocunq; ejusdem membro, quæ dictorum statutorum alicui repugnabunt, condant et decernant. Quòd si forte cancellarius, aut vice-cancellarius, aut reverendus pater Eliensis episcopus, aut demùm quivis alius contrarium attentaverit, et novum aliquod statutum aliud à prædictis adhibere molitus fuerit; ab ejus obligatione, autoritate nostrâ, magistrum et cæteros omnes tam socios quam discipulos penitus absolvimus, eisq; omnibus et singulis interdiciamus, ne ulli hujusmodi statuto aut ordinationi pareant, admittantve quovis pacto, sub pœna perjurii atq; etiam amotionis perpetuæ à dicto collegio ipso facto.

Quòd si inter magistrum et socios, aut inter socios ipsos, aliosve nostri collegij, super aliquo articulo statutorum nostrorum, dubium aliquod, aut ambiguitas, controversia seu opinionum varietas, vel discordia, oriatur, cujus decisio seu sensus et planus intellectus, intra octo dies, à tempore exorientis emergentis et commotæ dubitationis computando, nequiverit inter eos haberi; tunc volumus ut partes dissidentes duos ex collegio socios eligant, qui, ita electi, quam citò poterit, reverendum episcopum Eliensem pro tempore existentem, (in quo sinceram fiduciam ponimus, quemq; juxta planum, communem, literalem et grammaticalem sensum et ad dubium prætersum aptiorem, omnes hujusmodi ambiguitates interpretaturum, dissoluturum, declaraturum, arbitramur,) ubicunq; intra regnum Angliæ fuerit, adeant; vel saltem totam controversiam, in duobus scriptis, suâ ipsorum manu aut notarii publici subscriptione, vel alicujus sigilli authenticæ appositione, munitis, eidem reverendo parti significant.

Cujus quidem reverendi episcopi determinationi, interpretationi et declarationi, super prædicto dubio ita ut præfertur disputato ac ad eum delato, faciendis, magistrum præsidem socios et cæteros omnes dicti collegij obtemperare volumus, et cum effectu parere; sub ipsorum debito juramento collegio præstito, et pena amotionis perpetuæ à dicto collegio, si contra fecerint, ipso facto; nolentes quod per consuetudinem ullam, aut diuturnum quemlibet abusum, aut demùm actum aliquem, verbis aut intentioni dictorum statutorum in aliquo derogatur: illud autem imprimis mandamus, ut juramentorum suorum meminerint, atq; nostram mentem in ipsis statutis respiciant, magis quam aliquem (qui præter assensum nostrum clàm irrepsit,) eorundem statutorum abusum. Visitationem autem hujus collegij reverendis in Christo patribus episcopis Eliensibus, commendamus; quibus et concessimus ejusdam idonei præsentationem, qui sit futurus in hoc collegio socius: idoneum autem intelligimus, qui qualitates habeat [186] easdem quæ describuntur in statuto de qualitate sociorum; neq; enim alium quempiam recipi volumus à collegio; neminem autem illi præsentent, nisi talem qui pro suis meritis hoc sodalitiò dignus fuerit, et cui cum statutis per omnia conveniat.

## Chap. 51st. De Visitatore.

Nihil adeo bonis legibus firmari muniriq; potest, quin ab iis qui licenter vivere et luxui libidini fræna laxare student, aliquo fraudis commento facile queat illudi. Nos igitur fiducia benignitatis reverendi in christo patris episcopi Eliensis qui nunc est, et successorum suorum, freti, confisq; quod orthodoxæ fidei et reipubiæ Christianæ zelo hæc nostra statuta perpetuis futuris temporibus inviolabiliter, ad laudem dei et honorem collegii, observari procurabunt et nitentur; et ea vel eorum aliqua, contra nostram mentem et sanctissimum piæ fundatricis institutum, minime violari patientur.

Statuimus ordinamus et volumus, ut episcopus Eliensis qui pro tempore fuerit, quoties per magistrum et quinque ex senioribus, sive per septem seniores, reluctantem magistro, requisitus fuerit, ad collegium valeat et possit accedere; magistrum, præsidem, decanos, thesaurarios, socios, scholares et discipulos collegii, in ecclesiam ejusdem convocare; collegium tam in capite, quàm in membris visitare; ac de et super omnibus et singulis, statum commodum et honorem dicti collegii, statuta, magistri, præsidis, decanorum, thesaurariorum, sociorum, discipulorum vel ministrorum reformationem et correctionem, concernentibus, diligenter inquirere; juramentum, "de dicendo veritatem in præmissis omnibus et singulis," ab iisdem exigere; crimina, excessus, delicta et negligentias quorumcumq; dicti collegij, qualitercumq; commissæ in eâ visitatione comperta, secundum criminum, excessuum, delictorum et negligentiarum qualitatem et exigentiam, debite punire corrigere vel reformare, ac jurisdictionem suam ordinariam, quam volumus et hoc statuto nostro ordinamus ad eundem episcopum Eliensem et successores suos in perpetuum spectare et pertinere, in magistrum et socios dicti collegij exercere cæteraque omnia et singula facere et exercere quæ ad eorum correctionem et reformationem sunt necessaria aut quovis modo opportuna: etiam si ipsum ad privationem seu amotionem magistri præsidis aut alterius cujuscumq; ab administratione vel officio, seu ad amotionem alicujus socii scholaris vel discipuli ab eo collegio, (si tamen hoc ipsum statutum et ordinationes exigant), procedere contingat. Eum autem volumus, visitatione semel inceptâ atq; inchoatâ, ut quam citò commodè poterit, causas [187] omnes dijudicet et determet, ac finem visitationis suæ omnino intra quindecim postejus ad collegium accessionem dies faciat.

Statuimus insuper, ut in visitationibus collegij per reverendum patrem Eliensem episcopum quemcumq; pro tempore existentem, nullus sociorum aut scholarium contra magistrum aut aliquem alium illius collegii quicquam dicat, deponat, detegat, vel denunciât, nisi quod verum credat, seu de quo publica vox et fama contraeundem laborat, sub pœna violationis juramenti ab iisdem sociis et scholaribus collegij præstiti: et super excessibus vel delictis in visitatione et inquisitione hujusmodi, detecti, denunciati vel accusati, (copiis detectorum et compertorum, nominibusq; detegentium iis minime traditis vel ostensis,) super excessibus et delictis hujusmodi constitui coram domino Eliensi episcopo, summarie et de plano procedente respondeant et eorum quilibet respondeat per se, correctionem debitam pro iisdem subeant et eorum quilibet subeat, secundum nostrarum ordinationum et statutorum exigentiam et tenorem; cessantibus quibuscumq; provocationibus, appellationibus, querelis, et aliis juris et facti remediis, per quæ ipsorum et cujuslibet eorundem correctio et punitio differri valeat, seu alias quomodolibet impediri—si tamen ad privationem magistri, aut expulsionem socij scholaris vel discipuli agatur, tunc volumus et statuimus ut ostendantur ei detecta: quæ si rationabiliter et probabiliter evitare et justâ defensione propulsare non potest, volumus ut amoveatur, sine appellatione aut ulteriori remedio.

Et si quæ alia in membris corrigenda et reformanda fuerint, quæ brevitate temporis corrigi et reformari non poterunt, ea omnia et singula magistro in scriptis tradet: qui, secundum formam et exigentiam statutorum, et in virtute sanctæ obedientiæ ac juramenti sui, sub violationis pœna, hujusmodi corrigenda et reformanda diligenter et fideliter corrigere et reformare studebit, et tenebitur. Dissolutâq; visitatione, proesculentis, poculentis, expensis, oneribus, et procuracionibus ratione visitationis hujusmodi debitis, volumus et statuimus ut summa pecuniaria, in bonæ memoriæ domini Jacobi olim Eliensis episcopi concessionibus et ordinationibus limitata et declarata, absq; dilatione qualibet solvatur. Reverendi vero patris episcopi Eliensis cujuscumq; pro tempore existentis conscientiam apud altissimum oneramus, et in visceribus domini nostri Jesu Christi hortamur, ut in faciendo et exequendo præmissa, secundum



apostoli doctrinam "non quærat quæ sua sunt, sed quæ Jesu Christi": solumque deum habens præ oculis mentis, favore, timore, odio, prece, aut pretio, coloribus aut occasionibus post habitus quibuscumque; visitationis, inquisitionis, correctionis, reformationis officium diligenter impendeat, et fideliter in omnibus exequatur, sicut coram deo, in ejus extremo judicio, in hoc casu voluerit reddere rationem.

[188] His igitur dictis legibus, &c. (sicut in conclusione capitis de visitatore, in Episcopi Fisheri statutis).\*

#### Chap. 25th. De Modestia, et Morum Urbanitate.

Omnes lites domesticæ intra collegium et cognoscantur et di judicentur. Qui foras aliquem in jus vocaverit, sine consensu magistri, aut (eo absente) præsidis et majoris partis seniorum, collegio amoveatur. Dissentionis inter socios discipulosve ortæ intra biduum, si fieri possit, à magistro, aut (eo absente) præside et octo senioribus, sedentur: sin fieri non possit, quatuor socij per dissentientes eligendi, cum magistro, aut (eo absente) præside, litem audiant, et cum æquitate dirimant; et quam illi omnes, vel magister (aut si illi absit,) præses, cum duobus sic electis, sententiam tulerint, in eâ conquiescant dissentientes: qui secus fecerit, collegio privetur. Lis verò inter magistrum et socium unum aut plures orta, à præside et reliquis senioribus, aut (si præses unus litigantium sit) à socio maxime seniore, qui unus litigantiam non sit, et cognoscatur et (si fieri possit) tranquilletur: sin intra biduum hoc fieri, non possit, ad præpositum collegij regalis, magistros collegiorum Trinitatis et Christi, per duos socios utrinque eligendos, lis deferatur; et quod duo ex illis statuerint, juxta formam statutorum aut leges regni nostri, id ratum esto. Qui non paruerit, collegio amoveatur.

Also in the chapter relating to the election of the master,

It is ordained, that if five of the fellows, after two scrutinies (to be ended upon the same day) should not agree upon one person, then they are to come to the visitor of the college; and he is to be esteemed as master, whom the visitor only shall think fit to set over them: provided he answers to the statute, in all points, concerning the quality and office of master: and the said visitor shall signify to the fellows of the same college, within twenty days from the day of such devolution upon him, by an instrument sealed with the seal of his pastoral office, the same person so promoted to the mastership.

In the chapter relating to the election of president, lecturers, and other officers,

It is ordained, that if the master and fellows should not agree in the election; and the master should be out of the kingdom; then he whom the Bishop of Ely, visitor [189] of the said college, being within the kingdom, shall nominate, is to be elected into the office.

N.B. By the annexed foundation, (i.e. the before mentioned foundation of the two Southwell-Fellowships,) some objects of election were made preferable to others: and Todington's right, upon the merits, depended upon his being a preferable object; whereas Craven was only a general one. But the exception taken to Todington, against electing him into the fellowship, though otherwise a preferable object within Dr. Keton's descriptions, was his being mutilated, and thereby excluded, by the foundation, from being capable to be chosen: for that by one of the old statutes, (prior to Dr. Keton's deed, which refers to them,) it is ordained "that the persons eligible as scholars, should be corpore nullis contagiosis aut incurabilibus morbis vitioso, aliasve deformi aut mutilo." From whence it was inferred that though this clause is not indeed repeated as one of the qualifications of a fellow, yet it must be so intended: for the statutes could never mean to require less perfection in the fellows than in the scholars; since the fellows are expressly described as potiora et solidiora membra collegij, and are to be elected out of the scholars: and are considered as designed for the ministry and holy orders, into which no deformed or mutilated persons are admissible.

The counsel who shewed cause against the prohibition, and who argued (at first) only from Queen Elizabeth's statutes, (for Bishop Fisher's were not laid before the Court, till some time afterwards,) made three points upon them; viz.

\* Vide p. 181.

1st. Whether the bishop's general visitatorial authority does not extend to the election of fellows, upon the original foundation.

2d. Whether it extends to this annexed foundation.

3d. Whether the clause which gives distress upon the estates of the college, excludes the visitor.

And several of Queen Elizabeth's statutes were read, on behalf of the visitor; particularly, the 50th (*De Ambiguis et Obscuris Interpretandis*), and c. 51st (*De Visitatore*), and also c. 2 (*De Electione Magistris*).

Contra, on behalf of the college, were read and relied on, c. 25th (*De Modestia*, &c.) c. 13th (*De Electione Sociorum*) and c. 11th (*De Electione Præsidis*).

[190] N.B. All these were Queen Elizabeth's statutes: and it was said by the counsel for the visitor, that though Bishop Fisher as surviving executor of Margaret Countess of Richmond, gave statutes: yet he had no power, as executor, to do so; and that therefore Queen Elizabeth afterwards gave fresh statutes.

Cur'. Let it stand over till to-morrow: and let us have copies of the material statutes, in the mean time.

On Friday the 26th of November 1756, this motion proceeded. And on behalf of the visitatorial power, it was argued, 1st. That the bishop had a general right of visitation of the college; which included the election of fellows, as well as other matters that concerned the college; 2dly. That this general right extends to the annexed, as well as to the original foundation; and 3dly. That the clause of distress, (which had been urged to be a distinct and particular remedy given by the annexed foundation,) did not exclude the general right of the bishop to visit.

First—The original foundation of the college was upon express condition "that the Bishop of Ely should be visitor." And Dr. Keton's foundation is incorporated with the original foundation: he was, in effect, only a purchaser of two fellowships and two scholarships.

And the new statutes (of Queen Elizabeth) were subsequent to Dr. Keton's foundation: and Dr. K.'s fellows were part of the college, at the time when these statutes commend the visitation of the college, i.e. of the whole college, to the Bishops of Ely for the time being. These statutes constantly speak of the Bishops of Ely as general visitors of the college at that time, and already so; and not as being constituted so, merely and only by those statutes of Queen Elizabeth. And his general visitatorial power includes the election of fellows, as well as other matters.

The general visitor, upon lay-foundations, is the founder: upon spiritual foundations, the Ordinary.

The general power of visitation of the college is given to the Bishop of Ely, ex nomine of "visitor."

No particular set form of words is necessary to the appointment of a visitor. Fitz-Gib. 305, *Dr. Bentley v. Bishop of Ely*—"visitator sit Episcopus Eliensis," was the bishop's whole right to be general visitor of Trinity College.

[191] And he is complete visitor: and such power may cease and revive again. The case of *The King v. Bishop of Chester, Warden of Manchester College*, 2 Strange 797, proves this.

The late case of *Dr. Green v. Dr. Rutherford* in Chancery, was only a trust, given upon another footing.

No objection can arise, as to executive part, from the legislative power being reserved to the Crown.

Deprivation and admission of fellows are incidental and essential to the general power of a visitor. Sir T. Jones 175, *The King v. Warden of All Souls College, in Oxford*.

Neither is it any objection, "that particular times and occasions of going to the college, are stated and specified:" for upon particular gravamens, he may exercise the power of admission and deprivation, eo nomine as visitor.

Second point.—The bishop's general visitatorial authority extends to the annexed foundation, as well as to the original foundation. Both are within the same reason: and these ingrafted fellows are to be bound by, and even to swear to the statutes then in being. And here, no new statutes are given by the annexed founder: and the power he reserved was only to give additional ones conformable to the old ones. And the indenture refers, throughout, to the original foundation: which is a strong implication. In 5 Mod. 421, indeed, this point, "whether the visitor appointed by



the founder, can be extended to the new fellows" was doubted. This is called *Mr. Jenning's case, of Clare-Hall*: it was then adjourned, and does not appear ever to have been determined. But on 21st March 1747, in the case of *The Attorney-General, at the relation of Mapletoft, v. Talbot*, (the case of *The Master and Fellows of Clare-Hall in Cambridge*,) Lord Hardwicke held "that the annexed foundation, where no new statutes are given, must follow the original foundation."

Third point.—This deed giving another remedy, viz. by distress, does not preclude the visitor. It is not *ad idem*: it is given to the church of Southwell; not to the party injured in point of election and admission. But however, if it had been given to the party injured, it could not have taken away his appeal to the visitor, for relief: for the one is in order to obtain election and admission: the other, for the profits. The specific relief must come from the visitor: the distress would be only for the [192] delay, 2 Strange 1061, *Middleton et Ux. v. Croft* in B. R. (the third and last question) it was resolved "that the statute of 7 & 8 W. 3, did not, by inflicting a penalty, take away the jurisdiction of the Spiritual Court." The distress may be intended, to prevent collusion between the college and the visitor; and as a method to bring the matter collaterally in question: for notwithstanding what may be said in the books, particularly in the case of *Phillips v. Bury (Exeter College case)*, it would be very difficult to maintain a direct action for such collusion.

These new fellowships were, by the deed, to have all the rights of other fellows. Now one of these was a right of appeal. And shall the *nomine penæ* and clause of distress given to the church of Southwell, take away the distinct rights of the candidate, and of the bishop? no: they have a right to the remedy; but none to the penalty; the penalty belongs to the church of Southwell. But if the penalty had been given to the candidate; would that have discharged the college's obligation to perform their contract? and the restriction from going "*foras*," does not exclude the visitor, (for he is domestic;) but it only excludes forensic jurisdictions, Courts of Law.

And the collateral penalty cannot hurt the specific remedy: for it is not adequate to the injury; nay, it is not even given to the person injured; and it is temporary. However, the same person may have several remedies. And this is not the first instance of the present question, in this very college; for *Mr. Pegg's case* in 1726 was in point; and there the college submitted. The case was exactly the same with the present, excepting only that it was upon Dr. Beresford's foundation; which also was by deed, and with a clause of distress, as this is. His foundation was likewise of two fellowships and two scholarships in this college, by indenture tripartite, made 12 February 11 H. 8, between the college, the Dean and Chapter of Litchfield, and himself: in consideration of 400l. given by him to the college: in which indenture, a forfeiture is fixed and a right of entry into the college-lands, given to the Dean and Chapter of Litchfield, to distrain for it. Mr. Pegg was elected. Mr. Burton appealed to the Bishop of Ely, as visitor. Mr. Pegg protested against his jurisdiction. Civilians and common lawyers were heard, upon the point of the jurisdiction. The visitor pronounced for his own jurisdiction; and afterwards gave sentence for Mr. Burton, the appellant; and issued his monition to the master, president and six senior fellows, "to admit Mr. Burton." This monition was obeyed; and Mr. Burton admitted into the fellowship, by the president: by whom a certificate thereof was duly returned to the visitor.

[193] The right of visitation arises from the common law; as Ld. Ch. J. Holt held in the case of *Philip v. Bury*:\* (though Bishop Stillingfleet said it arose from the canon law). There was a case of this very college, which is reported in 4 Mod. 233, *Rex & Regina v. St. John's College, Cambridge*; and Comb. 279, S. C. and Skinner, 359, 368, 393, 546, S. C. Where the Court thought they ought to see that the law be executed. And another case also, relating to the same college, was *Dr. Rutherford's case*; which was upon a special trust. But the Courts of Justice will not interfere, unless the visitor abuses his power, in exerting it where he ought not.

Then the counsel for the bishop and Mr. Todington offered affidavits, as to matters of fact.

But Lord Mansfield said, this Court cannot enter into the merits of the election: for the question before us is "whether the Bishop of Ely appears to have a right to

\* V. Skinner 483, 484.

judge in this case, as visitor." If he has, there is no ground to prohibit: if he has no such jurisdiction, he ought to be prohibited.

The counsel who argued for the prohibition, begun with laying down some general positions—as, that fundatorial right takes its rise from the property of the donor; that a founder may give statutes; that if he does not, the right of visiting remains in the founder or his heirs; that he may appoint a visitor, either general, or partial, (with regard to his powers,) as he himself pleases; that if he gives him only partial powers, the visitor cannot exceed them; that if the visitor should attempt it, the Court will by prohibition restrain the excess of jurisdiction; that the Court will never refuse liberty to declare in prohibition, wherever there is the least doubt, (in order that the matter may be solemnly determined upon record, and so be subject to a regular course of appeal;) that a visitatorial power is not to be inferred by implication, but must be given by express and direct words; (as was determined by Lord Chancellor King, assisted by two great Judges of the common law, in the case of *Eden v. Foster*, reported in 2 Peere Wms. 325, the case of *Birmingham School*).

Then they entered upon their argument, to the following effect. 1st. The Bishop of Ely is not general visitor of this college; but only visitor in particular instances: and the general right of visitation in all other instances, remains in the Crown. This, they said, will appear from the 50th, 51st, and 52d chapters of Queen Elizabeth's Statutes.

[194] C. 50th. "Reservata nobis potestate vel adjiciendi vel minuendi, seu reformati interpretandi," &c. "Cæteris autem omnibus &c. inhibentes," &c. And immediately after, the Bishop of Ely is particularly there named, as one of the persons prohibited from counteracting the statutes. And it concludes with giving the Bishop of Ely a compensation, viz. the nomination of a fellow; who must be idoneus: and the college are appointed to judge of the idoneity; for it is said, "neque enim alium quempiam recipi volumus a collegio." Indeed the bishop is immediately afterwards admonished to offer no other than a proper person: but still the college are to be the judges, even of the bishop's own nominee.

C. 51st. (De Visitatore) gives him power accedere, only quoties he shall be requested, &c.; and he is thereby restrained to close his visitation within fifteen days: and there are many particular powers minutely given him; which exclude the supposition "that he has the general power."

C. 25th. (De Modestia) directs that omnes lites domesticæ intra collegium et cognoscantur et dijudicentur; and orders expulsion to him qui foras vocaverit, &c.; and refers their domestic disputes to be settled either amongst themselves, in college; or by the resident masters of the other colleges particularly therein named.

They denied that in *Dr. Bentley's case*, the expression "sit visitor," was the ground of the resolution: (which words, however, are not, as they observed, in the present case). But in that case the intent of the Crown fully appeared, throughout, "to give the whole power to the Bishop of Ely." Whereas here, the Crown reserves powers to itself, of various kinds; and might have appointed new visitors: but there, on the contrary, the right was perpetually given to the bishops of Ely. Here, the bishop's visitatorial power is limited and circumscribed: whereas a general visitor might do all that a founder could do. Here, he cannot visit ex officio, in less than five years.

As to *Strange, 797, The Bishop of Chester's case*, as warden of Manchester College—they agreed that in certain cases, the visitatorial right may be suspended, and revive again. But that case, they said, was not at all like the present case.

As to the case of *Dr. Green v. Dr. Rutherford*—it was only a construction of a will containing a trust: which was not an object of the visitatorial jurisdiction. Besides, the point of judgment in that case, they said, was with them.

[195] And they concluded, that therefore no appeal lies to the Bishop of Ely in the present case, upon the foot of its being, in general, one of the fellowships of this college.

2dly. Much less does it lie in this case of an annexed fellowship given by a subsequent foundation. The law will not imply that *Dr. Keton's* foundation is subject to any other visitor than himself and his heirs. An ingrafted foundation does not fall under the former powers, if the annexed founder gives other laws.

Now this is not a co-foundation, but a new foundation.

It is not true, "that *Dr. Keton* knew the Bishop of Ely to be general visitor." Or



the contrary, the bishop was not so, by Bishop Fisher's statutes: for by those statutes, the bishop had no right to interfere in the \*<sup>1</sup> election of fellows. And Dr. Keton reserved a power to give statutes consistent with the statutes of the college: and this right is either still subsisting in Dr. Keton's heir; or devolved to the Crown. Now at that time of Dr. Keton's foundation, the Bishop of Ely had no right of visitation as to the election of fellows.

3dly. Here is a common-law redress given: which no visitor can have a right to discuss. And the specific remedy is not to come from the Bishop of Ely at least; whatever it may be, or from whomsoever it is to come. They may go to a proper jurisdiction, for it. And as to the case of *Burton v. Pegg*, perhaps the Bishop of Ely was appointed visitor by Dr. Berisford: or the party concerned might not think proper to oppose, or not be able to oppose the bishop's proceeding. However the submission of the college cannot take away the right of the founder, nor the right of this Court; nor give to the bishop a right which he has not in him.

As to 4 Mod. 233, *Rex et Regina v. The Master and Fellows of St. John's College*, and Skinner, 359, &c. S. C. (*Dr. Gower's case*), and Comberb. 279, S. C. The return was not the dictum of the college: and such general terms were out of the case and improper. And the case of *Middleton & Ux' v. Croft* is not applicable. The Register of Writs, title Prohibitiones, pa. 38, is similar to this case, as to the being a common-law contract: "cum placita de annualibus redditibus, &c. &c. &c. ad nos et coronam et dignitatem nostram specialiter pertineant," &c.

The visitor is bound by the deed; and he cannot have any pretence to proceed in this case, until the covenants are broken, and the college have incurred the penalty: [196] and of this, the Courts of Common Law are to judge. If both jurisdictions should proceed together, their determinations may directly clash—therefore the common-law Courts will prohibit him from proceeding at all.

Dr. Keton was a purchaser of these two fellowships: and he reserved a power of distress. The requisites to his fellowships are, being a chorister of Southwell, if, &c.; and having learning and morals. If the college should fail to choose such persons, &c. they are subjected to a forfeiture: for which, a distress may be taken: this is the sanction annexed; and this is an adequate remedy. And upon this deed, the chapter of Southwell are only trustees for the candidates; and they would be answerable to him. And this would subject the matter to the Court of Chancery, as a trust; and might also subject it to this Court, as to granting a mandamus to admit him. And therefore, though the bishop should even be considered as general visitor of the college, yet this Court would prohibit him, from proceeding in this particular affair; or at least, give the college leave to declare in prohibition. This Court will prohibit jurisdictions who are proceeding without right; although they themselves cannot, perhaps, give an adequate remedy. However, here the founder considers the distress as an adequate remedy.

They concluded with saying that they only desired leave to declare in prohibition; not an absolute prohibition.

Mr. Just. Foster said he had not seen Bishop Fisher's statutes; which though now repealed, were yet in force at the time of this annexed foundation: and they are said \*<sup>2</sup> to restrain the bishop from exercising any powers relating to the election of fellows. Now that may deserve consideration, though these statutes should be now expired: for they were understood to be in force at that time when Dr. Keton made his foundation.

On the day following (viz. Saturday, 27th November 1756,) Ld. Mansfield said that upon looking into the papers left with him, he found it necessary, towards coming to a complete understanding either of the statutes or of the deed, "that the prior constitution of the college, antecedent to both, should be laid before the Court;" as both the deed and also Queen Elizabeth's statutes expressly refer to this prior constitution of the college, and consequently must be (in some measure) unintelligible and inexplicable, unless it be also known, "what that prior constitution was." He proposed therefore that the parties should, in the best manner they could, lay this constitution before the Court; and that the case should be spoken to again in the next term: not by all the counsel arguing it over again, but by only one counsel on each side, who should apply themselves to such conclusions as might arise from such

\*<sup>1</sup> Ante, p. 181, post, 196.

\*<sup>2</sup> Vide ante, 181 and 195.

prior constitution of the college, and be applicable to Queen Elizabeth's statutes or to the deed of covenants.

[197] The case was accordingly adjourned till next term, to be then spoken to by one counsel on each side, on the prior constitution of the college, antecedent to Dr. Keton's annexed foundation and deed, and consequently to Queen Elizabeth's statutes likewise.

On this day (Thursday, 3d February 1757,) this case was again spoken to, by one counsel on each side.

Mr. Yorke, Solicitor General, on the part of the bishop and Mr. Todington, made three questions, viz.

1st. Whether the bishop is not as extensive a visitor, under the old constitution, as under the new.

2dly. Whether the college are not bound by the acceptance of the new statutes.

3dly. Whether Dr. Keton's fellowships are not bound by the acceptance of the new statutes, as well as the rest of the college.

First—he insisted that the bishop is as extensive and complete a visitor under the old statutes, as under the new. This he endeavoured to make out, from the old statutes of the college. (And upon these, the question must depend.)

Secondly—the college are bound by the acceptance of the new statutes.

Ld. Mansfield—The college will not (most undoubtedly) agitate that question: for if they do, they must give up all their livings, &c. and all other advantages that they claim under them.

Mr. Norton, on the part of the college, readily agreed to this; saying that they should not (certainly) make a question of this; having acted 200 years under these new statutes.

Mr. Solicitor General then proceeded to his third question.

Thirdly—he insisted that Dr. Keton's fellowships are bound by the new statutes, as well as the rest of the college: for, as he has not given new statutes, these fellowships are to be conducted and bound by the ordinary statutes of the college; and the rather, for that these fellows enjoy all privileges, and come into the seniority, in the same manner as the rest of the fellows do.

[198] Mr. Norton, *contra*—for the college.

This case stood over, in order to see what was the state of the college, at the time when Dr. Keton's deed of covenant was made; at which time, Bishop Fisher's statutes subsisted.

The Bishops of Ely were owners, originally, of the site of the college; and, as Bishops of Ely, were ordinary visitors of this place: from one or both of which circumstances, they might possibly set up a right of visitation. Now Bishop Fisher's statutes professedly mean to obviate any such pretension; and to prevent the Bishops of Ely from claiming a right of visitation, as general visitors of the college. Which position Mr. Norton endeavoured to prove from Bishop Fisher's statutes. And he said that if the statutes were to be construed otherwise, it would occasion a clashing of jurisdictions and the utmost confusion in the college. As to any power of visitation that the Bishops of Ely may have at common law, he said he did not mean to dispute that, with them: but as to the claim of a general visitatorial power over the college, he prayed leave to declare in prohibition; that it might be solemnly determined upon record, and that each side might have an opportunity of appealing elsewhere, if dissatisfied with the determination of the Court.

He strongly contended, that it was premature, to determine now "whether the Bishop of Ely had jurisdiction;" that there ought to be a rule for the plaintiffs to declare: that such was the course of the Court, and it had not been usual to examine the matter upon shewing cause: after a declaration in prohibition, the whole would appear upon record, be solemnly judged, and the judgment might be reviewed upon a writ of error.

Lord Manfield—If the party who applies for a prohibition has a right to declare, though the Court should see no ground for the motion; a rule "to shew cause why the prohibition should not be granted," is to no purpose; and hearing counsel upon the sufficiency of that cause is time misspent.

When the matter seems doubtful to the Court, upon a question of fact or law, the plaintiff has leave to declare: that the parties may have the fact properly tried by a jury, or the law solemnly considered, as in a cause.



When the Court is clearly of opinion that there is sufficient ground for the prohibition, the defendant has a right to put the plaintiff to declare; that his jurisdiction may not be taken from him, in a summary way, where no [199] writ of error will lie. But if the Court be clearly of opinion that there is no ground for a prohibition, it ought to be denied, without putting the defendant to expence, and delaying, in the mean time, the exercise of what appears to them a lawful jurisdiction.

This denial is not conclusive to the plaintiff. If there is no jurisdiction, the sentence will be a nullity; and upon any attempt to execute or enforce it, the whole may be tried in an action. The plaintiff may also apply to any other Court in Westminster-Hall, for a prohibition; and take their opinion.

If, in cases of this kind, the Court should too easily yield to hang up the matter, by letting the plaintiff declare in prohibition; redress would come too late, and cost too much.

I was very desirous, as there is no fact disputed, to go fully into the argument now; and if I saw no ground to doubt of the bishop's jurisdiction as visitor, to stop unnecessary delay, vexation, and expence.

The subject-matter of the complaint to the visitor is a competition for present maintenance and education: upon an eleemosynary foundation: the cause of the contention is a controverted election; which is too apt to engage and animate the electors.

In compassion to the candidates, and for the peace of this learned body; the dispute ought not to be suffered to continue longer than is absolutely unavoidable.

If the plaintiff might, as of right, demand to declare in prohibition, the consequences would be fatal, in both universities. The college, as here, (i.e. the majority which determines the body,) would support the election they had made, and may easily keep the visitor off for years; their public stock would be applied to defray the charge: in the mean time, elections of new fellows might come on; their validity might depend upon the rights in dispute; the election of masters might come on; great abuses, in such a state of confusion, would naturally creep in; discipline could not be kept up; intestine heats and divisions would counteract the whole intention of the founder. The reason of a visitor would be destroyed. He is appointed and made absolute upon this principle, "that, in these societies, error of judgment, the chance of partiality, or injustice, is a less evil than the duration of contention:" but if, by disputing his jurisdiction without ground, his exercise of it may be protracted as long as a cause can be kept up for delay, by parties who do not regard the costs, the members of every college in both universities who complain of an injury done, must be [200] subjected to both inconveniences; 1st. to the law's delay, in the most deliberate method of judicial proceeding; and, at last, to the award of an absolute Judge, in the most summary method of trial.

If we are clear, "that the bishop has jurisdiction," we should do injustice in the present case, and set a bad precedent for keeping up groundless strife, if we did not discharge the rule. And therefore I think, the merits should be fully gone into now.

As to the merits—

The 1st question is, "whether the Bishop of Ely is visitor of St. John's College, as to the election of fellows and other officers:" (for so is the suggestion; where the averment is "that he is not visitor in that respect;" and the master and senior fellows make the complaint).

The 2d question is, "whether, supposing him to have this power, as to the fellows of the old foundation, he has also the like power, as to the fellows of this new annexed foundation of Dr. Keton's."

The visitatorial power, if properly exercised, without expence or delay, is useful and convenient to colleges. However, (be that as it may,) we must take it, as it is now established by law: and it is now settled and established, (since the case of *\* Philips and Bury* in Dom. Proc.) "that the jurisdiction of the visitor is summary and without appeal from it."

These foundations of colleges are to be considered in two views, viz. as they are corporations, and as they are eleemosynary.

As eleemosynary, they are the creatures of the founder; he may delegate his power, either generally, or specially; he may prescribe particular modes and manners,

\* Vide 4 Mod. 106, and Skinner 447. Show. P. C. 35, &c.

as to the exercise of part of it. If he makes a general visitor, (as by the general words "visitator sit,") the person so constituted has all incidental power: but he may be restrained as to particular instances. The founder may appoint a special visitor for a particular purpose, and no farther. The founder may make a general visitor; and yet appoint an inferior particular power, to be executed without going to the visitor in the first instance.

[201] No technical precise form of words is necessary for the appointment of either general or special visitor. In a case before Lord Hardwicke, on 21st March 1747, *Attorney-General v. Talbot*, in Chancery, "the chancellor of the university was held to be general visitor of Clare-Hall, without express words of appointment:" but it was implied, "from various branches of the visitatorial power being expressly given to him; from his having the interpretation of the statutes; and from an express exclusion of the founder's heir." Therefore it must be collected from the whole purview of the statutes considered together, "what power the founder meant to give to the visitor."

Under these general rules, I will now consider the present case, as it stands upon the statutes of this college.

The foundation of this college is to be taken (as to this question) from the statutes of Queen Elizabeth: which are the now governing constitution of this college. These statutes reserve to the Crown the legislative power: so that the case of altering the statutes is certainly excepted: if such power be included in the office of visitor. But where a body of statutes has been given by the founder, I should doubt extremely, "whether a visitor can alter those statutes, or give new laws:" (whatever may have been the notion in former times).

All other visitatorial power is given to the Bishop of Ely, by the statutes; and principally by the 2d chap. De Electione Magistri, the 50th, De Ambiguis Interpretandis, and the 51st, De Visitatore; (for the rest of the statutes are less clear and explicit than these are, as to the proof of this point).

His Lordship then went minutely through these three statutes, and shewed that they gave the Bishop of Ely the general power of visitation: which he specified in many instances, and particularly in the words, "visitationem hujus collegij episcopis Eliensibus commendamus."

In the case of *Green v. Rutherford*, in Chancery, 23d May, 1750, upon so much of these statutes as was then shewn, Ld. Hardwicke gave his opinion, "that the Bishop of Ely was general visitor of this college; but that he could not make new statutes; and if he should attempt it, the jurisdiction would devolve to the King's Courts, as in *The King v. Bishop of Chester*, the case of *Manchester College*, Pasch. the first of His present Majesty."\*1

More statutes are now shewn; but nothing arises from them, to vary this construction.

Nothing appears upon the old foundation or the other statutes, to impeach this construction.

[202] The visitatorial power is almost as strongly given him by the old statutes, as by the new: the difference is, that in the new statutes the ambiguous clause in restraint of the bishop's power, towards the end of the old Statute de Visitatore, is \*2 omitted.

What is there said does not restrain the power of the Bishop of Ely, so strongly as may at first sight appear.

The meaning of the provision seems to be, that he shall claim no right as a co-founder, though he was owner of the site; but only act as in other colleges, where he is, not founder. And in colleges where he is not founder he may act under powers of visitation delegated to him. However, be the meaning as it may, this clause is totally omitted in Queen Elizabeth's statutes.

This is not the case of expulsion; where the master and four senior fellows are to \*3 consent. The power of judging and giving relief upon complaints and appeals, is incident to the office of general visitor: and if this case related to one of the old fellowships, the statutes have laid the visitor under no restraint, as to the mode and manner of exercising it.

\*1 2 Strange 707.

\*2 Vide ante 188, compared with 181.

\*3 Vide ante 181.



As general visitor therefore of this college (which I think clearly the bishop is) he would certainly have jurisdiction, if this appeal related to one of the old fellowships. Which brings me to the

Second point—"Whether the visitor of an old foundation, has the like power and jurisdiction over a new annexed foundation, as he has over the old one."

It is a question of extent and consequence.

In this college, there are thirty-two original fellowships; and twenty-seven, upon annexed foundations.

I find that the general method of ingrafting fellowships, is by indenture, and with a clause of distress. I apprehend that this method took its rise from the old tenures by divine service, (which differ somewhat from tenures in frank almoigne :) where the donor had a power of distress, of common right, when the service was certain. (But this is only a conjecture.)

I have procured information, concerning most of the colleges in Oxford and Cambridge: and I find that most of the old colleges, in both universities, consist and are made up, (less or more,) of ingrafted fellowships; [203] and ingrafted by indentures too. And all these are considered as part of the old body; unless there be any particular exception, by the terms of the new foundation.

There was a case (6th July 1740,) of University College in Oxford (founded by King Alfred;) where W. of Durham afterwards founded two fellowships, "de proximis Dunelmæ partibus." A complaint was made to my Lord Chancellor, as general visitor of the college in right of the King: and it was determined against the college. Yet W. of Durham had in that case, given no statutes himself; but these ingrafted fellowships were considered as subject to the general visitor of the old foundation. In that capacity Lord Hardwicke took cognizance: and the college never made any objection.

In the case of *The Attorney General v. Talbot*, which I mentioned before, the Countess of Clare was foundress of Clare-Hall. One Freeman annexed two fellowships by indenture; (I do not observe there is any clause of distress in it). The contest was for one of these fellowships. Lord Hardwicke held "that the question belonged to the general visitor of the college: that new fellowships ingrafted must be subject to the jurisdiction and discipline exercised over the original foundation."

In the case of *Dr. Green v. Rutherford & Al.* (which I mentioned before,) both Lord Hardwicke and Sir J. Strange, expressly laid it down, "that new ingrafted fellowships, if no statutes were given by the founders of them, must follow the original foundation, and be subject to the same discipline and judicature.

I am satisfied that, upon mature reflection, the college would tremble at the consequence of leaving every election into any of these ingrafted fellowships, or any other disputes concerning them, open to Courts of Law, and the expence and delay attending suits in them.

I think clearly, that Dr. Keton did so consider and intend "that his new annexed foundation should be subject to the old statutes and constitution of the college, in case he himself should happen to die without making any ordinance by will or otherwise." These fellows of his foundation are to be elected as the other fellows; and at the time limited by the statutes. They are to enjoy the same liberties, &c. as the other fellows. The oath they were to take during the life of Dr. Keton, "to obey such statutes and ordinances as should be made by him," is qualified with this restriction, "so that the said statutes should be conformable with the [204] statutes of the foundress of the said college;" which necessarily implies that they were, in the first place, to obey the statutes of the foundress of the college.

(He explained this, by many other passages in the said indenture.)

Besides, eo nomine, the ingrafted fellow becomes subject and liable to the jurisdiction of the visitor over the fellows of the college. These ingrafted fellows are exactly the same as all the rest of the fellows, except as to the money arising to them from the new foundation; and are entitled to all the like privileges as the old foundation fellows are entitled to.

The objection to the bishop's right of visiting in the present case, arises from the power of distress here given for the forfeiture, in case the college do not observe certain terms which are prescribed to them.

But several other engrafted fellowships are just in the same situation: and therefore it would go a great way, (in point of consequence,) if, upon this ground, we were to determine them not to be part of the old foundation.

These are provisions diverso intuitu. And indeed the distress would be a very inadequate remedy, to the person injured : nor is it even given to the person injured, but to other persons. So that it is manifest, that this clause of distress, given to the church of Southwell, ought not to take away the specific remedy from the person injured.

It seems to me very clear, that the bishop is as much judge of this complaint, as if it related to one of the old fellowships : and if it related to one of the old fellowships, I think the jurisdiction of the bishop, as visitor, most evident. Therefore, I am of opinion, that the cause shewn against this rule is sufficient : and it ought to be discharged.

Mr. Just. Denison concurred, in the whole, with Lord Mansfield.

He thought clearly, that the Bishop of Ely was general visitor, except in the instances particularly excepted.

No particular technical words are necessary to create a visitor. And so was the opinion of the Court, in *Dr. Snape's case*, H. 2 G. 2, B. R. as well as in the case of *Philips v. Bury*. And the main business of a visitor, is to interpret the statutes.

[205] Now this deed, though with a clause of distress, cannot take away the authority of the visitor : it is for another purpose. And Dr. Ketton never meant to exclude his scholars and fellows from the benefit of an appeal, which the other fellows of the college enjoyed. And his fellows are sworn to observe all the statutes of the college.

The distress is very little more than the form of the conveyance ; and it is given to the church of Southwell too : but surely it is not an adequate satisfaction to the rejected fellow, who has a right to be elected into the fellowship.

The visitor has a right to the interpretation of the statutes ; and the ingrafted fellow has a right to appeal to him ; and the clause of distress does not take it away from him. And there is no manner of reason why the ingrafted fellow should not have the same privileges as the other fellows have.

I am so clear about this matter, that I think there is no reason for suffering the party applying for the prohibition to declare in prohibition : but the rule ought to be discharged.

Mr. Just. Foster also concurred.

He took particular notice of the 50th chapter of Queen Elizabeth's Statutes, about interpreting what might be ambiguous or obscure. Which statute, he agreed, does reserve to the Queen a power to add or diminish, reform, interpret, declare, change, alter or dispense, &c. But the doctrinalis expositio is expressly given to the Bishop of Ely, in the very same statute ; and the college are thereby enjoined, in virtue of their oath, and under penalty of perpetual amotion, to <sup>\*1</sup> obey his determination, interpretation, and declaration.

He declared that he had no doubt that the general power of visitation is given to the bishop ; and he said, he saw no inconsistency in the statutes. As to the clause of distress—that would give no sort of adequate satisfaction to this rejected fellow ; who comes for a specific remedy for the injury done to him. Therefore he declared his concurrence with Lord Mansfield and Mr. Justice Denison.

And per Cur.\*2 unanimously the rule was discharged.

[206] EARL OF BATH *versus* ABNEY, Spinster. Friday, 4th February, 1757. The executor of a termor of copyhold lands must be admitted, and pay a fine to the lord.(a) [Vide Vin. Cop. (16) W. (6). Strange 1042. 2 Gilb. Ten. 273, 259. 3 Leon. 9, contra.]

[Discussed, *Wilson v. Hoare*, 1831, 2 B. and Ad. 361. Referred to, *Everingham v. Ivatt*, 1872-73, L. R. 7 Q. B. 688 ; L. R. 8 Q. B. 388.]

A case out of Chancery, for the opinion of this Court.

The question was, whether an executor of a copyholder for a term of years, was

\*1 Vide ante 185.

\*2 N.B. Mr. Justice Wilmot was not present at any one part of this motion ; being engaged in the Court of Chancery (as one of the lords commissioners,) during the whole of it.

(a) Chancery will not compel the lord to give his tenant licence to lease. Ch. Pr. 572.

Custom that on payment of 10 years rent, the lord shall licence to let for 99 years.



obliged to be admitted; (and, consequently, liable to pay a fine upon such admittance).

The manor in which the lands lay, was Stoke Newington in Middlesex; the defendant, Mrs. Abney, is lady of this manor; the premises demised, were 60 acres of meadow, let at 125l. per annum.

The state of the case was pretty long and particular: but the question was short: (a)<sup>1</sup> viz. "whether an executor of a tenant for years, coming into the copyhold, as a chattel real, under his testator's will, is obliged to be admitted." For the counsel for the plaintiff, acknowledged that the being liable to a fine would consequently follow a necessity of admittance: that is to say, they admitted that if he was compellable to come in and be admitted, he would also be compellable to pay a fine. (b)

The full state of the case was in substance this—

That Henry Guy being seised in fee of sixty acres of meadow in the manor of Stoke Newington, let at 125l. per annum, the said Henry Guy surrendered the same to the use of his will, and having so surrendered (in a proper manner) to the use of his will, he died seised in fee; having first duly made his will, and thereby devised to John Taylour and Arthur Lake, their executors and administrators for ninety-nine years, if three persons (in his said will named) or any of them should so long live; upon several trusts, (c) viz. first, to the use of the present Earl of Bath, for life; then to his issue male, (viz. first and other sons, &c.) in strict settlement; then in the like manner, to the use of the earl's brother, General Pulteney; then to the late Mr. Daniel Pulteney, in like manner: then to the use of the Earl of Bath in fee. And after the death of the said testator, the said Taylour and Lake, the trustees, claimed to be admitted according to the tenor of the will; [V. post, 213] and were thereupon admitted according to the custom of the said [207] manor; did fealty; and paid a fine of 280l. to the then lord of the manor on such admittance.

One of the three lives is since dead; the other two, living; and both of the said two lessees, John Taylour and Arthur Lake are dead; but John Taylour survived Lake. Taylour, the surviving, (but now deceased) lessee, appointed Dr. John Taylour and another person his executors; and Dr. Taylour is now the surviving executor of John Taylour, the original and surviving co-lessee. (a)<sup>2</sup>

Mrs. Abney is now lady of the manor.

It did not appear to the lord or lady of the manor, that the lessees, Taylour and Lake, were dead, till 1752: when this fact was found by the homage.

Then the executor of the survivor, (which was Dr. John Taylour, the surviving executor of the said John Taylour the original co-lessee) was summoned to come in,

and if he will not licence, the tenant may let without, adjudged a good custom: yet the licence seems unnecessary, if there be a refusal, since it may be done without it. *Gilb. Ten.* 294.

To prove a custom to grant leases for years, it is not sufficient to prove it for thirty or forty years; but it ought to be "from time whereof, &c." *Cro. Eliz.* 351, pl. 3. *Sed vide contra*, 2 *Danv.* 190, pl. 1, in n.

(a)<sup>1</sup> There were, in fact, two questions, but the second was a consequence of the first, if it was decided for the lady of the manor. *Vide post*, 218.

(b) The devise was made by will founded on a surrender to the use thereof; and therefore it was the same as if it had been made by surrender, as the lady of the manor or her steward made no objection to an admission for a term of years.

(c) The devise was to the trustees for ninety-nine years, in trust to pay life annuities, and on several trusts, not for the benefit of Lord Bath; and after the determination of the term, then to Lord Bath for life, with remainders over. On the testator's death, the trustees were admitted to the copyhold premises as joint tenants, *secundum tenorem testamenti illius*, and paid a fine of 280l. which is under two years and one quarter value of the estate.

(a)<sup>2</sup> After the death of Taylour, the surviving trustee, Mrs. Abney, the lady of the manor, caused proclamation to be made for somebody to come and take the estate: whereupon the now plaintiffs, who are the remainder-men, the representative of the surviving trustee, and the two surviving annuitants, filed a bill, and upon allegation that the trustees were admitted to, and paid a fine for the whole term, and that the representative of the surviving trustee, has a right to be admitted without fine, (if any admission be necessary,) they prayed that the lady of the manor might be restrained from taking advantage of the forfeiture and from bringing any ejectment.

and be admitted; the jury having found that the original lessees were both dead: and proclamations issued, &c. [N.B. The proclamation was for the heir of Taylour or other person claiming, &c. to come in, &c.]

It is stated, that the general custom of the manor is, to grant the copyholds for life, or in fee; and that no other instance of a grant for years, besides the present instance (now before the Court,) has been known in the said manor of Stoke Newington.

The case further states, that fines have been usually paid upon admission; (*b*) and that the usual rate of such fines has been a year and a half's improved rent of the premises to which the tenant is admitted.

And by the usage of this manor, the fine usually taken for two lives, is as much and half as much as the fine for one life: and the fine usually taken for three lives, is as much and half as much, as the fine for two lives.

The two questions made upon this case, and sent to this Court for their opinion upon them, were, 1st. Whether the surviving executor of John Taylour (the surviving trustee of the term for ninety-nine years) ought to come in, to be admitted tenant of the copyhold premises in question: 2dly. In case he ought, then whether the lady of the manor will be entitled to any fine upon such admittance.

This case was twice spoken to, in this Court: first, on Tuesday, 18th May 1756, by Mr. Pratt for the plaintiff, and Mr. Sewell for the defendant; and a second time, on Friday, 4th Feb. 1757, by Mr. Norton for the plaintiff, and Mr. Gould for the defendant.

[208] And the two questions being reduced into one, as is above-mentioned (it being agreed "that if the executor was compellable to be admitted, he would consequently be liable to a fine;")

It was argued, on the part of the plaintiff, the Earl of Bath, that the fine becomes due to the lord (or lady) of the manor, upon every change of the estate; not upon the change of the tenant, where there is no change of the estate.

For where there are several remainders, to several persons, the admission of the first taker is the admission of every person in remainder. 4 Co. 22 b. Copyhold Cases; and 4 Co. 23 a. Case the 6th. Cro. Eliz. 504, *Gypyn v. Bunney*. Kitchen, 122.

And here, Taylour and Lake were admitted according to the tenor of their testator's will: which must have been to the whole estate comprized in the will. And therefore the fine must have been proportionable to the value of the whole term of 92 years: and it is against conscience that the executor of the deceased lessee should pay another fine for the same estate. Neither is he compellable to come in and be admitted afresh; it being the same estate.

And that no fresh admittance is necessary, nor any farther fine payable, appears from the case of *Dell v. Higden* in Moore, 358, and the case *Tiping v. Bunning*, Moore, 465. In both which cases it was holden and resolved "that the admittance of a tenant for life, of a copyhold, is an admittance of him in remainder; and that no new fine is due from him in remainder;" and in Cro. Eliz. 504, *Gypyn v. Bunney* (which is S. C. with Moore, 465). *Popham and Fenner* held accordingly; and that, because they have but one estate in law: and they held that only one fine is due; which the first taker shall pay.

In 3 Lev. 308, the case of *Barnes v. Corke*—Tr. 1 W. & M. in C. B. it came directly in question; and Lord Coke's dictum in 4 Rep. 23 a. was taken into consideration, and explained to be restrained to special customs only: but the general principle of law was settled to be, "that no fine is due to the lord, from the remainderman, without a special custom for it."

(*b*) If there be any exception to the rule, that admission universally gives a right to a fine, it is in the case of a widow's estate, or of a tenant by the curtesy; as to which, vide Gilb. Tenures, Ed. 1757, page 222, 223.

N.B. In a manor in which the tenants held estates by copy, to them and their heirs, by the words (*sibi et suis*) for ninety-nine years, yielding a rent; and mentioned, that by a custom, the lords upon expiration of every estate, ought to renew upon reasonable fines; the lord insisted that there was such a custom to renew, but the fines were always such as the plaintiffs could agree with him for, there being no benefit to the lord, during the ninety-nine years; but the Court declared that the plaintiffs on payment of two years value should be admitted to their estates. *Morgan v. Scudamore*, 2 Ch. Rep. 134.



And the reason is, (as Popham said, in the case of *Gyppyn v. Bunney*), "because both have but one estate in law, and the lord has already admitted to the whole:" which reasoning is quite applicable to the present case.

[209] If a copyholder in fee grants his copyhold upon condition, and enters for the condition broken; there shall be no fresh admittance, nor fine: because he is in statu quo prius. Coke's Complete Copyholder, § 56. So, if there be two joint-tenants, and one die: the survivor needs no admittance, nor shall pay a fine. Ibidem. So the widow of a copyholder, for her customary free-bench: because it is part of the old estate, and is cast upon her and vested by law.

So it is also in dower, and tenancy by curtesy; though there a new tenant intervenes.

Noy, 29, *Rennington v. Cole*, is full in point. Also Hutton, 18, *Jurden v. Stone*, S. C. Hob. 181, *Howard against Bartlet*, S. P. 2 Danv. 184, title Copyhold, letter M. pl. 1, in point. Cro. Jac. 573, *Waldoe v. Frances Bartlet Wid.* S. C. with Hob. 181, (but not this same point.) 2 Ro. Rep. 178, *Walter v. Bartlet*, S. C. It is considered only as an excrescence out of the original estate, by Ld. Hobart, pa. 181. And an executor of a copyholder for years is within the same reason; for it is only the old estate continued.

But the case of descents may be objected: for there the estate is the same; only the tenant altered.

Now it may be difficult to enter into the true reason of this. But it may be considered as a change of estate; and as a new grant: the lord gave a new admittance, a new grant.

But perhaps that case of descents may be an exception from the general rule.

There are several cases in point, for the plaintiff: and no authority against him, except Weston's opinion in *Dedicott's case*. *Dedicott's case* itself in 3 Leon. 9, is most express in point: and Dyer, 251, is S. C. (But Dyer does not mention this point at all)(a). The wife's interest was there a chattel-interest; and she was to have it for

(a) This case is very clearly reported in Dyer, and is a very strong authority against the plaintiff: for the opinion of the whole Court there was (according to that report, "that the entry of the administrator of the wife, to whom also the lord had granted the land, during the non-age of the son, (that was during the term,) was unlawful; but the interest which was in the wife, was a term, the which by the death of the feme vested in the husband by the law and custom of the realm, if there be not some private custom of the manor to the contrary." Now it is well known that the wife's term in freehold lands will vest in the husband by survivorship, if he outlives the wife in his own right; and that he has no occasion to take out administration if the term was in his possession: but if not, he must then take out administration to entitle himself to it, the same as to other choses in action. Co. Lit. 46 b. 299 b. 300 a. This, therefore, shews that the Court considered the term as an interest at common law, and this was the point adjudged. The other point there mentioned, which is the same as the point in the principal case there, was probably not taken notice of; because, as appears in 3 Leon. 9, there was a difference in opinion about it, and it was not directly the point in judgment, though there is a strong analogy between the two points; because the husband was a new tenant, and holden to be entitled by the common law; and if the common law gave it to him without admission, though he was a new tenant, on the general principle, that a term for years belonging to the wife will vest in the husband by survivorship, there seems no reason why, since the common law will in other cases vest the term in the executors of the termor, they should be obliged to be admitted any more than the husband; for it is not like the case of joint-tenant; for the reason why a joint-tenant shall not be admitted, is, because he was before admitted generally; all the joint-tenants are expressly admitted; but if not, the administration of one is the administration of all, Co. Cop. 50, s. 35. But that reason does not apply to the case of a feme who hath a term for years, in a copyhold, and afterwards takes husband and dies, which is the case in Dyer; and therefore there is no similitude in this respect between the case in Dyer and the case of joint-tenants; but the case of the husband surviving and holding during the term, without any admission, is more like the case of executors, because neither the husband nor the executors claim by custom, but by common law: and as the one is not subject to an admission, and fine, though he was never admitted, there

sixteen years: and her second husband, who survived her, had it as her assignee, without paying any fine, or being admitted. And in 3 Leon. 9, Brown and Dyer put the very present case in terms, of an executor of a copyholder for years; and agree that he shall have the term without admittance. And the case of *Ottery Monastery*, in 1 Leon. 4, and 4 Leon. 118, S. C. (twice printed, verbatim alike, almost,) mentions a determination of the present question, in point: agreeable to which, is another report of it, called *Heydon's case*, in Moore 128, S. C. Egerton, in his argument, of that case of *Ottery*, vouches a case as deter-[210]-mined in 8 Eliz. in C. B. which case is expressly in point with us. But the case itself, of 8 Eliz. in C. B. which he so cites, is not to be found. 2 Danv. 190, letter Y, mentions S. C. Sheppard's Court-Keeper's Guide, 5th edit. pa. 136, and Calthrop's Readings on Copyholds, 2d edit. pa. 67, is express in point: and so again, in pa. 72, tenant in dower and freebench. Tenures 272, 273, S. P. accordingly: (the Book of Tenures that has no name to it). And Comberbach, 445, express "that the executors of a termor for years of a copyhold shall pay no fine for admittance."

They said that the case of *Dell v. Higden*, in Moore, 358, was but a loose note:

is no reason why the other should be subject thereto; and Gilbert, in his Treatise of Tenures, ed. 1738, pag. 272, 273; ed. 1757, pag. 289, 290, cites the above case in 3 Leon. 9, and Dyer 251, and after taking notice that one Judge differs from the other two, gives his opinion in favour of the right of the executors, to have the term without any new admittance; for he observes that opinion seems reasonable, for they continue the possession of the testator, and have it only to his use.

Before this determination, all the authorities, or at least the great weight of them, were in favour of the executors; and the principles on which other cases have been determined, are also in favour of the executors; for it was holden uniformly, if the lord hath a particular estate in the manor; if his estate determines before the expiration of the term of years for which the lease was made, and the licence granted by him, that the lease will be determined, 2 Brownl. 40. And the reason is, that such a lord cannot discharge the lord's interest any further than his own interest in the manor extends. Gilb. Ten. 299.

It is also holden, that if the lord seized in fee gives licence to lease, and the copyholder leases according to the licence, his lessee may assign or make an under-lease without any new licence, Gilb. Ten. 299. Though the reference there is not to the point; but the same points are mentioned as of course, though without any state of the case, or any notice taken by whom, in 12 Mod. 230; and this reason is given, viz. "because the lord's interest was bound for ninety-nine years."

N.B. If tenant in fee of a copyhold surrenders to one for years, it seems that he shall hold of the lord; but if the lease be made by indenture, there it seems he holds of his lessor, Gilb. Ten. 175, edit. 1757. Note also, that the lease for years was in this case, of *The Earl of Bath v. Abney*, created by devise pursuant to a surrender to the use of the will; and in all such cases the estate passes by the surrender, and the will is only declaratory of the uses: therefore this case is to be considered in the same light, as if the term had been created by surrender, and consequently the termors were tenants to the lord; and therefore on the death of the survivor, a fine would be due from his executors, who would also be tenants to the lady of the manor; and wherever there is an admission there is generally a fine due: but if the lease had been created by deed, and by licence, then the termors would not have been tenants to the lady of the manor (Gilb. ubi sup.): therefore Burrow ought in this report to have stated how the term was created; and the judgment in this case ought to have been founded upon the above distinction; but as it was not, but is given generally as law, with respect to all terms for years, in copyholds, the judgment, as it appears on this report, and as it seems to have been given by the Court, is not law, because it is given as law with respect to leases, whether made by deed by the copyholder with licence, or by grant by the lord; whereas in fact it is law only in the last of those two cases.\*

\* In the index, tit. Copyhold, the case is put rightly: for it is there put of a grant of a copyhold, which means a grant by the lord; therefore as there put the case is right; and qu. if in licences to lease, there are not frequently special reservations so as to prevent any prejudice to the lord? for there are in all or most I have seen.



and Cro. Eliz. 372, which is a report of the very same case, does not mention any such question in it.

And as to what was cited out of the case of *Gyppyn v. Bunney*, Cro. Eliz. 504, and Moore, 465, they said it was no more than a dictum of Popham's.

Then, if the executor is not obliged to be admitted, no fine is due: for no fine is due, but upon admittance.

But the inconvenience may be objected, "that a lord may be stripped of his inheritance, by copyholder's surrendering for long terms (as even for a term of 1000 years:)" and so the lord might lose his fines.

But, 1st. This inconvenience does not really exist at present: and, 2dly. The lord might in such case refuse to admit; and could not be forced to it, either in law or equity.

2 Bulst. 336, *Foorde v. Hoskins*, proves "that the copyholder cannot bring an action at law." (It is a most express determination in point.)

And in equity, they would not assist the copyholder in such an attempt. Comberb. 445.

The present case is a lease to two persons, for 99 years determinable upon three lives: in which, the fine might easily, in fact, be settled by a proportional computation, if it could be done by law.

The copyholder derives his estate, not from the lord, but from the custom of the manor: for a lord who is only tenant for life, may admit in fee.

And "that the lord would not be bound, either in law or equity, to admit, upon a surrender by a copyholder in [211] fee, for 1000 years," Comberb. 445,\* expressly proves; and also proves "that in such a case, an executor shall pay no fine for admittance:" which, it must be supposed, was taken down by the reporter, as Lord Holt's opinion.—(\* This is no part of the case of *Sandwell v. Sandwell*; but manifestly, a quite distinct case; probably, at Nisi Prius.)

The lord's interest in his fine is sacred: an Act of Parliament shall not be construed so as to deprive him of it. (V. Manwood's Diversity, in Moore, 128.)

It would be very hard on our side, if a year and a half's rack rent was to be paid upon every charge of an executor.

Therefore they prayed a certificate in the plaintiff's favour.

On the part of Mrs. Abney, lady of the manor, it was agreed, that, in this particular case, the fine and the admittance must depend on each other; i.e. that either both might be required, or neither could.

But it was said that the reason of admittance, in general, depends upon the relation that subsists between lord and tenant: and that the admission of the tenant, in these cases, was personal to the tenant himself only; and the estate depended upon the will and pleasure of the lord. He might originally admit whom he pleased, on the decease of a tenant. Indeed, at length, a sort of claim in the heir at law, to succeed to his ancestor, became established by custom. However, a great deal still remains in the lord's power and discretion: and the tenure is still (strictly) at the lord's will.

It was always necessary that the new tenant should personally appear: and it so remains still, to this day; he must pay his fine, and do fealty in person. Co. Copyholder, § 19, and 4 Rep. 22 b. &c. to the like effect.

And they forfeit, if they grant leases without licence. 4 Co. Copyhold Cases. 9 Rep. 76 a. *Combe's case*.

And they must be persons capable of being admitted: for it is impossible to admit one who is incapable of admission.

Now no man is heir or executor to the tenant during the tenant's life. Therefore the thing itself is impossible, "that the admission of the first tenant should be an admission of them also, as heir or executor to such first tenant."

[212] The "change of estate, and not of tenant, cannot be the true ground of the fine to the lord." For that notion would let in many inconveniences: and it would be most unreasonable that one single fine to the lord should answer to all changes of the tenant.

The remainder-man may be tenant for one purpose; not for another. Co. 4 Rep. 23 a. b.

Admittance precedes the fine; and is the cause of it. It is necessary, in order to intitle the lord to a fine. And this appears to be the sense of the Legislature, by

9 G. 1, c. 29, "An Act to Enable Lords of Manors more Easily to Recover their Fines, &c." And upon admittance, a fine is due. And 1 Mod. 102 & 120, *Backburn v. Graves*, proves that the lord shall still have his fine; although the admission of the particular tenant be the admission of the remainder-man. It does not follow, that because the estate is vested, therefore there shall be no admittance or fine: for upon descents, (where there is no doubt but that a fine is payable,) yet the estate is undoubtedly vested in the heir. And Coke's Complete Copyholder, § 56,\* page 63, is express in point "that he in remainder shall be admitted, and pay a fine; although his estate was vested by the admittance of the tenant for life."

In the case of *Barnes v. Corke*, 3 Lev. 308, the principal question, they said, was upon the forfeiture: and that the other points were only incidental. (But the 1st point was (in terms) "whether a fine was due.")

In the case just now mentioned, stiled *Batmore & Ux' v. Graves*, in 1 Ventr. 260. Or \* rather *Blackburn v. Graves*, as it is called in 1 Mod. 102 & 120, S. C. It was determined, "that the admission of tenant for years was an admittance of him in remainder, and occasioned a *possessio fratris*:" and it is there resolved, that the admission of the tenant for years, though it is an admittance of him in the remainder, yet shall not prejudice the lord, as to the fine from the remainder man. And 1 Ventr. 260 is express and plain, "that the remainder-man must pay a fine, when his estate comes in esse."

Indeed, where the whole fine has been already paid to the lord upon the first admission, there is no reason why it should be paid over again: and the remainder-man is in fact admitted, in such case. But where the fine is not paid for the whole, upon the original admission; there, the remainder-man must pay a fine, and must be admit-[213]-ted. (V. 1 Vent. 260, and 1 Mod. 120, where this matter seems to be put upon a right and reasonable foot.)

If the remainder-man dies during the life of the tenant for life, his heir shall be admitted and must pay a fine. Therefore the payment is for lives in being; and the fine is payable upon the change of the tenant: and the admittance does not extend beyond the persons of the tenants admitted. They are still only tenants at will. Co. Copyholder, § 14, § 32, § 41, expressly, 4 Rep. 22 b. S. P. in point, accordingly. And the estate is only vested in the tenant personally.

In the present case, the persons originally admitted, prayed to be admitted "according to the tenor of the testator's will;" and it was granted to them, according to the custom of the manor: there is nothing said of their executors. And they were admitted as trustees, and not for their own benefit: and their admission was only personal.

The admittance of an heir is very different. Compleat Copyholder, § 41. 4 Rep. 22 b.

The heir has very considerable interest, before admission: yet he must be admitted.

As to tenants pour autre vie, they shall be admitted, and pay fines. Co. Copyholder, § 56.

All who allow of a general occupant, say he must be admitted: and there is no doubt but that a special occupant must be admitted and pay a fine.

Wherever a right is transferred, upon death, there must be an admittance.

A termor may die intestate, and have no administrator; or may make a will, and the executor renounce: and shall the lord have no tenant? Surely in these cases, the lord shall not be without any tenant at all.

An assignee of a term shall pay a fine; so, a devisee of a term; indeed, every new tenant shall pay: a mortgagee; an assignee of a bankrupt; the heir of the assignee; in short, wherever there is a change of tenant.

If it depended upon the change of estate only, an estate in fee would never pay.

[214] *Dedicott's case* is strong for the defendant.

Dyer, 251, explains 3 Leon. 9. The husband, it appears by Dyer, was not the personal representative of his wife: for she had an administrator, appointed by the Ordinary. In 3 Leon. 9, there was, as he reports it, an obiter dictum of two Judges, indeed; but contradicted by another. In Dyer, it appears that the husband held in, in right of his wife: and the dispute was between the wife's administrator, and the

\* Vide 3 Keble, 263, 329, S. C.



husband. The husband was possessed jointly with the wife, on his marriage; and he only continued in possession. Executors may be considered as assignees, (the rather as copyhold estates are not assets;) but the husband could not, in this case of *Dedicott*, be considered as assignee. In 5 Rep. 18 a. Lord Coke cites 29 E. 3, 48, and 30 E. 3, 14, *Simpkin Simeon's case*; by which it appears "that the baron is not assignee to his wife;" in *Dedicott's case*, there was no transmission of estate. It is like the case of joint-tenants; where the survivor shall not pay. Co. Copyholder, § 56.

Calthrop's Reading, 67, is plainly the same case with 3 Leon. 9, and Dyer, 251, *Hauchet v. Rose*; as appears by the margin of Dyer, and by the end of the case itself too. It is only a scrap, out of Leonard.

As to the case of *Ottery Monastery*, reported in Moore 128, and in 1 Leon. 4, and 4 Leon. 117, (S. C. in terms) and the case of 8 Eliz. there cited, by Mr. Solicitor General Egerton; there was no question between tenant and lord: and Egerton plainly means *Dedicott's case*, and the dictum there mentioned. For *Dedicott's case* was in C. B. and was in 7 Eliz. according to 1 Leon. 9, and H. 8 Eliz. according to Dyer.

As to Noy, 29, *Rennington* against *Cole*—the custom of the manor was for the wife to hold durante viduitate: and the wife's estate durante viduitate was "but a branch of the husband's estate," (as is rightly there said Hobart).

As to Hob. 181, the case of *Howard v. Bartlet*,—the same custom is stated: and the husband's estate was holden not to be merged; and the last-mentioned case, of *Rennington v. Cole*, was there taken notice of and cited by Lord Hobart.

As to Comberb. 445, it is a mere short, loose, Nisi-Prius note: neither the book itself, nor this note in it, are of any authority. And non constat whose opinion it is, that the note mentions. If it were good law, it would render [215] all family-settlements ineffectual: for he asserts "that the surrender may be for a thousand years, and that the executor shall pay no fine." At this rate, the granting copyholds for terms of years would be, in effect, infranchising them.

We are not now upon any special custom of a manor; but upon the general custom of manors: therefore the cases upon particular customs are not applicable to the present. The collateral qualities of dower, freebank, &c. are not incident to copyholds; but depend upon special customs. In this manor, the fines are uncertain: but one year and a half's value of the nett year's rent has been generally taken, for one life; two years and a quarter for two lives; and for three lives, half as much more.

And regard ought to be had to the fine paid on the last admittance.

This estate was of the value of 125l. per ann. when the two tenants Taylour and Lake, the first lives were admitted; and the fine paid (viz. 280l.)\* answers to the two lives admitted, according to the abovementioned rule: and the length of the term is of no consequence. These two persons therefore were the tenants: after their death the lord has no tenant: it makes no difference, whether the admittance be for lives: or for a term of years determinable on lives.

Upon the usage stated on this case, a proportionable sum is to be paid for a fine, according to the number of lives. And this is a just rule, and the best rule: and it is better to keep to this rule, than to form a new rule, upon a suit in equity "to compel the lord to admit."

The point turns merely and entirely upon the change of tenant. If it were otherwise, lords of manors, nay even jointured ladies of manors, might make voluntary grants, and incurber their posterity, ad libitum. The lady of this manor is lessee under a prebendary: and consequently, such lessee (though she were only so for one year) might admit for 500 years, without any fresh fine, upon their principles; and so defraud the original owner of the manor in fee. It would take it out of the restraining statutes of Queen Elizabeth.

The first admission was in 1709; (viz. the admission of the two lives who were admitted according to the tenor of the testator's will).

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	£	s.
* 1 year . . .	125	0
$\frac{1}{2}$ a year . . .	62	10
1 year & $\frac{1}{2}$ . . .	£187	10
$\frac{3}{4}$ of a year . . .	93	15
2 years & $\frac{1}{4}$ . . .	£281	5

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[216] Reply, on the part of the plaintiff.

The dispute between us, "upon what principle fines are due to the lord."

They say, "on the change of tenant;" we say, "on the change of estate, only."

They argue the admittance to be personal; and urge it, from the doing fealty, at the time of admission.

We agree, this was so originally: but we say the admittance is not always personal, now. The cases of dower, and of tenant by curtesy prove this: for neither of these tenants appear personally, or do fealty. And the case of *Barnes against Corke*, in 3 Lev. 308, alone proves the same thing.

And *Ld. Coke*, in his *Copyholder*, agrees "that the heir would not need to be admitted, if it were not on account of the lord's fine."

And all the remainder-men are admitted under the original admittance, till a descent: but we agree that whenever a descent happens, the lord shall have a fine.

The gradual diminution of fines, on admitting for several lives, seems to shew that only one fine is due; and that that fine is payable on the first admission.<sup>(a)</sup>

The case of an occupant *pour autre vie*, is a new estate: for the old estate is gone; though the grantor is estopped to take against his own grant, (which extended beyond the life of the grantee himself).

As to the assignee of a term—he can only come in by surrender and admittance: which is a new estate: and he can have nothing till admittance.

So, in case of a mortgage, the mortgagee comes in under a surrender: which makes a new estate.

So, in case of an assignee of a bankrupt. And the Act of Parliament of King Jac. 1, requires the assignees coming in thus: it takes express care of the lord's interest. (V. 13 Eliz. c. 7. 1 J. 1, c. 15. 21 J. 1, c. 19, and also *Co. Copyholder*, § 56, pa. 62, at the very bottom.)

The case of a devisee, is likewise undoubtedly a new estate.

[217] And in case of the executor's renouncing, or of no administration being taken out, still the lord will not lose his fine.

In case of a woman's free bench, there is a change of tenant. So in a tenant by curtesy's case.

As to the case in *Dyer*, 251, the husband is a new tenant, it is true: but the estate is the same.

Just so here, in the case of an executor, the estate remains the same.

Probably the case mentioned by Mr. *Calthrop* is the same case with that in *Dyer*. But still Mr. *Calthrop's* opinion stands uncontradicted: and it is confirmed by Lord *Ch. J. Holt's* dictum, and by the tenures, and by *Danvers*. (V. ante, 210.)

As to the quantum of the fine—they say the original fine was taken only as an equivalent for two lives; and that therefore another ought now to be paid, as an equivalent for a third.

But the fine usually taken in this manor, where a third life is added to two former ones, is only the fine upon two lives, and half as much more.\*

Whereas they now demand a whole fine: and they might just as well demand it, if only a few years of the term remained unexpired.

As to the inconveniences, the lord cannot be compelled to admit, either by law, or in equity, without the tenant's paying a reasonable fine to the lord.

And a temporary lord can never infranchise the tenants' estates, by collusion: for that would be a void grant, and would be considered as a voluntary admission, which would not prejudice the capital lord.

(a) The lord may set a fine for the particular estate, and another for the remainder. *dub.* 1 Vent. 260.

But there ought to be a special custom, otherwise a fine is not due for a remainder, per two Judges, 3 Lev. 308; per *ib.* Cro. El. 504. And if another fine is set for a remainder, it is only half. *Kit.* 122 b.

And it need not be paid till the remainder comes into possession. Per *Wild*, 1 Vent. 260.

If a copyhold be granted to A. for years, who dies during the term, the executor shall be admitted, and pay a fine. Per *Weston*, 3 Leon. 9. 2 Com. Dig. 392.

\* N.B. The fine for two lives, is the sesqui of that taken for one; and the fine for three is sesqui of that taken for two; by the usage of this manor. Vide 207, ante.



This is owing to the modern fashion of introducing long terms unknown to our ancestors and to our old law : which none but the Parliament can change.

Perhaps it would be no bad policy, if all copyholds were enfranchised. However, though a lord may grant a copyhold for a term of years, yet he is not compellable to do so : it is voluntary ; the lord is not obliged to admit for term of years.<sup>(a)</sup>

[218] Here they are admitted "according to the tenor of the will:" for so they pray it ; and their prayer is granted. (V. ante 206.)

The law is clear, "that no admission of the remainder-man is necessary."

And there are no inconveniences attending such a determination but what the lord himself may obviate.

The Court took time to advise ; and, after advising, to certify.

And, about a fortnight after the end of this term they gave their certificate : which is here subjoined.

N.B. What is said by Hales and Wylde, in 1 Mod. 120, and 1 Ventr. 260, seems to be the justice of the case.

The opinion of the Court of King's Bench on the case stated, upon the following questions, viz.

1st. Whether the surviving executor of John Taylour, (the surviving trustee of the term of ninety-nine years), ought to come in, to be admitted tenant of the copyhold premises in question ?

2d. In case he ought, whether the lady of the manor will be intitled to any fine upon such admittance.

Having heard counsel on both sides, and considered of this case, we are of opinion "that the surviving executor of John Taylour, (the surviving trustee of the term of ninety-nine years,) ought to come in to be admitted tenant of the copyhold premises in question ; and that the lady of the manor will be intitled to a fine upon such admittance."

MANSFIELD, M. FOSTER,  
T. DENISON, J. E. WILMOT.

24th February 1757.

[219] SIR JOHN TRELAWNY, BART. *versus* BISHOP OF WINCHESTER. Saturday, 5th Feb. 1757. Bishops may grant ancient offices with the ancient fees. [S. C. Burn's Ec. L. 2d vol. ed. 1781, p. 341.]

Hil. 26 G. 2, Roll. 868.

(Lord Commissioner Wilmot absent in Chancery.)

It was an action of debt for 600l. for five years salary of several offices, viz. great or chief steward to the bishoprick, and all its castles, lordships, manors, &c.; and conductor of the men and tenants of the bishop thereof ; with a salary of 100l. per annum ; and of master keeper or preserver of the wild beast in all the forests, parks, chases, and warrens belonging to the bishop, and chief governor of all birds, fish, and beasts of warren, &c. (commonly called chief parker ;) with a salary of 20l. per annum : which offices and salaries were granted to the plaintiff by Sir Jonathan Trelawney, Bart., late Bishop of Winton by letters patent, with clause of distress if unpaid.

The bishop pleads the § statute of 1 Eliz. c. 19, and also that the offices aforesaid

(a) The husband is seised in right of his wife of customary lands in fee, and he and his wife by licence of the lord make a lease for years by indenture, have issue two daughters, and the husband dies ; the wife takes another husband, and they have issue a son and a daughter, and die ; the son is admitted to the reversion, and dies without issue : by Manwood, that reversion shall descend to all the daughters ; for the estate for years, which is made by indenture, by licence of the lord, is a demise according to the common law ; and according to the nature of the demise, the possession shall be adjudged, which possession cannot be said possession of the copyholder ; for his possession is customary, and the other is mere contrary, therefore there shall be no possessio fratris. But if one had been the guardian by custom, or the lease had been made by surrender, there the sister of the half blood should not inherit. And Mead said, the case of the guardian had been adjudged, 4 Le. 38 a. 103. 7 Vin. 585, pl. 35.

§ See the last clause of that statute, which he pleads verbatim, as infra, 220, and 221. [See also 10 Vin. 217, pl. 8.]

are not ancient offices of the bishoprick, nor were usually granted for life; and that the said fees are not the ancient fees; and that the said offices are useless and merely nominal, and no duty or service to be done for or in respect of them; and that the grants are grants of hereditaments parcel of the possessions of the bishoprick, &c.

The plaintiff replies that they are ancient offices: and the fees, the ancient fees; and that they have been usually granted for life: absque hoc that they are useless and merely nominal.

The bishop rejoins that the offices are useless and merely nominal, and without any duty or service to be done for or in respect of them; in manner and form as, &c. and issue is joined thereon.

The special verdict finds that the offices of chief steward, and of conductor of men and tenants of the bishoprick, are ancient offices of the bishops; and have been anciently and usually granted for life, with an annuity; and that the annuity of 100l. is the ancient fee.

That the same were granted to the plaintiff, by Jonathan late Bishop of Winchester, on the 4th July, 10 Queen Anne: which grant was approved by the dean and chapter, and confirmed by them.

[220] That the plaintiff thereby became seised, and is still seised thereof: and received the annuity during the life of Jonathan late Bishop of Winton (the grantor), and of his successor Charles (Trimnel), and of his successor Richard (Willis), and also during the first eleven years of the present bishop's time (Dr. Benjamin Hoadly); and that five years annuity, ending at Michaelmas 1751, remains unpaid.

Then they find (verbatim) the <sup>\*1</sup> private statute of 1 Eliz. c. 19. (See Moore's Reports 107; and post, 221.) By the last clause of which Act, "all gifts, grants, &c. made by any archbishop or bishop, of any honors, castles, manors, lands, tenements, or other hereditaments being part of the possessions of his archbishoprick or bishoprick, or united, appertaining or belonging to any of the same archbishopricks or bishopricks: to any person or persons, bodies politic or incorporate, (other than to the Queen's Highness her heirs and successors): whereby any estate or estates shall or may pass from the said archbishops or bishops or any of them, (other than for the term of twenty-one years, or three lives, from such time as any such lease, grant or assurance shall begin, and whereupon the old accustomed yearly rent or more shall be reserved and payable yearly during the said term of twenty-one years or three lives); shall be utterly void and of none effect, to all intents, constructions and purposes; any law, custom or usage to the contrary in any wise notwithstanding."

That these offices, at the time of the making of this Act, and now, are merely nominal, and no duty attendance or service to be done for or in respect of them or either of them; in manner and form as the bishop has alledged.

But whether, &c.

As to the other office (of master-keeper of all the beasts in the parks, or chief parker) they find that that is not an ancient office; and that the bishop for the time being hath not anciently and usually granted it, nor the annuity for the life of the grantee; and that that office also was, at the time of making the Act, and still is an office merely nominal; and that no duty, service, work, labour, attendance or business ever was or is, &c.

The question upon this special verdict, was, "whether Sir John Trelawny, the grantee, was entitled to hold the two first-mentioned offices, and to recover these arrears against the present bishop." As to the last [221] mentioned office (of chief parker) the facts found by the special verdict made an end of any question concerning it: and the point was given up.

This case was first argued, upon Tuesday 27th of January 1756, by Mr. Salusbury Brereton for the plaintiff, and Mr. Pratt for the defendant.

Note—Sir John Trelawny, the plaintiff, <sup>\*2</sup> died during the time of the first argument: but as the demand was for arrearages, this event did not prevent the Court from proceeding to hear the arguments.

On Tuesday, 1st February 1757, it was again very fully argued by Mr. Norton for the plaintiff, and Mr. Solicitor General (Yorke) for the defendant.

<sup>\*1</sup> It is No. 40.

<sup>\*2</sup> 8, 9 W. 3, c. 11, s. 6, relates only to plaintiff's or defendant's dying after interlocutory judgment, and before final.



Lord Mansfield said he was ready to give his opinion now: but as Mr. Justice Wilmot had heard the first argument, he chose to report to him what had passed upon this, and to know his sentiments, before judgment should be given: and therefore ordered it to stand over till Saturday then next.

And, this day, his Lordship gave the resolution of the whole Court; after having first stated the case, to the effect as above, &c.

Lord Mansfield—At common law, a bishop, with the confirmation of his dean and chapter, might exercise every act of absolute ownership, over the revenues of his see; and bind his successors, as much as tenant in fee can bind his heirs.

By the statute of 1 Eliz. c. 19, "All gifts, grants, feoffments, fines and other conveyance, or estates, from the first day of that Parliament, had, made, done or suffered, or to be had, made, done or suffered, by any archbishop, or bishop, of any honours, castles, manors, lands, tenements, or other hereditaments, being parcel of the possession of his archbishoprick or bishoprick, or united, appertaining or belonging, to any of the same; to any person (other than to the Queen, her heirs or successors); whereby any estate should or might pass from the archbishop or bishop, other than for the term of twenty-one years, or three lives, from such time as any lease, grant or assurance shall begin; and whereupon the old accustomed yearly rent or more, shall be reserved, payable yearly during the said term of twenty-one years or three lives: shall be utterly void; any law, custom, &c. notwithstanding."

Patents, or grants of offices, with fees, salaries, or profits annexed to them, are not mentioned in the Act: there are [222] no general words adapted to the case of offices. And yet, there was not a single bishoprick, at that time, without some office granted.

Had the Legislature meant to restrain the re-granting them, as they should drop in, it must have been done by a special provision, with an exception of some, at least of judicial offices. As the general restraint is not extended to the case; there was no occasion to make exceptions.

Continuing ancient offices, with the ancient fee, in the usual manner, was not a dilapidation of the revenue of the bishoprick. Every bishop left this power to be exercised by his successor, as his predecessors left it to be exercised by him. Such grants bring no new charge upon the bishoprick: which only remains liable to the same fees or salaries, to which it was liable before.

The Act has no retrospect, as to any charges or incumbrances whatsoever, brought upon the revenues of the bishoprick, before the first day of that session (23 January 1558).

So little were offices thought within it, that the Bishop of Ely, on the 20th of April 1558, made a new grant of the office of keeping his house and garden, (which was never granted before,) with a fee or salary of 3l. a year. This came in judgment in H. 10 Eliz. Ro. 758, as cited in Ley 78.\* It was holden good; because the office was thought to be a necessary office, and the fee reasonable. Which is the proper measure whereby to judge, "whether it was an indirect alienation, under colour of a new grant:" though it was extraordinary, to hold this office necessary, or the fee reasonable; or indeed, to imagine that any office could be necessary, which never existed before.(a) However, that determination has been esteemed good, and acquiesced in.

The next case was in Trinity 30 and Hilary 31 Eliz. (cited in 10 Co. 61 b. and Ley 72 & 75). The Bishop of Chester granted five marks for life, pro concilio, &c. to Bolton: and Bolton averred that his predecessors had granted reasonable fees, but did not aver this fee ever to have been granted before. The opinion of the Court was against the plaintiff; so he never had judgment: and the † reason of the opinion was, "that this was a voluntary thing, and not an office."

At last, in the 43d of Eliz. the true distinction seems to have been taken, in Ley

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\* Moore, p. 88, reports this case (though he calls the plaintiff Howse, and the mansion Downham,) as of the same term, 10 Eliz. rot'lo 758. But in Cro. Car. 48, it is cited as of H. 10 Jac. ro. 758. And 2 Brownlow, 137, reports it as of M. 9 Jac. 1611.

(a) These might be the reasons, but not mentioned to be so by Moore, nor clearly so mentioned in Ley 78. The record of the case is Bendl. 182, by the name of *Howse and The Bishop of Ely*.

† Ley, 75.

75, where the Archbishop of Canterbury granted the office of surveyorship, with the ancient fee, and more: it was holden void, on account of the new addition. That was an injury to the successor.

[223] In the first year of the reign of King James the First, the Legislature had this Act, and the subject matter of it, under consideration. The 1 Jac. 1, c. 3, extends to the King, that restraint which the first of Eliz. laid upon grants made by a bishop to a subject. But though questions had arisen upon grants of offices; though, in fact, during the whole long reign of Queen Elizabeth, the bishops had regranting their ancient offices as they fell in;—yet, the Legislature did not interpose; and therefore meant that this power should continue. They were satisfied with the distinction of *The Archbishop of Canterbury's case*, in the 43d of Eliz. “that no new charge could be brought upon the see.”

From the 10th of Eliz. (the time of *The Bishop of Ely's case*,) to this day, no grant of a new office, with a new fee, ever was held to be good. Such a grant is within the meaning of the 1st of Eliz. by construction; because it is a colourable alienation; and under that pretext, the whole statute might be evaded.

From the 1st of Eliz. to this day, there is no case, where the re-grant of an office in being before the first of Eliz. in the usual manner, with the ancient fee, was adjudged to be within the restraint of that statute.

If these grants are not within the statute, but stand as they did at common law; the utility or necessity of them can never be material. A bishop, at common law, with the confirmation of his dean and chapter, might bind his successors by grants from which they could have no benefit.

There is no case since the 10th of Eliz. that has judicially turned upon the utility or necessity of the office: the only question has been “whether the grant was agreeable to the usage before the first of Eliz.”

*The Bishop of Salisbury's case* (10 Co. 58 b.) T. 11 Jac. 1614, came before the Court upon a demurrer. It is not alledged in the pleadings of either side, “that the office was or was not necessary.” The plea in bar to the avowry was, singly, “that the office never was granted before, beyond one life:” and the grant was holden good. In the 5th resolution,\*<sup>1</sup> it was resolved “that the grant of an ancient office to one, with the ancient fee, by a bishop, shall not bind his successor, unless it be confirmed by the dean and chapter: (a) for such grants are not, as appears before, restrained by the Statute of the First of Eliz.; (b) and therefore remain at the common law; and by consequence ought to be confirmed by the dean and chapter.” If so, the [224] utility or necessity of the office was not at all material: for, by the common law, the utility or necessity of an office was no requisite towards rendering the bishop's grant of it (confirmed by his dean and chapter) good and valid.

*The Bishop of Chichester's case*,\*<sup>2</sup> in Cro. Car. 47, and Ley, 71, (2 Car. 1, anno Dom. 1626,) came before the Court upon a demurrer too—There is no allegation in the pleadings on either side, as to the office being necessary, or not: the question turned solely upon the addition of a new fee.

The case of *The Register of Rochester*, in Cro. Car. 557, Hil. 14 C. 1, anno

\*<sup>1</sup> 10 Co. 62 a.

(a) Confirmation is necessary.

(b) This is but half reasoning; because if such grants are within the 32 Hen. 8, c. then if made with the requisites of that Act, they would be good without any confirmation, if they were not restrained by 1 Eliz.; and therefore the Statute of Hen. 8 remained in force as to such offices, supposing they were made agreeable to it.—But qu. Why such offices as have been immemorially, are not within 1 Eliz. c. 19, as they were resolved to be, Cro. Eliz. 259? And the judgment there was affirmed in Dom. Proc. in May 1641. And the reason given in Cro. Car. for the resolution appears there to have been, that “they are within the words and the intent of the statutes; for they be hereditaments, and appertaining unto them:” and note the very words of 1 Eliz. c. 9, are “manors, lands, tenements, or hereditaments, part of the possessions of, or united, appertaining or belonging to any the archbishopricks or bishopricks.”

\*<sup>2</sup> *Gee, Bishop of Chichester v. Freedland*.

† *Young v. Fowler*, Cro. Car. 555. March 38. 2 Ro. Abr. 153, pl. 7, 8, 154, pl. 5. See also Sir William Jones, 311, *Yonge v. Stowell*, Tr. S. Car. (in an action upon the case, for disturbing the plaintiff in the same office), S. P. accord.



Domini 1638, came before the Court upon a special verdict. There is not a word as to the office or reversionary grant being necessary: but it is found to have been usually granted in reversion; and therefore the Court adjudged such a grant in reversion to be good against the successor.

Thus stood the construction of this statute, upon the reason and words of the law, practice, and judicial determinations. But it happened that, besides the real ground of the judgment, in *The Bishop of Salisbury's case*, they echoed the reasoning of *The Bishop of Ely's*, without distinguishing the essential difference between the two cases; and \*1 laboured to prove, "that the office was necessary."

Under the great authority of the reporter, the same reasoning is repeated in the subsequent cases; and where the grant is good, because it was warranted by the usage before the 1st of Eliz. they needs must, ex abundanti, labour to shew, "that the office is necessary," by arguments so inconclusive, and so contradictory, that one is sorry to read, or repeat them. "It is necessary to grant for one life; but not necessary to grant for two, or in reversion:" and then, "it is necessary to grant in reversion; that when the first life drops, there may be another immediately to fill the office." Whereas in real truth, few of these patent offices (except the judicial) are useful, or necessary in any sense: fewer are necessary, or even expedient, to continue beyond the bishop's own time: none necessary (by any colour of argument) to be granted in reversion or for more than one life. But if they existed before the 1st of Eliz. they are not within the statute, they are governed by the common law; and therefore grants of them bind the successors, how useless soever they may happen to be.

[225] The next case that was mentioned, was the case of *Ridley v. Pownall*, 2 Lev. 136, 27 C. 2.\* There the special verdict found the office to be a necessary office; (which is the first instance where it appeared judicially to the Court, "that the office was necessary;") and that it had been separalibus temporibus, since the foundation of the bishoprick, granted for three lives.

My Lord Hale (who distinguished what he read, and thought and reasoned from himself) says "before the 1st of Eliz. there was no difference between the grant of offices, of ancient and new bishopricks: both made their grants, as owners; and if they usually granted for three lives before the statute, they may grant so after. But the verdict is defective, because it does not find that it was usually so done before the 1st of Eliz." And on account of the uncertainty, there was a venire de novo: otherwise, judgment would have been given for the defendant. So that you see, finding the office to be necessary, was totally immaterial.

In the case of *Jones v. Beau*, in B. R. 3 W. & M. 1691, reported in 4 Mod. 16, the issue directed out of Chancery was, "whether the office of Chancellor of Landaff, had been usually granted to two, before the 1st of Eliz." And the jury finding "that it had;" the Court held the grant of the office to two to be good. And no man alive will say, "that it was necessary that the office of a bishop's chancellor should be granted to two."

The office in question in this cause, is found "never to have been more useful or necessary than it is now:" and yet all the Bishops of Winchester, from the 1st of Eliz. have thought the grants of it valid; and every succeeding bishop has submitted to the grant made by his predecessor: and † the greatest men of the kingdom, or the nearest relations to the bishops, have successively held the office. The present bishop thought this grant good, for eleven years; but has conceived a doubt, from the misapplication and repetition of inconclusive and contradictory arguments about the office being necessary, which are to be found in the reports of the cases I have mentioned, before the 27th of C. 2d.

Whereas we are all unanimously of opinion, that an office and fee, which existed before the first of Eliz. is not within the statute; but may be granted since, precisely

\*1 V. 10 Co. 61 a. b.

\*2 This was an action upon the case, in B. R. for disturbing the plaintiff in his office of register to the Bishop of Bristol, (a new bishoprick founded temp. H. 8). See 3 Keble 472, 506, 540, 560, S. C.

† Sir John's grant was—"To hold in tam amplo modo, as Richard Earl of Portland, Thomas Cary, George Duke of Buckingham, Charles Earl of Nottingham, Thomas Duke of Norfolk, Philip Earl of Pembroke and Montgomery, James Duke of Ormond, or Henry Earl of Clarendon had holden."

in the same manner, in which it was granted before; and that the utility, or necessity of such an office, is no more material, since the 1st of Eliz. than it was before. And this opinion we think agreeable to [226] the words and intent of the Act, and every precedent since the statute. And in this opinion, my brother \* Wilmot concurs with us. And therefore there must be

Judgment for the plaintiff.

Which judgment was ordered, at Mr. Norton's request, to be entered as of the term in which the *postea* was returnable: because Sir John Trelawny was † dead, between that time and the present time of pronouncing the judgment.

GOSS *versus* NELSON. Saturday, 5th Feb. 1757. Note of hand payable to an infant when he shall come of age, specifying the day, is a good note. [S. C. Bull. 273.]

Mr. Gould, *pro quer'*, shewed cause why the judgment obtained by the plaintiff against the defendant in an action upon a promissory note should not be arrested: the note having been objected to, as contingent, uncertain, and not negotiable within the Act of 3, 4 Ann. Mr. Gould's answer was, that the sum payable by this note, is *debitum in præsentī*: though *solvendum in futuro*.

The question depended entirely upon the validity of this note: which was a promissory note given to an infant, ‡ payable "when he (the infant) should come of age;" and specifying the time when that was to be, viz. 12th June 1750. The defendant's counsel had moved to arrest the judgment, for that this was not (as they alledged) a good note, within 3, 4 Ann. c. 9, § 1: for giving like remedy upon promissory notes, as upon bills of exchange.

In answer to which, Mr. Gould now cited 2 Strange, 1217, the case of *Cook v. Colehan*; where a note, "to pay in six weeks after the defendant's father's death," was holden a good note.

Mr. Caldecot *contra pro def'*: Here are, in this declaration, two counts on notes of hand indeed: but the notes set forth in the declaration, are not notes for the benefit of trade; nor is the money made certainly payable. The note was given to the plaintiff, thirteen years before the time when he was to come of age; and it was not at all certain that he would live to attain that age.

He cited 2 Strange, 1151, the case of *Beardsley v. Baldwin*: where a note "to pay within so many days after the defendant should marry," was held not to be a negotiable note within the statute.

[227] The case of *Cook v. Colehan* (cited by Mr. Gould), 2 Strange, 1217, was payable six weeks after a death: which was a certain event.

In order to have the effect of a promissory note within this statute, it ought to be a cash-note, and payable at all events.

No note is negotiable, which is not for the payment of money absolutely. 1 Strange, 629, *Morris v. Lee*. That was a note promising "to be accountable to the plaintiff or order for 100l. value received."—And held good. But a "*quære tamen*" is added by Sir John Strange. All notes payable on contingencies are bad, within this Act: and this is a contingency, "whether he may arrive at the age of twenty-one, or not."

Lord Mansfield—It would have been clearly good, if it had been made payable on the 12th of June 1750: (that is to say, on a day certain;) without mentioning the plaintiff's being then to come of age; and surely it is not the less certain, for adding that circumstance.

Legacies are of a different nature: and they are determined by different rules. They are directions to the executor to pay: and in legacies there is a known distinction between the time being annexed to the substance of the gift, or to the payment. If complete words of gift direct the executor to pay; the other words only fix the time of such payment: and then the legacy vests, and is transmissible, though the legatee should die before the day of payment: as a legacy given, "to be paid at twenty-one."

\* V. ante, 219, 221.

† V. ante, 221.

‡ V. post—*Roberts v. Peake*; a like point, (viz. payable on the death of G. H.) [See also 1 Durn. 637. 6 Ves. 248, and qu. 1 Atk. 486.]



But if the time is annexed to the substance of the gift, as a legacy "if" or "when" he shall attain twenty-one; it will not vest before that contingency happens.

But here the words of engagement make the debt; and it is no direction to another person. The former part of the note is a promise to pay the money: and the rest is only fixing the particular time when it is to be paid. It is enough, if it be certainly and at all events payable at that time, whether he lives till then, or dies in the interim. Therefore it is a good note, within this remedial statute.

Indeed a contingent note, where it is uncertain "whether the money shall ever become payable at all, or not," is another case: such a note is not within the statute.

Mr. Just. Denison concurred.

[228] For here is no condition or uncertainty: but it is to be paid certainly, and at all events; only the time of payment is postponed.

And the case of *Cook v. Colehan* was the opinion of the whole Court.

He also cited *Boraston's case*, 3 Co. Rep. 19, (which proves "that where the words refer to what must necessarily happen, it is no contingency, but a remainder executed." V. Equity Cases Abridged, fo. 190, pl. 16, S. C.)

Mr. Just. Foster concurred.

A legacy may be given upon any terms.

But upon a promissory note, the time of payment is only for the benefit of the debtor. Here, the time of payment is certainly fixed: and the particular day specified for payment of the money, being mentioned to be the day on which the infant is to come of age, makes no difference from what it would have been, if that circumstance had been omitted.

And they all agreed that this was debitum in presenti, though solvendum in futuro.

Per Cur' unanimously rule discharged: and the postea ordered to be delivered to the plaintiff.

GOODTITLE, EX DIMISS. HAYWARD *versus* WHITEY. Tuesday, 8th February 1757.

Devise to trustees, in trust, to lay out the rents and profits for the maintenance of two nephews, and when they attain twenty-one, to be to them and their heirs, is an immediate gift vested in the nephews, immediately, with a trust to be executed for their benefit during their minority. [See 8 Vin 285, pl. 4. 6 Ves. 246. 3 Durn. 43. 1 Durn. 391. 9 Ves. 228.]

(Mr. Just. Foster absent.)

[Approved, *Doe d. Wheedon v. Lea*, 1789, 3 T. R. 43. Referred to, *Stanley v. Stanley*, 1809, 16 Ves. 507; *Phipps v. Akers*, 1842, 9 Cl. & F. 596. Distinguished, *Locke v. Lamb*, 1867, L. R. 4 Eq. 382. Referred to, *Cropton v. Davies*, 1869, L. R. 4 C. P. 167.]

This was a case from Lancaster Assizes, upon an ejectment.

R. P. being seised, &c. devised all his messuages, lands, tenements, and hereditaments, whatsoever and wheresoever situate, to the Reverend Mr. Thomas Hayward and John Bates and the survivor of them and the heirs of such survivor; "in trust, that they and the survivor of them, his heirs and assigns, should lay out, employ and bestow the rents and profits of the devised premises, for the maintenance, education, bringing up and putting forth into the world, of Thomas and John Hayward, sons of the testator's sister Elizabeth Hayward, during their minorities: and when and as they should respectively attain their ages of 21, then to the use and behoof of the said sons of his sister Hayward, the said Thomas Hayward, and John Hayward, and their heirs, equally." And the testator made the said two trustees, the Reverend Thomas Hayward and John Bates his executors.

It is stated that Thomas Whitby, the defendant, is the testator's heir at law.

That Thomas and John Hayward are the testator's sister's sons.

Thomas Hayward the elder of the testator's said two [229] nephews died under the age of twenty-one, and without issue.

Upon his death, his brother John being then under age, Thomas Whitby the testator's heir at law, was let into the moiety of the deceased nephew, Thomas Hayward, by the trustees.

John the surviving brother brings the ejectment, being now come of age; and claiming the moiety of his deceased brother as well as his own proper moiety.

Question—"Whether this moiety of Thomas the deceased brother, belongs to John Hayward, either as heir to his brother, or as surviving joint-tenant; or whether it belongs to Thomas Whitby, as heir at law of the testator as an undevise estate."

Mr. Perrot for the plaintiff, (viz. for John Hayward, the surviving nephew of the testator.)

This point is settled by many resolutions.

1st. This is only a chattel-interest in the trustees, (though given to them and their heirs :) because it is to last only during the minorities of his nephews.

The question is, "whether the remainder vested in Thomas and John Hayward;" or "whether it remained in contingency, till their respective coming of age."

All that the testator had in view, in this trust, was to provide for the care of his nephews during their minorities: and he only meant that the time of their coming of age, should determine the time when they should be capable of acting for themselves; not to make it contingent till they should come to twenty-one. For at that rate, if they had married and died under twenty-one, their children could not have taken: which the testator, most undoubtedly, could never mean.

[230] *Boraston's case*, 3 Co. 21, was held a vested remainder.

The case of *Taylor v. Biddal*, 2 Mod. 289, is in point.

The case of *Edwards v. Hammond*, 3 Lev. 132, (where the estate's being contingent or not, depended on its being a condition precedent or subsequent, was only held a condition subsequent, and a present devise to the eldest son.

Equity Cases abridged, H. 1713, fo. 195, pl. 4. The case of *Mansfield v. Dugard* is almost the same with the present case.

So here, the estate vested immediately in the two nephews, upon the death of the testator; and therefore, upon the death of Thomas, his brother John is intitled to this moiety; either as heir at law to him, or as survivor.

Mr. Norton pro def<sup>r</sup> Thomas Whitby, the testator's heir at law.

The will is, in substance, no more than this—

The testator gives to A. and B. and the survivor of them and the heirs of such survivor, all his messuages, lands, tenements, &c. in trust that they shall dispose of the rents and profits of the demised premises for the maintenance, education, bringing up, and putting forth into the world, of his two nephews (his sister's sons,) Thomas and John Hayward, during their minorities: and when and as they should respectively attain to twenty-one, then to the use and behoof of them the said Thomas and John Hayward his two nephews, and their heirs, equally.

The cases on this head appear indeed inconsistent and repugnant: but the true method of solving them is, to attend to the intention of the testator.

Now here the testator intended his nephews a fee, if they should live to make use of it; if not, then only a provision during their minority.

And it is a rule, "that the heir at law shall not be disinherited by uncertain words of a devise."

Here, nothing vested in either of the two nephews, during their minorities.

If the testator had intended a benefit of survivorship, to his two nephews, he knew how to do it; as appears by another part of his will.

The two nephews were not each of them intitled to a [231] moiety of the profits during their minority: for, they were only to be maintained at the discretion of the executors.

The question is, "whether this be, or be not, a condition precedent; or an estate depending upon a future event that makes it uncertain whether it shall ever take effect."

Sheppard's Touchstone of Common Assurances, 117, defines a condition precedent, to be "where the condition must be fulfilled, ere the estate can take effect."

A gift to A. "if he comes from Rome," does not vest till he comes from Rome.

Just so, a devise to A. if he comes of age; cannot vest till he comes of age.

And he was not to have the fee, till then.

In gifts of personal estate or legacies, it is the same. For if the time is annexed to the legacy itself, and not to the payment of it, then, if the legatee dies before the time of payment, it is a lapsed legacy: but if annexed to the payment, then it is not. 1 Lev. 167.\*



2 Salk. 415, pl. 2. The case of *Smell contra Dee*, 6 Ann. in Chancery, 2 Vern. 349.

As to the executors taking only a chattel-interest ; the being defeasible does not make it the less a fee.

In the case of *Gardner v. Sheldon* (Vaughan, 259,) it is so laid down by Ld. Vaughan.

This is a fee to the trustees and their heirs ; though liable indeed to a contingency. It is the word "heirs," that makes it a fee. Littleton, § 1.

If so, then it cannot be a vested remainder ; but must be an executory devise, a mere contingent interest. 10 Co. 85, *Leonard Loveis's case*.

[232] As to Mr. Perrott's cases—

*Boraston's case*, 3 Co. 23, is not at all applicable to the present case : and it was there necessary, towards forwarding the intention of the testator, that it should be a vested interest. And that was an express devise of a chattel : so that the fee vested immediately. But here are no such circumstances, in this case.

As to the case of *Taylor v. Biddal*, 2 Mod. 289, there also was an express devise of a chattel, to Elizabeth Wharton ; and the fee descending to her, would have merged the term, contrary to the intention and words of the testator.

As to the case of *Edwards v. Hammond*, 3 Lev. 132, it is no more applicable to the present case, than the other two are. That was a condition subsequent.

But here are no words to shew the intention of the testator to have been, "that if either of his nephews should die, his heir at law should not inherit."

And here it is stated that the testator's heir at law was let into and held this moiety by consent of all the parties, till this John came of age. (V. ante, 229.)

As to the case of *Mansfield v. Dugard*, it is distinguishable from the present case.

Mr. Perrot, was going to reply—but Lord Mansfield stopped him, and said it was unnecessary.

Lord Mansfield—The case is no more than this. R. P. being seised in fee, makes his will to the following effect—"I give and devise all my messuages, land, tenements and hereditaments, &c. unto the Reverend Thomas Hayward and John Bates, and the survivor of them, and to the heirs of such survivor, in trust to and for the benefit of my nephews Thomas and John Hayward ; that is to say, upon trust and confidence that the said Thomas Hayward and John Bates, and the survivor of them, his heirs and assigns, shall lay out and employ the rents and profits of the said premises for the maintenance, education, bringing up and putting out in the world, of the said Thomas and John Hayward, (the testator's two nephews,) during their minorities : and when and as they shall attain their respective ages of twenty-one, my will and desire is, that the same premises shall be and remain to them the said Thomas Hayward and John Hayward, and their heirs, equally." And he makes the same T. H. and J. B. his executors.

[233] It is stated, that the defendant Whitby is the testator's heir at law : but the case does not state how, and in what course of consanguinity, Thomas Whitby is heir at law. It is probable that he is not of the male line ; because his name is Whitby.

The testator died. T. H. and J. B. the two trustees, entered into possession. Then Thomas Hayward, one of the two nephews and devisees died, under age, and without issue. Then, the trustees let the now defendant, the testator's heir at law, into possession of his moiety. But it is not material what they did among themselves ; that will not affect the right of the plaintiff.

The question is, "whether the estate vested immediately in the two nephews, upon the death of the testator ; or remained in contingency, till their respective coming of age : " and consequently, "whether this moiety belongs to John Hayward, upon the death of his brother Thomas, either as his heir at law, or as survivor ; or whether it descends to the heir at law of the testator, as being undevised."

In the construction of wills, adjudged cases may very properly be argued from ; if they establish general rules of construction, to find out the intention of the testator ; which intention ought to prevail, if agreeable to the rules of law.

Here it is agreed that a fee is devised to the nephews : but it is made a question "whether it be a fee depending upon a precedent contingency ; or, an immediate fee."

He said he would lay down a rule or two of construction, previously to giving his particular opinion on this case.

1st. Wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property.

This rule is laid down in *Matthew Manning's case*, 8 Co. 95 b.

2d. Whether an absolute property is given; and a particular interest given, in the mean time, as "until the devisee shall come of age, &c. : and when he shall come of age, &c. then to him, &c. : " the rule is, that that shall not operate as a condition precedent; but as a description of the time when the remainder-man is to take in possession.

And to this purpose is *Boraston's case*, 3 Co. 21 a. b. where this doctrine is fully laid down and explained.

[234] And this is sufficient to answer the intention of the testator: the devisee does not want it in the mean time.

The case of *Mansfield v. Dugard*,—in the Abridgment of Equity Cases 195, pl. 4, is also very strong, to prove the general rule.

Here, upon the reason of the thing, the infant is the object of the testator's bounty: and the testator does not mean to deprive him of it, in any event. Now suppose that this object of the testator's bounty marries, and dies before his age of twenty-one, leaving children; could the testator intend in such an event, to disinherit him? certainly, he could not. And as to the testator's heir at law, his heir at law is only to take what the testator has not devised away from him.

But in the present case the testator takes no notice of this Thomas Whitby, who is indeed stated to be (but it doth not appear how) his heir at law. And he does not except any thing out of the interest he has given to his nephews; he only makes a trust, to be executed for their benefit; and devises nothing for the benefit of the trustees, who were also his executors. And this is only a chattel-interest, which cannot last twenty-one years.

On the rule in *Matthew Manning's case*, here is (at the utmost) only an exception, by this devise to the trustees, out of the absolute property given to his nephews.

It is so plain upon the true intent and meaning of this will, that it is a shame to cite cases upon it. But yet I remember an apposite case, in H. 17 G. 2, in *Canc. Tomkins v. Tomkins*, where the devise was "to his brother, in trust for his eldest son B. till he should attain twenty-one years; and if he should die before twenty-one, then a devise over." The Court held the age of twenty-one to be no limitation of B.'s interest: but only a limitation of the trust, during his minority; and that B. took the whole by implication.(a)

So here, the property is absolutely given: and the limitation is only of the trust.

Therefore upon the whole, he held the present case to be

An immediate gift to the two nephews; with a trust to be executed for their benefit, during their minority.

Per Cur. Let the postea be delivered to the plaintiff.

[235] MASTER, &C. OF THE VINTNER'S COMPANY *versus* PASSEY. A company's right to have a livery must be founded on charter or custom, and cannot be presumed. [See 1 Bosan. 100, 101.]

This was an action of debt brought upon a bye-law of this company.(b)

The declaration (after a proper introduction) set forth the bye-law, which was made on the 24th April 1656, intituled "An Ordinance of Election of Men into the Livery of the Corporation or Mystery of Vintners of the City of London:" whereby it

(a) That is B. when he came of age took the whole by implication; the doubt must have arisen on this, that it was given to B. only until he should come of age; without adding, as it ought, these or the like words, viz. and if B. shall live to the age of twenty-one years, then to him. The omission of these or the like words were supplied by the Court, in order to support what the Court thought must have been the implied intention of the testator.

(b) A bye-law that every member of a corporation chosen into a particular corporate office mentioned in the bye-law, shall accept it under a penalty, is good; though there be no exception of unfit persons: for if such a one be chosen he may give his excuse in *nil debet* pleaded to debt on the bye-law.

The above is all that was determined in this case, and it is nothing new.



was ordained and established, that the master and wardens of the Corporation or Mystery of the Vintners of the City of London, for the time being, should have a decent livery, comely for themselves, and meet to attend upon the lord mayor and his brethren the aldermen of the said city from time to time and at all times, as need should require; and upon the said master and wardens, at all such time or times thereafter, and in such gowns and liveries, as they should be lawfully warned and summoned to come and be in, upon any necessary occasions concerning the credit and worship of the said company; and also that once in every year, or oftener if occasion should serve, the said master, wardens and assistants, or the major part of them which should be then present at a Court of Assistants for the time being, to be holden for the said mystery, should and might elect and choose into the livery or clothing of the said corporation or mystery, such and so many of the yeomanry of the said mystery, as should seem most meet and convenient unto them; and that every such person of the said yeomanry so chosen into the said livery as aforesaid, should, at or before his admission into the said livery, pay to the said master, wardens and freemen and commonalty of the Mystery of Vintners of the City of London, to their use, the sum of 31l. 13s. 4d. of lawful money of England. And then and there, at the same assembly, the said master, &c. did make another bye-law, that every person and persons of the said corporation, which at any time thereafter should be by the said master, wardens, &c. for the time being, at any Court, &c. elected or chosen into the livery of the said mystery; and should not, upon notice given to him or them in that behalf, by the clerk or beadle, accept of the same; or, upon acceptance thereof, should, before his admission into the said livery, refuse to pay to the said master, &c. the sum of 31l. 13s. 4d. that then every particular so refusing to accept, &c. or to pay as aforesaid, should forfeit, &c. to the said master, &c. the sum of 25l. to be recovered by action of debt, bill, plaint, or information, to be brought in any Court of Record within the commonwealth of England, by the said master, &c.

[236] Then the declaration avers both the said bye-laws to be reasonable, &c.; and also, that at the time of the making them, and ever since, all the freemen of the said mystery, before their admission to the livery, were known by the name of the yeomanry; and that the defendant was a fit and able and proper person to be elected into the livery and clothing of the said company. Then it sets forth his election upon the livery; and that he refused, &c.

To this declaration—

The first plea was “*nil debet.*” And there was also, by leave, a 2d plea, that there are twelve greater livery-companies, in London, and other inferior companies; and that an order was made at a Court holden before the lord mayor and aldermen, &c. on, &c. at &c.: at which Court it was enacted, &c. “and that no person should take upon himself the livery of any company being one of the said twelve companies, &c. unless he should have an estate of 1000l. &c.” And the plea avers, that this was one of the twelve companies; and that he had not an estate of 1000l. &c. And therefore he says, that he was not duly elected upon the said livery of this Company of Vintners.

The plaintiffs demur to this 2d plea: and the defendant joins in demurrer.

Mr. Williams *pro quer.* made three objections to the plea.

1st objection—That it is not set out by what authority the Court which made this order, was holden. *Clift.* 186, 196.

2d objection. The Court is uncertain: for many Courts are holden before the Mayor and Aldermen; and non constat, which of them this is.

3dly. Non constat, what authority the Court of the Lord Mayor and Aldermen had to make this order.

Mr. Serjeant Martin *pro def.* said—

It was not known, at the time of the plea, nor can now be known, what authority the Court of Lord Mayor and Aldermen had to make this order: therefore he gave up the plea.

[237] But he objected to the declaration, in two respects.

1st. The bye-laws are bad.

2d. The defendant was not duly summoned to attend at the Court of Assistants to take upon him the livery.

First—The bye-laws are arbitrary, illegal, oppressive, and not warranted by custom or charter.

They are, "that the company may elect such of the yeomanry of their members as should seem most meet and convenient to them, upon the livery of their company;" and "that every person so elected, who should refuse, &c. shall forfeit, &c.: and every person so elected, shall accept the same, and shall upon or before admission, pay 31l. 13s. 4d. for an admission fee, on forfeiture of 25l." (which penalty of 25l. is made payable absolutely and in all events).

Now the livery-men ought to be persons of substance, capable of being at the expence of serving or paying the fine.

And the averment "that he was a fit and able and proper person," goes only to the just execution of the bye-law; but will not make the bye-law itself good, which is in itself void.

3 Lev. 293, *Mayor, &c. of Oxford v. Wildgoose*; (in point, as to this).

The right "to have a livery" must be founded either on charter or custom.

Pasch. 30 G. 2, *Innholders Company v. Gledhill*, B. R.—was so determined; and that the Court cannot presume it: and the want of shewing this, was holden to be such a fault in the declaration as might be taken advantage of upon general demurrer.

In Lilly's Entries there is a precedent of such a pleading upon such a bye-law.

On 27th July 1697, the mayor and aldermen made an order (set forth in the pleadings), which shews the opinion of that Court upon this head of sufficiency of the persons elected.

In Raym. 446, *Taverner's case*, 33 C. 2, (which he cited for the sake of the return,) this very company made it part of their return to the mandamus "that every livery-man [238] of this very company was used and ought to be de bono statu et substantia," &c. (But N. B. the fine of 31l. 13s. 4d. was there allowed to be good.)

Comberb. 221, the case of *The Stationers Company v. Salisbury*: (which was cited, as to the first objection of it, and applied to the first objection here:) also the 2d exception there, answers (as the serjeant observed) to the 2d objection here. (But that case was not determined.)

2d objection to the declaration—non constat that he was summoned to attend at the Court of Assistants, to take upon him the livery.

The declaration shews, that the master and one warden may appoint a Court whenever they please: so that the time of holding this Court is uncertain. And they only shew that he was summoned to attend at the next Court, generally; without specifying when it was to be holden.

Mr. Williams in reply.

1st. These bye-laws are now of above 100 years standing: and they have been holden good, notwithstanding all objections. Vide Raym. 446, *Taverner's case*: (where the return of them was allowed.) And they ought to receive a favourable construction.

If they choose a person unfit, it may be taken advantage of in pleading, or upon evidence.

*City of London v. Vanacker*, Carthew, 480, 483. A power "to elect such persons as should seem to them to be fit and able"—gives them a discretion. 5 Co. 100 a. *Rooke's case*.

This is a discretionary power; and is confined to such as are fit and able; though it must be legally executed.

It is objected also, that the penalty of 25l. is made payable absolutely: whereas it ought to be, unless he has a reasonable excuse.

But this is implied.

And if he has a reasonable excuse he may plead nil debet.

Carthew, 483, *City of London v. Vanacker*: (in point) 1 Lutw. 402. Bye-law of the City of Canterbury: where non debet was pleaded. (V. fo. 405.)

[239] In answer to the 2d objection—

As to the time of holding the Court, the objection is only to the form of the declaration. But,

It is averred "that notice was duly given him of his election:" and "that notice was duly given him, to attend at the next Court of Assistants."

Besides, he as a member of the company, was obliged to take notice of the time of holding their Courts.

As to 3 Lev. 293, the bye-law there does not even confine it to the inhabitants of the city: but this is confined to the members of the company. (Still, this is no answer to the material objection.)



As to Comberb. 221, it was not determined. (No more it was.)

Lord Mansfield.—The plea is admitted to be bad.

The objections are to the bye-law: which has been of 100 years standing; and, several times, judicially before the Court; and yet this objection has never been hit upon.

However, one answer strikes me: which is “that nil debet may be pleaded, if the party was really unfit.” Carthew, 483, *Vanacker's case*, and 1 Lutw. 402, 405, *Major, &c. de Cambridge v. Herring*—are proofs of this.—By the former it appears that it may be given in evidence, upon nil debet pleaded; and in the latter, it was actually pleaded; and issue taken upon it. And this equally holds, as to any reasonable excuse. And we will not intend him to have been an improper person.

Being a livery-man of the company, he ought to know when the next Court is: and therefore this objection has not much weight.

Mr. Just. Denison.—The bye-law gives power “to elect such and so many out of the yeomanry, upon the livery, as shall seem to them most meet and convenient.” The main design seems to relate to the number. As to the ability—bye-laws ought to have a reasonable construction: we ought not to construe them so strictly, as to take them to be void, if every particular reason of making them, does not appear.

[240] Now here, it is objected “that the person elected may be a beggar.”

But we can never intend that they would choose persons not meet and convenient.

And if this be done, “nil debet” will bring that question before the Court.

And you cannot, upon this record, take in the order of the Court of Lord Mayor and Aldermen; because that plea is given up.

And the notice shall be intended to be regular.

This is an ancient bye-law; and nothing unreasonable appears upon the face of it.

Per Cur. (viz. Lord Mansfield and Mr. Justice Denison, the other two Judges being absent,)

Judgment for the plaintiff.

WILSON, Clerk, *versus* GREAVES. 1757. Prohibition to the Spiritual Court to stay proceedings upon the stat. 5 and 6 Ed. 6, c. 4, s. 2, for smiting or laying violent hands denied.

Mr. Serjeant Hewitt shewed cause against a prohibition, which Mr. Serjeant Poole had moved for (on the 6th of July last) to be directed to the Archdeacon of Nottingham, to stay his proceeding in a suit against Mr. Wilson, (parson of Newark), for brawling in the church, and also for smiting in the church: but he prayed the prohibition, only as to the latter charge, the smiting in the church. (V. 5, 6 E. 6, c. 4, § 2:) which Act contains three distinct clauses, levelled against three distinct offences committed in the churches and church-yards; viz. the 1st against quarrelling, chiding, or brawling, by words only; the 2d, against smiting, or laying violent hands; the third, against striking with a weapon, or drawing one with intent to strike.\*

His objection was, (a) that as to this offence of smiting in the church, there ought to have been a previous conviction at law; though the statute says “that he shall ipso facto be deemed excommunicate.” In proof of which, he cited Cro. Eliz. 224, pl. 6, *Dethick's case*; where he was indicted, upon this Statute of 5, 6 E. 6, for striking in St. Paul's church-yard: though he got off indeed, for want of being named Garter.

1 Ventr. 146, the case of *Dyer v. East*, is full in point, “that the striker in a church-yard does not stand ipso [241] facto excommunicated, until he be thereof convicted at law, and this transmitted to the Ordinary.”

And here having been no previous conviction at law, he prayed a prohibition quoad the smiting; and obtained

A rule to shew cause.

Against which rule, Mr. Serjeant Hewitt (on Monday 7th February 1757,) shewed cause, as follows.

[\* Suits for the offences against the 1st and 2d sections are limited to eight calendar months, by 27 Geo. 3, c. 44.]

(a) This case is a trifling case, not worth reporting: not a new point in it; nor any correct citation of any report but 1 Ventr. 146, and that had been done long before, Cas. temp. Hard. 193.

On 5, 6 E. 6, c. 4, there are three sections, and three different offences: and this offence charged in the libel, is not an offence constituted so by this Act; but was a matter within the jurisdiction of the Spiritual Court, before that Act, and abstractedly from it. They have, without dispute, jurisdiction as to the brawling. And as to the second branch, for smiting in the church, there needs not be a previous conviction at common law: it is enough, if the excommunication be in the Spiritual Court. To prove which, he cited Hetley 86. The case of *Viner v. Eaton*, Cro. Jac. 462. The case of *Large v. Alton*, pl. 7: Cro. Eliz. 680. The case of *Baker v. Brent and Robinson*, 1 Hawk. P. C. fo. 139, c. 63, § 27.

2 Ld. Raym. 850, the case of *Wenmouth v. Collins*. The Court denied a prohibition; because this offence was originally and before this statute, conusable in the Ecclesiastical Court, *ratione loci*; and that the statute, though it provides a penalty, does not alter the jurisdiction.

Therefore he concluded that notwithstanding this objection, the Spiritual Court have jurisdiction.

It was then adjourned to the next day; when it proceeded and was determined. Mr. Justice Foster and Mr. Justice Wilmot were both absent.

Mr. Serjeant Poole—I cited 1 Ventr. 146, *Dyer v. East*, as a case in point, “that there must be a previous conviction by a trial at law:” and “that such conviction must be transmitted to the Spiritual Court.”

Cro. Eliz. 224, *Dethick's case*: where there was an indictment actually found and pleaded to.

As to my brother Hewitt's cases—

Hetley 86, *Viner* against *Eaton*, is a loose, incomplete note; and gives no reason why the prohibition was denied.

[242] Cro. Jac. 462, *Large v. Alton* proves nothing at all to the present purpose; and it was for brawling, only; in which case, I agree that no prohibition shall go.

Cro. Eliz. 680, is indeed in the alternative, “after sentence, or due trial and conviction, and not before.” But that is only said by Dodderidge, then at the Bar, in arguing for the defendant.

*Wenmouth v. Collins*, might be for a prohibition generally. Indeed a reason is given for denying the prohibition; viz “that the Spiritual Court originally had jurisdiction to hold plea of this matter, before the Act.”

But I deny that they had such original jurisdiction; and the Act gives them none. This is a force vi et armis; an assault and beating: and the Temporal Courts will prohibit them from proceeding upon it.

Bro. Prohibition, pl. 14, and Bro. Consultation, 6, are express, “that where a man sues in the Spiritual Court: and an action at common law lies for the same matter; a prohibition lies, and no consultation shall be granted.” (These are both the same case; viz. 22 E. 4. 20.)

Mr. Taylor White spoke on the same side, for Mr. Wilson.

He even attempted to shew that a prohibition would be reasonable as to the brawling: for that the fact stated could not come within the notion of brawling; and it was only speaking to a third person, to turn Greaves out of the church.

As to the striking—the Spiritual Court had no jurisdiction before the statute; and the statute gives them none: they have only power to pronounce the sentence of excommunication; but not the power of judging.

As to the case of *Wenmouth v. Collins*, it is but a loose note; and Holt was absent; and there might have been a confession.

And there have been many indictments, he said, on this statute: and this method of conviction was the ancient method.

Lord Mansfield—The statute of 5, 6 Ed. 6, c. 4, has three degrees of offences, and three different punishments.

[243] And whatever jurisdiction the Spiritual Court might claim before the Act, they are now proceeding since the Act; therefore it is not very material how the matter stood before the Act.

The punishment is given, by this Act, to the Ecclesiastical Court: and the punishment is such as can only be executed by the Ordinary.

The case stated with regard to the first offence, is sufficiently a brawling, within the meaning of the Act, sec. 1.

The second offence is smiting in the church, or church-yard.



Now this is indeed still an offence at common law; and he may be indicted for it. (a) But, besides this, he may, by this act, be ipso facto, excommunicated. By whom? by the Ordinary. Indeed the Ordinary may use a conviction at law, as a proof of the fact.

And the case in Raym. (2 Ld. Raym. 850, *Wenmouth v. Collins*,) is a plain proof that the Ecclesiastical Court may proceed upon the two first clauses, and are not to be prohibited.

But then there is a third offence and third punishment mentioned in the Act, of 5, 6 E. 6, c. 4: which has made all the confusion. This offence is maliciously striking with any weapon, in any church or church-yard, or drawing any weapon there, with intent to strike. For this third offence, the Act inflicts a double punishment; one temporal: the other, spiritual: the temporal punishment is loss of an ear, or marking in the cheek, after conviction; the spiritual is, "and besides, every such person to be and stand ipso facto excommunicated as is aforesaid."

Here, indeed, there must be a previous conviction; and a transmission of the sentence; and a declaration.

But on the second clause, no previous conviction is necessary: (though, if there is one, it may be used as a proof of the fact).

This libel is upon the first and second clauses: not upon the third.

And the proceedings of the two Courts being diverso intuitu, it is no objection, to say, "that a man will, at this rate, be twice punished for the same offence."

This is common, in many cases: for we proceed, to punish; they, to amend.

[244] It is clear, that upon the two first clauses, the Ecclesiastical Court has a jurisdiction.

The cases upon words do not apply to the present case.

Mr. Just. Denison concurred.

Their proceedings are pro salute animæ. Indeed if they proceed for damages, this Court will prohibit them. And that was laid down by the Court, in the case of *Large v. Alton*, in Cro. Jac. 462, where the costs being given only pro expensis litis, the Court would not prohibit them: but they declared that they would have done otherwise, if it had been pro damnis.

And it is plain to me, that the case in 1 Ventr. 146, *Dyer v. East*, was really a determination upon the third clause of the Act; and is a mistake: I suppose the words "with a weapon," are left out, by mistake. The reporter was then a young man.

But however, this is the only case to be met with, to this purpose; and it must be a mistake, either in the state of the case, or in the opinion: for on the second clause, surely, we can not prohibit them; because they are exactly within the words of the statute, "that if any person or persons shall smite or lay any violent hands upon any other, either in any church or church-yard, they shall ipso facto be deemed excommunicate."

Per Cur', (viz. the only two Judges now present) the rule was discharged.

WOOLLEY ET AL' versus COBBE ET AL' (Bail of Cobbe, a Bankrupt). Wednesday, 9th Feb. 1757. The bankrupt getting his certificate prior to the fixing of his bail will discharge them. [See 1 Bos. 450 n. 1 Atk. 238. 7 Vin. 72. 2 Bl. Rep. 811.]

The original defendant became bankrupt, pending the action. The bail was fixed in July. The bankrupt obtained his certificate, in August following.

The question was, "whether the bail should be discharged, by this certificate," (which was not obtained till after they were fixed and the debt levied upon them by fi. fa. and the money actually in the hands of the sheriff;) or, "whether the bail were become absolutely liable;" and consequently, the certificate came too late to help them.

[245] Lord Mansfield made a distinction, and Mr. Just. Denison and Mr. Just. Foster agreed to it, "that if the certificate is obtained before the bail are fixed, they

(a) No indictment is maintainable on the Act for this offence, Cro. El. 231. Cro. Car. 464; therefore the words at common law are properly here made use of by Lord Mansfield.

shall be discharged : but if they are fixed, before the certificate is obtained, they remain liable." (a)

V. post, 436. Mich. 1757. 31 G. 2, *B. R. Cockerton v. Owston* S. P. agreed to by the whole Court. Also, *Ludlam v. Maidwell*, 26th May 1772, 12 G. 3.

REX *versus* GAYER, ESQ. 1757. An acting justice of peace a substantial householder, and a lieutenant of Marines not compellable to serve as overseers of the poor where there are other sufficient persons within the parish. [See 3 Doug. 131. 2 Durn 398, 779.]

[Discussed, *R. v. Patteson*, 1832, 4 B. & Ad. 23. Referred to, *R. v. Derbyshire JJ.* [1909], 1 K. B. 452.]

Mr. Gould and Mr. Willes shewed cause against quashing an order of sessions, which (upon appeal to them, by Mr. Gayer,) discharged an order of two justices appointing James Gayer, Esq. and Benjamin Cobley to be overseers of the parish of Rockbear in com. Devon.

Mr. Gayer alone appealed from this order of appointment; and the sessions discharged it, as to the appointment of Mr. Gayer only : (the words of the order are — "it appearing unto this Court that, &c. and also, &c. and that, &c. ; this Court doth therefore vacate and make void the said warrant, as to the said J. Gayer"). It appearing unto them, that he had some years been, and was at the time of the nomination, and still at the time of making the sessions order, an acting justice of peace for the said county, residing within the said parish of Rockbear, and a substantial housekeeper there; and also a lieutenant of Marines in His Majesty's service, on half-pay; and that there are other sufficient substantial householders within the said parish, for the doing such office. The Court "therefore vacated and made void the said warrant, as to the said James Gayer."

Mr. Norton had, on 13th November 1756, moved to quash this order of sessions: for that neither of these two reasons were sufficient to justify the sessions in quashing the order of two justices, whereby Mr. Gayer was legally and regularly appointed one of the overseers of the said parish.

And a rule was thereupon granted, "to shew cause."

On shewing cause, the counsel on both sides went (at large) into a long argument, "whether the reasons given were sufficient:" particularly, "whether the office of justice of peace, and the office of overseer, were compatible;" and "whether the objection could be removed [246]ed by appointing a deputy-overseer; if it could, then whether a justice of peace was liable to be appointed overseer, in order to his executing the office by deputy."

Lord Mansfield said, the general questions concerning the incompatibility of offices, and the power of appointing deputies, are a large field indeed; but the present question seems to turn in a very narrow compass.

The sessions, upon an appeal, have a right to exercise the same latitude of discretion, in judging "who are fit to be nominated overseers," as the two justices had. They have given their opinion "that Mr. Gayer was not a proper person to be appointed overseer." They are not obliged to give any reason for their opinion: because the Legislature has intrusted them, upon an appeal, with the power or authority of appointing overseers.

If they had given no reason, their order had undoubtedly been good: we must have presumed that they acted upon proper grounds.

It is true, that where the whole reason is set out, and is clearly wrong, we may and ought to quash an order manifestly made by mistake, upon an erroneous foundation.

But then the bad reason given must appear to have been their only inducement. If there may have been other grounds, they should be presumed sufficient; and the order ought not to be set aside, because some of the reasons, unnecessarily given, appear to be bad.

(a) This last point was again so determined in B. R. 25th May, 1772, Ea. 12 Geo. 3, and Serjeant Burland and Serjeant Davy acquainted the Court that the point had been so held in C. B. and the Court said it was a new cause of action against the bankrupt.



There was no necessity for appointing Mr. Gayer; the sessions state "that there were other sufficient substantial householders within the said parish." They might think Mr. Gayer, under all the circumstances, improper unnecessarily to be appointed: his being an acting justice of peace residing within the parish, and a lieutenant of Marines, might be two circumstances which weighed among others. But it does not follow, neither is it said, that they looked upon both or either of these reasons, as an exemption from being appointed, or a disability to serve the office of overseer; and that they vacated the warrant of two justices as illegal upon that account.

The execution of a discretionary power, where it is not necessary to give a reason, ought to be supported, unless the whole reason is set out, and manifestly wrong. Here, the whole reason upon which the sessions acted, is not given. They say there were other persons, qualified. Supposing Mr. Gayer liable to serve the office, they might think him not so proper as many others. And therefore [247] we are not obliged to say "that the whole reason they went upon is bad;" allowing (for argument) that there arose no legal objection to the appointment of Mr. Gayer: which, I think, there is no occasion now to examine.

Mr. Justice Denison concurred.

They were not obliged to give any reason at all: and if it be only an imperfect one, we ought not to quash their orders.

He added—I remember a case, (*Rex v. Spalding*, I think it was,) where the justices held a man settled in a parish, by reason of an apprenticeship; not saying "that he had served forty days in the parish, under it;" yet the Court would not intend that they did wrong.

We will intend every thing in favour of the justices, in their orders.

Now here, the reason does not appear to be a wrong reason; it is enough, that they judged him an improper person to be overseer.

Mr. Justice Foster concurred.

Per Cur. unanimously

Order of sessions confirmed:

Order of two justices quashed.

REX *versus* INHABITANTS OF CHIDINGFOLD. Thursday, 10th Feb. 1757.

See this case at large in the quarto edition in my Settlement-Cases, No. 132. p. 415.

[248] PLUMMER *versus* BENTHAM. Saturday, 12th Feb. 1757. Custom of London to be certified at the Bar by the recorder *ore tenus*; [Vidian, 29. Brownl. Ent. 100. Inst. Cler. 4 Ed. 30, 452. 2 Inst. 126. 2 Com. 17.]

The Recorder of London (Sir William Moreton) came to the Bar, and certified two customs of that city, *ore tenus*.

Mr. Williams moved, (when Sir William Moreton was down at the Bar,) that the Recorder of London might return two writs of certiorari directed to the Lord Mayor and Aldermen of London, to certify two of the customs of their city.

And then Mr. Williams opened the case, viz. that it was an action of trespass on the case brought by the plaintiff against the defendant, for obstructing his ancient lights, by a new erection or building which the defendant had raised against them; to which, the defendant had, (by leave,) pleaded two justifications, both of them under the custom of the City of London. One of them was, that there is an ancient custom in the City of London, "that if any person has a messuage or house in the City of London, adjoining or contiguous to another messuage or house or to the ancient foundations of one in the said city, which former house has ancient lights or windows fronting opposite to or over such other adjoining or contiguous messuage or house or ancient foundation of one; such other person, owner of the latter messuage or house, or ancient foundation of one, may well and lawfully exalt such his messuage or house, or rebuild upon the ancient foundations of such his adjacent or contiguous messuage or house any new messuage or house, to any height that he shall please, against and opposite to the said ancient lights and windows of such first-mentioned neighbouring messuage or house to which his messuage or house or ancient foundations of a messuage or house are so contiguous or adjoining; and thereby darken and

obscure such ancient lights and windows of such first-mentioned neighbouring house, having such ancient lights and windows : unless there has been some writing, instrument or record of an agreement or restriction to the contrary."

[249] On this plea, issue was joined : and a certiorari issued, directed to the Mayor and Aldermen of the City of London, to certify "whether they have or have not such a custom."

The second plea, issue, and certiorari were the same with the first, only with this difference or rather extension of the custom pleaded ; viz. "that the owner of any erection or building, or the ancient foundation of any erection or building, might well and lawfully exalt such erection or building, or erect and build thereon a new erection or building to any height that he pleases, &c. ;" and so on, as in the former plea : only that the former plea confined the claim of the privilege to messuages or houses ; which this latter plea extends to all erections or buildings.

Sir William Moreton, Knt. Recorder of London, accordingly certified ore tenus, by command of the lord mayor and aldermen, (after having recited the pleadings and certiorari,) "that there is such a custom as is alledged in the former plea ; but that there is no such custom as is alledged in the latter plea."\*

The recorder then delivered in both the writs of certiorari, with written copies of the respective returns annexed ; though he had delivered them ore tenus at the Bar : (which, he told me, was usual). The returns were worded as follows : viz. the execution of this writ appears in a certain certificate by us the Mayor and Aldermen of the said City of London, made by the recorder of the said city at the day and place within contained, according to the customs of the said city, by word of mouth, as is within commanded.

The Answer of Marshe Dickinson, Esq., the Mayor, and of the Aldermen  
of the said City.

We the said mayor and aldermen of the said city, by Sir William Moreton, Knt. Recorder of the said city, by word of mouth of the said recorder, according to the said custom of the said city, do, in obedience to the said annexed writ, humbly certify that there is now had, and from the time whereof the memory of man is not to the contrary there hath been had and received such ancient and laudable custom in the said city used and approved : to wit, "that if any one hath a messuage or house in the said city, near or contiguous and adjoining to another ancient messuage or house, or to the ancient foundation of another ancient messuage or house in the said city, of another person his neighbour [250] there ; and the windows or lights of such messuage or house are looking fronting or situate towards, upon or over or against the said other ancient messuage or house or ancient foundation of such other ancient messuage or house of such other person his neighbour, so being near, adjacent, contiguous or adjoining, although such messuage or house and the lights and windows thereof be or were ancient, yet such other person his neighbour, being the owner of such other messuage or house or ancient foundations so being near, adjacent or adjoining, by and according to the custom of the said city in the same city for all the time aforesaid used and approved, well and lawfully may, might and hath used, at his will and pleasure, his said other messuage or house so being near, adjacent or adjoining, by building to exalt or erect : or, of new, upon the ancient foundations of such other messuage or house so being near, adjacent or adjoining to build and erect a new messuage or house to such height as the said owner shall please, against and opposite to the said lights and windows near or contiguous to such other messuage or house, and by means thereof to obscure and darken such windows or lights : unless there be or hath been some writing, instrument or record of an agreement or restriction to the contrary thereof in that behalf."

The return to the other writ of certiorari was in the same form, and to the very same effect as to the custom certified by the former ; and repeated the return to the former certiorari in totidem verbis, very nearly : but it went on further, with a

\* See the first case in Sir H. Calthrop's Reports, (prettily reported and worth reading,) where the question was very like the present, and the determination agreeable to the certificate as to this first plea. [See also 20 Vin. (C) 1. 21 Vin. 24, 25, 26, 27.]



negation of the existence of any such custom as the defendant had alledged in his second justification. The additional part was as follows :

And that in the said City of London there is not now or ever was any such custom, "that if any one hath a messuage or house in the said city, near or contiguous and adjoining to an erection or building or to the ancient foundations of an erection or building, in the said city, of another person his neighbour there; and the windows or lights of such messuage or house are looking fronting or situate towards, upon, over or against such erection or building or the ancient foundations of such erection or building of such other person his neighbour so being near, adjacent, contiguous or adjoining: although such messuage or house, and the lights and windows thereof be or were ancient, yet such other person his neighbour, being the owner of such erection or building or ancient foundations of such erection or building so being near, adjacent or adjoining, by and according to the custom of the said city in the same city for all the time aforesaid [251] used and approved, well and lawfully may, might and hath used, at his will and pleasure, his said erection or building so being adjacent or adjoining, by building to exalt and erect; or, of new, upon the ancient foundations of the said erection or building so being near, adjacent or adjoining to build and erect a new erection or building, to such height as the owner shall please, against and opposite to the said lights and windows of such messuage or house, and by means thereof to obscure and darken such windows or lights."

The Court ordered the certiorari to be filed, and the return recorded.

Note—Nothing of this kind has actually happened for many years past, (not even since H. the Sixth's reign,) in this Court; (though it has in the Court of Chancery). And a consultation was had in the city, concerning the sort of gown which it was proper for the Recorder to put on, to make this ore-tenus return: in which consultation it was determined that it ought to be the purple cloth robe, faced with black velvet; and not his scarlet gown, his black silk one, nor the common Bargown.

See Viner's Abridgment; title Customs of London, letter P. placita 2 & 4, concerning this manner of trying the customs of London: and how to surmise "that they ought to be tried thus, and not by the country:" it is vol. 7, page 246, note—without such a surmise, they shall be tried by the country, as other issues in fact are.

REX *versus* STRONG. 1757. Indictment for exercising a trade contrary to 5 Eliz. c. 4, may be found at a city or a borough sessions.

Mr. Serjeant Poole shewed cause against quashing an indictment on 5 Eliz. c. 4, sect. 31, (for exercising a trade, not having served an apprenticeship therein,) found at the sessions for the City of Carlisle.

Mr. Norton had (on 27th November 1756) moved to quash it, upon an objection, "that the city sessions had no jurisdiction." And he had cited, in proof of it, the case of *Regina v. Taylor*, 2 Ld. Raym. 767, where such an indictment was quashed, "because the borough sessions had no jurisdiction to take such indictments." He insisted that only the Quarter-Sessions of the county have jurisdiction. The indictment in that case of Taylor was found at the sessions for the Corporation of Wells; and moved hither by certiorari.

[252] Lord Mansfield, at the time of the original motion, looked into the Act of 5 Eliz. c. 4, and said that this Act (§ 39,) expressly gives the power to mayors or other head officers of cities or towns corporate, at their sessions.

And now upon shewing cause,

The Court was unanimously of that opinion.

The case of *The Queen* against *Taylor* was in Easter term, 1702, 1 Annæ; and is contradicted by that of *Regina v. Franklyn*, in 2 Ld. Raym. 1038, which was determined in Mich. 3 Ann. 1704, though it is in 1 Salk. 370, by mistake, put under Mich. 3 Will. & Mar.

Per Cur. Rule discharged.

#### MEMORANDUM.

The Court was not up till near an hour after midnight; though many rules were enlarged, and many long motions adjourned over till next term.

As the regulation made by the Court concerning views took its rise in this term,

it may be proper here to state every thing relative to that subject; which, at the time of this publication, is a practice fully settled.

The granting of rules for views in \* civil causes stands † now settled upon the following foot.

Great inconvenience had arisen from the abuse of views and their being perverted into means of delay, to the intolerable hindrance of justice. Some late instances shewed the mischief in a glaring light: and the example being once set, there was no doubt it would be followed.

After the 4 & 5 Ann. c. 16, sect. 8, views were granted, upon motion, of course. And upon this Act and 3 G. 2, c. 25, sect. 14, a notion prevailed "that six of the first [253] twelve upon the pannel must view, and appear at the trial: if they did not, there could be no trial, and the cause must go off."

Where either party wished delay or vexation, he moved for a view. A thousand accidents might prevent a view, or six of the first twelve from attending the view, or their attending the trial. He who wished them not to attend, might by various ways bring it about. Where a defendant in possession was well liked, and the plaintiff a stranger or unpopular, gentlemen of themselves found excuses; especially, if the view was troublesome and at a distance. Causes in several counties had at a great expence been repeatedly carried down, and put off; either because there was no view, or because six of the first twelve did not attend the view or did not attend the trial. Though twelve viewers should appear at the trial, yet according to the notion which prevailed, if six of the first twelve upon the pannel were not among them, the cause could not be tried.

The tendency of this abuse, to delay, vexatious expence and the obstruction of justice, was so manifest, that the Court thought it their duty to consider of a remedy: and in Michaelmas term 1757, and at other times, Lord Mansfield informed the Bar to the following effect: "That they had conferred together upon the abuse of views, and considered of a remedy in the power of the Court."

Before the 4 & 5 Ann. c. 16, sect. 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or Judge, at the trial, "that the nature of the question made a view not only proper but necessary:" for, the Judges at the assizes were not to give way to the delay and expence of a view, unless they saw that the cause could not be understood without one. However, it often happened in fact, that upon the desire of either party, causes were put off for want of a view, upon specious allegations from the nature of the question, "that a view was proper;" without going into the proof, so as to be able to judge whether the evidence might not be understood without it.

[254] This circuitry occasioned delay and expence: to prevent which, the 4 & 5 Ann. c. 16, sect. 8, empowered the Courts at Westminster to grant a view in the first instance, previous to the trial.

As a view might be of use, and in this shape was attended with no delay and but little expence, it became the practice to grant them of course, upon the motion of either party.

The 3 G. 2, c. 25, sect. 14, provides "that where a view shall be allowed, the jurors who have had the view shall be first sworn, (or such of them as shall appear,) before any drawing:" which means, in opposition to such other jurors as are to be drawn by ballot; and not to establish "that six at least of the first twelve shall be sworn."

Upon a strict construction of these two Acts in practice, the abuse which is now grown into an intolerable grievance has arisen.

Nothing can be plainer than the 4 & 5 Ann. c. 16, sect. 8. The Courts are not bound to grant a view of course; the Act only says "they may order it, where it shall appear to them that it will be proper and necessary."

It is infinitely better that a cause should be tried upon a view had by any twelve,

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\* N. B. 4, 5 Ann. c. 16, § 8, does not extend to criminal cases; so that in them there can be no rule for a view, without mutual consent.

† In 1765.



than by six of the first twelve : or by any six ; or by fewer than six ; or even without any view at all : than that the trial should be delayed from year to year, perhaps for ever : it can never be proper or necessary to grant a view which is asked and used for so unjust a purpose.

There have been instances of great causes put off for years : and though even nine, ten or eleven viewers have attended, yet upon objection "that they were not six of the first twelve," the cause has been put off, and a view moved for, as of course, again by the party who had availed himself of so glaring a chicane.

We are all clearly of opinion, that the Act of Parliament meant a view should not be granted, unless the Court was satisfied that it was proper and necessary.

The abuse to which they are now perverted makes this caution our indispensable duty : and therefore, upon every motion for a view, we will hear both parties, and examine (upon all the circumstances which shall be laid before us on both sides) into the propriety and necessity of the motion ; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice.

[255] Lord Mansfield having made this declaration, his Lordship desired the gentlemen of the Bar to think of it ; and, if any objections should occur, to mention them.

The expedient proposed by the Court was universally approved.

The first instance happened in Hilary term 1757, in a great cause between *Pierce and The Earl of Faulconberg and Others* : which was an issue out of Chancery, often tried at Durham by special juries, and now ordered to be tried at Bar by a special jury from Yorkshire. (See the rule at large, together with the addition of the consent-part, *infra*, pa. 256, 257.)

Subsequent to this, was the cause of *The Earl of Darlington v. George Bowes, Esq.* which was an issue out of Chancery, and had been thrice carried down to be tried at Durham (where there are assizes only once a year) at a great expence, and every time put off by the defendant, upon objections on account of the view. Once, nine viewers appeared : but they were not six of the first twelve. Another time, only four viewers appeared at the assizes. In 1757, a view was granted by mutual consent, upon terms : but by an accident (of a fall from his horse) the Judge of Assize was prevented from trying it. The defendant Bowes moved, in Trinity term 1758, for a view ; but refused to renew his former consent, or to come into any terms ; insisting that by law he was entitled to a view of course. The plaintiff had likewise moved for a view ; consenting to the terms. Both motions were adjourned to the last day of the same Trinity term 1758 : when the Court, upon all the circumstances, rejected the defendant's motion, unless he should consent within a week to the terms proposed. He would not consent. The cause came on to be tried at Durham, without a view, before Mr. Baron Smythe. It happened, many of the jurors had viewed upon some of the former occasions. A verdict was given, for the plaintiff, to the satisfaction of the Judge. The defendant moved the Court of Chancery for a new trial ; because he had been refused a view ; and because it might be fit to have another trial, before his inheritance was bound. Mr. Baron Smythe certified "that he was satisfied with the verdict ;" and also, "that a view was totally unnecessary, there being no dispute concerning the locality, discrimination or limits of the premises, but merely a question to whom certain lands belonged." The Court of Chancery thought proper to grant another trial ; but approved the denying a view, unless he renewed his consent ; and made it part of the order for a new trial, "that he should consent to the terms." It was again tried, before Mr. Justice [256] Bathurst : and a verdict was found for the plaintiff, to his satisfaction. The defendant moved the Court of Chancery for a new trial : which was refused.

Had not the Court put a check to granting views, from time to time, as of course, a rich defendant, conscious that the merits were against him, might, from pique or humour or litigiousness, have kept off the cause as long as he lived, for want of a view, upon a question where a view could not be of the least utility.

The wisdom and fitness of what the Court had done to regulate views was so fully manifested upon the occasion of this cause, and appeared to be so well justified by the authority given them by the Act of Parliament and by every principle of justice and convenience, that no party has ever since moved for a view, without consenting to the

terms: and it is found in experience, that views are<sup>\*1</sup> now regularly had, and a competent number of viewers appear at the trial. A view is not asked<sup>†1</sup> now, except in cases where it may probably be of use: and as the non-attendance of viewers can now gratify neither party, both concur in wishing the duty performed.

The rule that was made in the first instance that happened after the expedient was proposed by the Court, and was received with general approbation as is above-mentioned, was drawn up in the following words.

"<sup>\*2</sup> Saturday next after fifteen days of St. Hilary in the 30th year of King George the 2d."

"*Pierce, Esq. v. Earl Faulconberg and Others.*

"By consent of counsel on both sides, it is ordered, that there issue a writ of distringas juratores, to be directed to the Sheriff of the county of York; in which shall be contained a clause commanding the said sheriff to have six or more of the first twelve of the jurors to be impanelled and returned to try the issue between the parties, at the place in question, before the time of the trial of the said issue, to wit, upon, &c.; and that B. R. on the part of the plaintiff, and T. W. on the part of the defendants, shall attend on the same day and shew the matters in question to the said six or more of the first twelve of the said jurors; and that the expences of taking the said view shall be equally borne by both parties; and no evidence shall be given, on either side, at the time of taking thereof."

[257] "<sup>†2</sup> And by the like consent, it is further ordered, that in case no view shall be had; or if a view shall be had by any of the said jurors, (whether they shall happen to be any of the twelve jurors who shall be first named in the said writ, or not:) yet the said trial shall proceed; and no objection shall be made on either side, either for want of a view, or that a view was not had by any of the twelve jurors first named, or for that it was not had by any particular number of the jurors named in the said writ, or for want of a proper return to the said writ."

"On the motion of Mr. Norton, of counsel for the plaintiff; and of Mr. Gould, of counsel for the defendants."

The cause was tried at the Bar, on the 7th of May 1757: and a full jury of viewers appeared.

The above recited rule was for a view to be had by a special jury; and was made absolute at once, being consented to by both parties: but during the remainder of the same term (of Hilary 1757,) and also during the three following terms (of Easter, Trinity and Michaelmas 1757,) the Court, upon proper affidavits, granted like rules (mutatis mutandis) in cases that were to be tried by common juries; making them only "to shew cause," not absolute in the first instance. The next term (Hilary 1758,) they made some of them, "to shew cause;" others, absolute in the first instance; but none without proper affidavits. Soon after, viz. in Trinity term 1758, they made all these rules absolute in the first instance; some, upon affidavit; others, as of course: since which time, they are become motions of course, without affidavit.

The form of them is as follows—

If the trial is to be by a special jury, the rule runs thus—

It is ordered that there issue a writ of distringas juratores, &c. &c.—"taking thereof:" (in the words of the first clause of the above recited rule between *Pierce and Lord Faulconberg and Others*<sup>\*3</sup>). The additional clause is expressed in these terms—"the plaintiff, (or the defendant, viz. the party who prays the view) consenting that in case no view shall be had; or if a view shall be had by any of the said jurors, whether they shall happen to be any of the twelve jurors who shall be first named in the said writ, or not; yet the said trial shall proceed; and [258] no objection shall be made, on either side, on account thereof, or for want of a proper return to the said writ."

<sup>\*1</sup> At the time of this publication. (1765).

<sup>†1</sup> V. supra.

<sup>\*2</sup> 29th January 1757.

<sup>†2</sup> Note—the former clause of this rule was in the usual form of rules for views where the trial was to be by a special jury.

But this latter clause ("and by the like consent it is further ordered, &c.") was now first added.

<sup>\*3</sup> See last page.



The rule for a view, where the cause is to be tried by a common jury could not continue the same, since the Balloting Act (3 G. 2, c. 25;) as it was before; nor could it be exactly like to that for views by special juries, (by reason of the particular directions given by the 14th section of the Balloting Act :) but it used to run much like it, only *mutatis mutandis*. The present form (since that Act,) is this—"It is ordered that there issue a writ of *distringas juratores*, to be directed to the Sheriff of the county of Y. : in which, shall be contained a clause commanding the said sheriff to have six or some greater number of \* the jurors to be impanelled and returned to try the issue between the parties,† who shall be mutually consented to by the said parties or their agents, at the place in question, before the time of the trial of the said issue, to wit, upon, &c. ; and that R. R. on the part of the plaintiff, and T. W. on the part of the defendant, shall attend on the same day, and shew the matters in question to the said six or some greater number of the ‡ said jurors, who shall be mutually consented to as aforesaid; and that the expences of taking the said view shall be equally borne by both parties: and no evidence shall be given, on either side, at the time of taking thereof."

The additional clause, now added to this rule, is in "these words—the plaintiff," or "the defendant," (the party at whose instance the rule is prayed) "consenting that in case no view shall be had, or if a view shall be had by any of the jurors, whether they shall happen to be six§ or any particular number of the jurors§ who shall be so mutually consented to as aforesaid; yet the said trial shall proceed; and no objection shall be made, on either side, on account thereof, or for want of a proper return to the said writ."

The end of Hilary term, 30 Geo. 2, 1757.

[259] EASTER TERM, 30 GEO. II. B. R., 1757.

Three Judges present, viz. Lord Mansfield, Mr. Just. Denison, and Mr. Just. Foster.

(Lord Commissioner Wilmot absent, in Chancery.)

COOPER *versus* MARSHALL. Friday, 29th April 1757. [S. C. 2 Wils. 51.] Plea in justification of a trespass, that it was done to abate a nuisance, from which he could not enjoy his common as of right he ought is bad. [S. P. ruled accordingly; and that a general declaration was sufficient. 3 Durn. 74. 1 Bosan. 15, 16. 6 Durn. 484. See also 4 Bur. 2425.]

This case was the same point with a case of *Cope v. Marshall*, which had been formerly twice argued, (viz. on 28th June 1754, and 31st January 1755). Both of them stood now in the paper for argument; the present case having been never argued at all, and the other having never been argued either before Lord Mansfield or Mr. Justice Wilmot.

This case of *Cooper v. Marshall* stood first in the paper, and came on first. It was an action of trespass for breaking, entering, and digging up the plaintiff's close, and filling up and spoiling the coney-burrows there, &c. And there was a 2d count for doing the like in the plaintiff's free warren.

Several pleas were pleaded, by leave of the Court.

Plea—As to the 1st count, was a justification under a right of common in twenty acres, &c. ; and that the coney-burrows were wrongfully, unlawfully, and injuriously newly erected and kept up there: by reason whereof the [260] said common was surcharged and spoiled; so that the defendant could not enjoy sufficient common in the said twenty acres, as of right he ought. And therefore, he justifies the breaking, entering, and digging up the plaintiff's close, and filling up and spoiling the coney-burrows, as it was lawful for him to do, in order to abate the said nuisance.

There was also a second justification, much to the same effect.

To the 2d count—were two justifications not much different from the former.

\* N.B. This Act (of 3 G. 2) does not require them to be six of the first twelve.

† These words are taken from the same Act of Parliament, sect. 14.

‡ V. *supra*, notes (\*) & (†).

§ V. *supra*, notes (\*) & (†).

The plaintiff demurs to these pleas: and the defendant joins in the demurrer.

Mr. Morton pro quer.—The justification arises merely from the plaintiff's having surcharged the common: and the wording of the plea cannot alter the matter and substance of it. So that the defendant's calling it a nuisance will not make it so: but it really is a mere surcharge of common. Therefore the word "nuisance" is here misapplied.

He cited Cro. Jac. 446, the case of *Fowler v. Sanders*: where the prescription was treated as a prescription to make a nuisance, though not so expressed in terms.

But it is not an illegal act, for the lord to place conies upon his own land; though the land be liable to right of common. They are beasts of warren, and profitable to the lord: and the commoner cannot chase and kill them.

Bracton, lib. 4, 221, makes a difference between a *nocumentum justum*, and a *nocumentum injuriosum*.

Fleta, lib. 4, c. 26, De Nocument' Servitutibus Injuriosis, makes the like distinction: "*nocumentorum aliud, injuriosum et dampnosum; et aliud, dampnosum et non injuriosum.*"

These authorities shew that the injury arises only from the excess.

And the commoner has no such remedy, as the defendant here relies on.

The question therefore is, "whether the commoner has a right to dig up the lord's soil; in order to preserve his right of common."

[261] The lord cannot indeed totally destroy the commoner's qualified interest, contrary to his own grant. Yet the lord has rights compatible with the commoner's right: and these are legal in their own nature: though they may become injurious, by excess.

On which head, he cited Fleta, lib. 4, pa. 252. (V. pa. 252, 253, in cap. 18, De Pertinentiis.)

But this justification puts the latter case upon the same foot with the former: whereas the commoner's remedy is, really adequate only to the injury done to him. Now a surcharge of common is of the latter kind of injury: and yet he here claims a right to dig up the soil and destroy the conies. So that the remedy claimed by the justification exceeds the injury done. And indeed it would go further than a judgment upon a writ of admeasurement would carry it: for which, he referred to Fitzh. Nat. Brev. 295, (276) and Westm. 2, c. 8, (13 E. 1). There, the tenant who is guilty of a second surcharge shall only pay damages, and forfeit the overcharge to the King: whereas what is here claimed, is a total confiscation of the lord's property, for his first injury done to the commoner.

Authorities in point, or nearly so, "that the commoner cannot do this," are Godbolt, 122, *Coney's case*, H. 29 Eliz. which is full in point: and the principal resolution is confirmed by 4 Leon. 7, *Ould and Coney's case*, S. C. In which case, it was adjudged "that the commoner cannot kill or destroy the conies which destroy his common:" but it appears by Godbolt, that "he may have other remedy. And per Suit, Justice, he may have an action of the case or assize, against the lord, for putting in the conies, if he has not sufficient common left." Indeed it is said in 1 Leon. 7, "that he hath not any other remedy." But Fleta, lib. 4, c. 23, De Admensur. Pasturæ, pa. 262, 263, justifies Mr. Just. Suit's opinion, "that he has remedy;" viz. either admensuration, or assize of novel disseisin.

A commoner cannot even distrain the lord's beasts which surcharge a common. For which position he cited Godbolt, ut supra, pa. 124, as an authority. (V. what is there said per Godfrey arguendo; but not any part of the resolution of the case.) Much less, then, can he destroy them.

Cro. Eliz. 876, p. 43 Eliz. the case of *Bellew v. Langden*, the same point, and adjudged accordingly; "that the keeping of conies by the owner of the soil is lawful; and the killing them, unlawful." And Owen 114, S. C. (there called the case of *Pellin v. Langden*.) S. P. accord-[262]ingly: which adds, that the owner of the soil may make a fish-pond upon the common; and that the commoner could not destroy it.

Yelv. 104, *Hobbesdon Mil. v. Gresil*, M. 5 Jac. B. R. and Cro. Jac. 195. P. 5 Jac. S. C. there called *Hobbesdon v. Grissil*: it was adjudged "that the commoner cannot kill nor chase the lord's beasts off the common; but his remedy is by assize, or action on the case."

Agreeable to this resolution—in a case in Cro. Jac. 229, M. 7 Jac. 1, there called *Sir Jerom Horsey v. Hagberton*, a plea very like the present, was over-ruled without



defence. The case really was between Sir Jerome Horsey and Mead and Havor and his wife. The justification was, "of levelling the coney-burrows, and laying them smooth and even with the ground;" and the reason given for doing it, was, "that uti non potuit his common, prout debuit." Adjudged, without argument, "that the commoner could not do this."

After this, the commoners tried their chance again, by altering their manner of pleading. This was in the case in 2 Bulstr. 116, *Carrill v. Pack and Baker*, Tr. 11 Jac.

Here, the coney-burrows were treated, by the justification, as holes made upon the common, by the plaintiff, into which the commoners sheep fell; and that the sheep of the commoners often fell into those holes, and were thereby lost; and therefore they justify the chasing the conies, and digging and filling up the burrows.

And agreeably to this case, the pleading in the present case is, "that the plaintiff erected coney-burrows, &c."

In that case, all the cases and arguments were urged: and yet it was adjudged against the defendant; who had justified the chasing the conies, and digging down the burrows and filling up the holes.

Since which time, the grand point has never come in question.

Mr. Aston pro def.'

In the first place, it does not appear that the defendant did kill any of the conies: though Mr. Morton would suppose that to be implied in his digging and filling up the burrows.

[263] The lord may feed or depasture the common, I agree: and the commoner cannot kill or chase his cattle.

But it does not follow, that where necessity obliges the commoner to abate a nuisance, he may not do it.

And surcharging a common with rabbits in a great degree, is a private nuisance.

1 Hawk. Pl. Cor. 197, c. 75, treats of common nusesances, and how they may be removed; and he says "that any one prejudiced by a private nuisance may destroy it." Pa. 199, § 12, is express.

2 Rol. Abr. tit. Indictment, letter Q. Nuisance pl. 7, 8. A presentment of a surcharge of common, is not good: because it concerns a private interest. The same, of an inclosure of common, in nuisance of the commoners.

Bracton, lib. 4, c. 21, pa. 221, shews that though the act was legal at first, the excess makes it a nuisance.

But here the 2d plea is "that the lord has erected so many coney-burrows that the commoner had not sufficient common left." And this fact is admitted by the demurrer. Therefore the lord has broken through the bound of right between the lord and the commoner.

The lord cannot inclose or built upon the common.

And there are no degrees of insufficiency: the only question is "whether there be or be not sufficient common left;" as in the case in 2 Mod. 7, *Smith v. Feverel*.

And the commoner may in such case abate the nuisance. 2 Inst. 88, is in point. 15 H. 7, 10 b. is also in point. He may also, indeed, if he chooses it, bring an action of trespass or assize. But he may abate them, without suit. Hale's Analysis 110, (V. pa. 125, § 42). *Robert Mary's case*, 9 Co. 112 b. affords the reason; viz. the preventing multiplicity of suits.

As to the doctrine of the commoner's not meddling with the soil—

The lord could approve before the Statute of Merton. 1 Ro. Rep. the case of *Sir S. Proctor v. Sir J. Mallorie*; [264] per Coke: and agreed to by the Lord Chancellor. Fitzh. title Appovement (there cited).

And this appears too by the writ of quod permittat. Bracton, lib. 4, pa. 227 b. (the writ there) shews that the commoner might pull down pales, &c. 2 Inst. 88, ad idem.

This is like all other cases of nuisance: a person may abate a nuisance to his property, though upon the land of another. 9 E. 4, 35 a. is so.

As to Mr. Morton's cases—there is no material difference between destroying a hedge, and destroying a coney-burrow. Now 2 Mod. 65, the case of *Corsar v. Mason* is in point, "that the commoner may prostrate and abate a hedge;" and surely that is meddling with the soil.

And there may be cases where the commoner may chase off the lord's beasts: as suppose they are infected.

As to *Coney's case*, it was very different from the present: for there the killing and carrying away was justified; whereas we do not justify killing, chasing, or taking away.

So the case of *Bellew v. Langlen* was killing. There was no pretence of any surcharge of common. It is a justification of killing the conies as being damage-feasant: and it is only adjudged there "that the killing them was unlawful."

So Yelv. 104 was chasing and killing.

And in those cases, there might be sufficient common left, for aught that appears to the contrary, in any one of them.

*Sir Jerome Horsey's case* is not like this. That is for breaking a warren: and the coney-burrows there are not said to be newly erected. And it was done to prevent the coney-burrows increasing, so as to be a nuisance: not averring "that they were then a nuisance."

Whereas here it is averred to be a nuisance, and a new erection.

As to the case of *Carril v. Pack and Baker*—it is for entering the plaintiff's free warren, and digging the land. And there, in the justification, it is alledged to be done for the better preservation of the common. And the free warren is admitted: and therefore he could not justify the killing, &c.

[265] As to a pond—if it was so large as not to leave sufficient common, it would be a nuisance, and might be abated.

1 Lutw. 101, the case of *Hassard v. Cantrell* (which was mentioned on a former argument) was only "that the commoner could not enjoy his common in so beneficial and ample a manner as before." But it does not say, as here, "that there was not sufficient common left." Which is going a great deal further than that case does.

Mr. Morton in reply—

Mr. Aston agrees that the act of the lord is legal. Therefore it is not like acts which are against his own grant; or cases which become manifesta disseisina.

"*Ulterius nocumentum*" imports a present nuisance—

Lord Mansfield stopped Mr. Morton in his reply.

"Whether it be or be not hurtful:" or "how far it may be so;" is not the question: the question turns upon the remedy; "whether it is abatable; whether the commoner can do himself justice."

It may be prejudicial to the commoner, yet not injurious: it may be both prejudicial and injurious, yet not abatable.

The lord, by his grant of common, gives every thing incident to the enjoyment of it, (as ingress, egress, &c.); and thereby authorizes the commoner to remove every obstruction to his cattle's grazing the grass which grows upon such a spot of ground: because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate, or a wall, to keep the commoner's cattle out, is inconsistent with a grant which gives them a right to come in.

But the lord still remains owner of the soil: and is not debarred from exercising any act of ownership.

The commoner has no right to meddle with the soil.

The true distinction is taken in the case of *Mason v. Caesar* in 2 Mod. 66: where the Court was of opinion "that the defendant, a commoner, might abate the hedges; for thereby he did not meddle with the soil, but only pulled down the erection."

[266] The hedge stopped the commoner from entering, and putting in his beasts. The grant gave him leave to enter, and put in his beasts: therefore it virtually authorized him to remove any obstruction directly repugnant to that liberty.

But in the present case, the lord has done nothing contrary to the grant: he has not obstructed the commoner from entering and putting in his cattle.

The lord has a right to put conies upon the common: as appears from the case of *Carrill v. Pack and Baker*, in 2 Bulstr. 115, 116.

The conies themselves naturally make the burrows. So that they are incident to the right of putting on the conies.

If the lord surcharges, the commoner is injured in his right of common, it is true: but what is the commoner's remedy? Not to abate: not to be his own judge, in a complicated question, which may admit of nicety to determine.

There is a certain line to be drawn: the lord has a right so far; but no farther. Yet the commoner cannot destroy or drive off the conies: nor, consequently can he destroy the burrows; which is, in effect, destroying the conies.



This is founded upon reason, and upon many authorities.

*Sir Jerome Horsey's case*, (V. ante, 262). 2 Bulstr. 115, 116. The case of *Carrill v. Pack and Baker* (V. ante, 262).

And its being a free warren makes no difference.

So that the question is not, "whether this be an injury": "but, whether it is abatable."

I think it so clear a case, that I have no difficulty at all about it.

Mr. Just. Denison declared the same thing: and he said he saw no difference between this case, and the cases cited: but merely in the expression, viz. that in this case it is treated as a nuisance; which is not the expression, in them. But this form of expression makes no difference.

Upon this record, it must be taken, "that the plaintiff was owner of the soil, and had a free warren; and that [267] there is not sufficient common left, (by the increase of the conies) for the use of the commoner."

The question then is "whether the commoner shall be intrusted to destroy the estate of the lord, in order to preserve his own small right of common."

1 Rol. Abr. 405, pl. 2, gives the reason why the commoner cannot\* kill the conies, but ought to bring his assize or action; viz. "because he cannot be his own judge."

So here, this justification would make him a judge in his own cause. No: let him take his proper remedy.

This is plain reason; even if it was not supported by authorities: but the cases are also strong, to prove it.

The only point of this case turns upon these pleadings calling it a nuisance.

But this will not make it a nuisance abatable by the defendant himself; nor can it alter the law.

In *Sir Jerome Horsey's case*, Cro. Jac. 229, it was adjudged "that the commoner has no other interest than to take the common, by feeding his cattle there: and may not destroy the conies nor coney-burrows."

A coney-burrow is not, of its own nature, a nuisance: on the contrary, it is essential to a free warren.

Therefore the nuisance depends upon the number of them: and you can, at the utmost, only abate so much of the thing as is a nuisance. You cannot destroy the whole, (which is the right here claimed); but only so much of the thing as makes it a nuisance.

In 1 Strange 688, in the case of *Rex v. Papineau*, Lord Ch. Just. Raymond expressly declares so. Suppose a man builds his house up so high, as to be a nuisance to his neighbour, by obstructing his lights or in any other respect arising from its excess; you cannot destroy the whole house, but only so much of it as by its excess above what is allowable, constitutes the nuisance.

Mr. Justice Foster was of the same opinion.

This justification is clearly bad. It is founded on a claim of right which cannot be maintained.

[268] It is admitted "that a commoner cannot, in this case, destroy the conies." Consequently, he cannot destroy the burrows: for the effect is destroying the conies.

If the lord has exceeded the bounds of his right, the law is to determine the quantum of such excess; and to the law the commoner must resort for his remedy, if he is aggrieved.

Per Cur. unanimously.

Judgment for the plaintiff.(a)

See the next case—the same point.

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\* Yet Roll says, "dubitatur."

(a) This case was briefly as follows: "Trespass for breaking plaintiff's close and spoiling coney-burrows there; and a second count for the like, in the plaintiff's free warren: the defendant justified under a right of common, and that the coney-burrows were wrongfully newly made there, so that he could not enjoy as of right he ought, and therefore he filled up the coney-burrows: on demurrer there was judgment against the defendant, for the lord has a right to put conies on the common, provided he does not surcharge the common, which if he does, then and

COPE *versus* MARSHALL. 1757. [S. C. 2 Wils. 51.]

H. 27 G. 2, Rot'lo. 145.

This being the same point with the last preceding case of *Cooper v. Marshall* :

The Court without argument at this time, (but this very case had been argued twice before,\* though not before Lord Mansfield and Mr. Just. Wilmot,) gave the like judgment as last above, viz.

Judgment for the plaintiff.

HOPE, EX DIMISS. BROWN ET UX. *versus* TAYLOR. 1757. An ordinary man makes his own will without any assistance, and after disposing of his real estate, says, "if either of the persons before named die without issue lawfully begotten, the said legacy shall be equally divided between them that are left alive;" this creates an estate tail. [See 2 Durn. 724. 1 East. 37, n. 5 Durn. 71 a. and qu. Fearne 357, 358.]

This came on upon a case stated, upon the trial of an ejectment.

The case stated was this :

Robert Johnson, seised in fee (inter alia) of a copyhold of inheritance, and having first surrendered to the use of his will devised to John Wedgeborough, his sister's eldest son, his house in the brook with the out-buildings : and 30l. to be paid within twelve months after his decease ; to his nephew Robert Taylor, 50l. to be paid within twelve months after his decease ; to his nephews Charles Taylor, Robert Taylor, and William Taylor, his sister's three sons, twenty-nine acres of arable and meadow land bought of B. ; not to be parted, but to part the rent equally between them ; then to William Taylor, his sister's [269] son, the house in question, by the description of "his house on the green : with the ground and outhouses thereto belonging ;" and gives him also 10l. and to his brother-in-law Charles Taylor 5l. : and he directs the said legacies to be paid within twelve months after his decease ; and declares his will and meaning to be "that if either of the persons before named die without issue lawfully begotten, then the said legacy shall be divided equally between them that are left alive."

Note—It was stated that the testator had five houses in all ; and that the will begun with this expression, "as to all my worldly estate, &c." And it concludes thus, "and all the rest of my houses, goods, land, and cattle, I give to my kinswoman Elizabeth Wedgeborough ; and make her my sole executrix."

The testator died seised of the said five houses and lands.

William Taylor entered, and was admitted, and enjoyed till the 13th of June 1755 ; when he died, leaving the defendant William Taylor, his only son, and heir at law.

The wife of Brown, the lessor of the plaintiff is heir at law to the testator ; and, as such, brought this ejectment, against the defendant William Taylor the son, who claims as tenant in tail.

In this case, there are made

Two points which are (in substance)

1st. What estate William Taylor, the devisee, took by the will ; viz. whether an estate tail, or for life only.

2dly. If only an estate for life, then whether the residuary clause did not carry the reversion in fee, to the residuary devisee : (in which case, the heir at law could have no claim).

Mr. Clayton for the lessor of the plaintiff, the heir at law.

To the first question, he argued that William Taylor the defendant's father, took only an estate for life ; not an estate tail.

then only the commoner is injured, and may have remedy, but it must be by action ; for he cannot be his own judge, and kill the conies, or fill up the burrows." And the judgment in this case is in effect the same, and grounded on the same reason as that in 2 Bulst. 115.

\* Vide ante 259.



The devise is only to William Taylor himself; without any further limitation whatsoever.

The subsequent words are, "that if either of, &c. shall die without issue, then the said legacies to be divided amongst the survivors."

[270] Now the word "legacies" will be satisfied by the money-legacies: and there were four money-legacies before given, therefore this clause shall not be extended to the devise of real estate. For an heir at law shall not be disinherited, by doubtful words, or by implication.

2d question, upon the residuary clause

The residuary clause does not carry the reversion in fee in these premises in question, to Elizabeth Wedgeborough.

There were other lands besides these, for the words to operate upon: and these words here are, "all the rest of my houses, lands, &c."

3 Peere Wms. 56, the case of *Chester v. Chester* was a case, (and many other cases might be mentioned,) where there were no other lands for the words to operate upon.

But here he had five houses; and only three were devised: so that "rest" means his other houses.

But (what goes to both points—)

This was copyhold; and he had likewise freehold lands, distinct from the copyhold: and therefore the copyhold not being particularly named, the words of the devise shall only extend to the freehold. Which is fully proved by two resolutions in *Cases in Equity Abridged*, p. 124, pl. 13, & pl. 14.

Mr. Nares pro defend'.

He made the same two points, with Mr. Clayton.

1st. The testator had no child, but several nephews; viz. J. W. his sister's son by a former husband, and three nephews Taylors, her sons by a latter husband; and he gives houses and legacies amongst them, in different proportions.

The word "legacy" relates, and the testator intended it to relate, to the houses, as well as to the money-legacies. He could never intend to give such a trifle as the interest of 5l. to his brother-in-law, for his life only. And it may be observed, that if this Charles Taylor, the testator's brother-in-law, (one of the legatees above named,) shall happen to die without issue, the other three legatees (his three sons) must consequently be dead too: and then there would be nobody left alive, to divide it amongst.

[271] And if the word "legacy" relates to the real estate, it is a clear estate tail in William Taylor. (Which position Mr. Clayton agreed to.)

2d question—The will begins, "as to all my worldly estate." Therefore he meant to pass every thing by this his will.

The cases of *Ibbetson v. Beckwith*, (Forrester 157) M. 1735, in *Canc. and of Tanner v. Wise*, in 3 Peere Wm. 295, both of them prove this.

1 Lev. 212, the case of *Cooke v. Gerrard* is expressly in point—"that the word land" in a devise meant not only the thing itself; but the "interest of the thing."

As to *Cases in Equity Abridged* 124, there was no surrender of the copyhold estate: but it is here stated "that the testator had surrendered the copyhold estate, to the use of his will." Which renders his intention clear, to dispose of it.

However, this reasoning only reaches the 2d question: for the first devise is express. And the defendant is son and heir to William Taylor.

Therefore he prayed judgment of nonsuit against the plaintiff.

Mr. Clayton in reply—

All the money-legacies are to be paid within a year. Therefore the event must happen within that year; or else the eventual devise could not take effect.

The word "rest" clearly excludes what he had before devised.

Lord Mansfield—Mr. Clayton admits that if the word "legacy" is applicable to lands, W. T. has an estate tail.

This is plainly a will of a man's own drawing.

He professes to dispose of his whole estate. He means to make one of his relations his general heir; the other objects of his bounty are four nephews. And he gives them land; and also gives some pecuniary legacies, to be paid within twelve months after his death: (which indeed the law would have implied).

[272] Then he gives his brother-in-law 5l.

And if either of these persons before named shall die without issue lawfully

begotten, then he gives the "said legacy" to those that shall be left alive, to be equally divided between them.

The explanation of this word "legacy" must be governed by the intention of the testator: and to this purpose, some stress may be laid upon this introduction of the professed disposition of all his worldly estate. A different construction has been sometimes put upon the very same words, as applied to money and lands; in order to support the intent of the testator: as in the case of *Forth v. Chapman*, by Ld. Macclesfield.

It is most agreeable to the intention of the testator in this case, to construe this word "legacy," to extend to land.

It would not be a legal limitation, if confined to money.

The legacies may happen to be spent, soon after the twelve-month is expired.

And it could never be intended that so small a sum as the 5l. should be put out to interest, and kept liable to this limitation.

If the brother-in-law died without issue, there would be no one left to divide the legacies.

Common people do not make such distinction between money and land, as persons conversant in law matters do.

The testator meant this clause as a restraint upon his former bequest; and meant that the issue should have it.

The word "legacies" does extend to lands, as well as to monies. Common persons would not think of using the word "devise:" (which is the more usual legal technical term).

Therefore upon the first question I think it is an estate tail.

But his Lordship did not choose (it not being at all necessary) to declare any opinion upon the 2d question: because a third person not now before the Court, might be affected by it.

Mr. Just. Denison concurred—he thought the word "legacies" extended to real estate; and consequently that it was an estate tail.

[273] Mr. Just. Foster also held that the testator intended the land to go over; and that it was an estate tail.

If the word "legacy" was confined to pecuniary legacies, the devise over could not have taken effect; being after a dying without issue; (V. ante p. 272, Lord Mansfield accordingly).

Besides, Charles Taylor, who was one of the persons before named, has no pecuniary legacy given him: so that it must mean land, as to him.

And these are small legacies, (one of them only of 5l.) and payable within a twelvemonth. Therefore the testator cannot be supposed to apply this limitation to them; but to the land which he had devised by his will.

Per Cur. unanimously judgment for the defendant (viz. of nonsuit of the plaintiff).

DENN *versus* LORD CADOGAN ET AL'. Saturday, 30th April, 1756. Decem tales granted upon a Saturday, returnable the Monday following; and is the first instance.

This day having been appointed for a trial at Bar, in this cause, only nine of the jury appeared.

Sir Richard Lloyd pro quer' prayed a decem tales.

By the course of the Court, this trial could not have come on again, till Michaelmas term; (the immediately next term being an issuable term, wherein there are no trials at Bar).

But the Court observing the great expence and delay which would by this method of proceeding be occasioned to the parties, asked "whether there were gentlemen of the county enough in town, to make a complete jury."

And being told "that there were;" and the gentlemen of the jury who now attended, expressing a desire "not to be kept in town."

The Court ordered the return of the decem tales to be on the Monday following; (though there had never been before an instance of it).

[274] And by so doing, they saved vast expence, as well as some delay to the parties concerned.

For now, on Monday 2d May 1757, a full jury appeared: and the trial proceeded. The cause itself had no difficulty in it; and was soon over.

For the lessors of the plaintiff claimed as heirs at law of George Smith, Esq. who died in 1607: and they drew down their descent through two sisters, who had married Carlos and Underwood. One of their other ancestors, as they pretended, was Francis Smith, third brother of the first Lord Carrington, (Charles Smith, alias Carrington :) but they could not by any means make this out.

Their claim was as heirs at law, under a family settlement of the Lord Carrington, in 1687. But they could not shew the least probability that Francis the third brother of the Lord Carrington (whose estate was prior to the plaintiff's claim) was dead without issue.

Whereupon the plaintiff was nonsuited.

The Court, on the application of the gentlemen of the jury, took off the fines (of 20l. a-piece) which had been set, on Saturday last, upon the defaulters.

**HAWKINS versus COLCLOUGH.** Tuesday, 3d May 1757. Award that each party shall pay their own charges at law, and that the defendant should pay the plaintiff 5s. for his making the first breach in law is certain and final.

Trin. 29, 30 G. 2, Rot' lo 962.

(Lord Commissioner Wilmot absent, in Chancery.)

In an action of trespass for an assault, battery and false imprisonment: an award (made pending the action) being pleaded to this action, and a tender of the sum awarded; the plaintiff demurred.

The award (which was made upon a submission of all disputes, &c.) was in these words—"Whereas there has been a suit at law between the parties, that hath run to a great expence on both sides; and it being left to me to make an end of it; I determine that they shall each of them pay their own charges at law; and that the defendant pay the plaintiff five shillings, for his making the first breach in the law."

[275] Mr. Anguish pro quer' objected to the award, as being

1st. Uncertain.

2dly. Not final.

First—it is uncertain. The submission is of several matters: and the award does not at all shew, which of them it means to determine. 1 Ro. Abr. 242, letter B. pl. 1, 252, pl. 10.

And an averment without a fact to support it is of no avail. 1 Ld. Raym. 246; in the case of *Bacon v. Dubarry*, the fourth resolution is expressly so.

This is an action of trespass. The submission is of all trespasses: and the award does not distinguish what trespasses it determines. 1 Ro. Abr. 251, letter I. pl. 1, and pl. 3, and the case of *Maw v. Samuel* in Popham 134, and 2 Ro. Rep. 1, the case of *Bacon v. Dubarry* (before cited). The third resolution says "that the award was void for the uncertainty, without releases."

Now here are no releases. Each is to pay their own charges. And the defendant is awarded to pay to the plaintiff 5s. for his (the defendant's) having been guilty of the first breach of the law.

The injury complained of was assault, battery and false imprisonment. And here is no satisfaction awarded for the injury. 1 Ld. Raym. 247. The case of *Freeman v. Bernard*.

Second point—it is not final: which it ought to be.

An award must be final. But this award was made pending the action: and it does not put any end to it at all.

Under this head, he cited 1 Ro. Abr. 252, pl. 16, 17. (But one of these is marked by the abridger, "dubitatur:" the other, "Contra 15 H. 7, 22.") Also 2 Strange 1024, the case of *Tipping v. Smith*, where the award was held ill, being uncertain and not final; and Cro. Eliz. 904, the case of *Colston v. Harris*: where the award was holden void; because nothing was awarded to the defendant, nor to be free from suits: so no advantage to him.

Mr. Caldecot contra pro def.

This award is pleaded by consent of the plaintiff, and by leave of the Court. And



though pleaded as being [276] made pending the action, viz. between the action brought and the plea pleaded; yet the Court will determine upon the mere validity of it.

1st. It does appear upon what particular suit, the award was.

The generality of the submission is not inconsistent with the particularity of the award. 8 Rep. 98 b. *Baspole's case*. (Second resolution.)

This shall be taken to be the whole matter depending between the parties: and no other suit than this appears to have been depending between the parties.

The case of *Bacon v. Dubarry*, in 1 Ld. Raym. 246, is not like or similar to the present case.

After payment made or tendered, the action of trespass is discharged.

Hob. 49, the case of *Nicholls v. Grunnion* is expressly so. (The words are—"for a satisfaction implies a discharge.")

The present award (which was made by a cobler) recites that there was such a suit: and that it being left to him to make an end of the said suit, he determined as follows, viz. "that the said J. H. and J. C. should each of them pay their own costs and charges at law; and that the said J. C. should pay the said J. H. 5 shillings for his making the first breach in the law."

And this may be pleaded in bar, in another action.

The arbitrator certainly intended to make an end of this suit depending between the parties; and thought 5s. adequate to the injury.

Mr. Anguish in reply—Notwithstanding the consent "to plead this award in bar." Yet all objections to the award itself are still open.

This is not shewn to be the only matter between them: and non constat that the award was made concerning this particular action.

I agree that payment discharges the trespass. But then it ought to appear that the payment was in satisfaction of the same trespass, which does not appear in this case.

[277] Lord Mansfield—The question is whether this be a good award.

Awards are now considered with greater latitude and less strictness, than they were formerly. And it is right that they should be liberally construed; because they are made by Judges of the parties own choosing. And this is often, (as it is here,) in cases of small consequence, where the play is not worth the candle.

Indeed they must have these two properties, to be certain, and final.

But the certainty may be judged of according to a common intent, and consistent with fair and probable presumption.

This submission is, in general terms, "of all actions, controversies, and suits between them." The arbitrator recites one; referring to the submission, as authorizing him to determine it: and it appears that this suit was depending between the parties. And the parties have not desired to be heard upon any more than this one. Therefore there is no probable presumption of any other.

2dly. As to its being final—it seems to be a reasonable and fair award.

The arbitrator, plainly, thought it a mere trifle; and seems to have thought both parties to have been in the wrong; and therefore awarded each to stand by his own costs.

And the 5s. awarded to be paid, is plainly in satisfaction of this same action; and therefore is a discharge of it, being paid or tendered.

And he declared against critical niceties, in scanning awards made by Judges of the parties own choosing, in order to the determination of disputes between them.

Therefore he was clear that the judgment ought to be for the defendant.

Mr. Just. Denison concurred—

The submission is general: the arbitration is alledged to be "de et super præmissis;" and it does not appear that any thing else was before the arbitrator. It is plain that this matter was submitted: and we have no reason to presume "that there was any other."

[278] And it is sufficiently final: it is to pay 5s. for having been guilty of the first breach of the law. Therefore it is the same as if it said "in satisfaction." Therefore it is mutual and final.

And awards ought to be construed liberally and favourably.

Mr. Just. Foster concurred, for the reasons already given.

Judgment for the defendant.

**PERRY versus NICHOLSON.** 1757. In action of debt upon an award plaintiff need shew forth nothing more than is necessary to support his claim; but if brought on the arbitration bond, the plaintiff must set forth the whole demand.

After an unsuccessful motion, made on the part of the defendant, "to set aside an award;" and an equally unsuccessful one, made on the part of the plaintiff, "to enforce it by an attachment for non-performance;" the plaintiff found himself obliged to have recourse to his action against the defendant upon it.

And now, upon an action of debt brought by him on this award, reciting that in an action of assumpsit, the parties, at the trial, had submitted the matters in difference in the said cause, to certain arbitrators, &c. so as they should publish their award in writing concerning the premises, before, &c.; and that they accordingly did publish their award in writing, &c. and awarded "that the defendant Nicholson should pay to the plaintiff Perry 48l. 11s. 10d. in full payment, discharge and satisfaction of all money whatsoever or any ways due or owing unto Perry by Nicholson, at the time of commencing the said action; and that all actions depending between them for any matter, cause or thing whatsoever arising before or at the time of referring should from thenceforth cease; and that upon payment of that sum, they should within two days after the taxation of costs in the action and payment thereof to Perry, seal and execute to each other, general releases of all matters in difference in the said cause."

Then the plaintiff avers that there was, at the commencement of the action, or at the time of reference, no other money whatsoever, any ways due to him the said plaintiff Perry from Nicholson, but the matter in difference in the said cause; and that no other action was depending between them; and that the costs were taxed at 28l.

The defendant pleads "that no such award was made." Replication—"that there was such an award, &c." And issue thereupon.

[279] The plaintiff gave in evidence, an award in writing, indented, under the hands and seals of the said arbitrators named in his declaration and replication, with the following variations from and additions to the award set forth in the declaration—viz. there was in the declaration,

1st. An omission (after the award "to pay, &c.") of these following words—"that Nicholson at the same time deliver up to Perry a promissory note of Perry's payable to Nicholson or order for 5l. 7s. to be cancelled."

2d. A misrepresentation of the release: which is "that they should execute mutual and general releases of all actions, &c. debts, &c. for any matter, cause or thing whatsoever from the beginning of the world unto the day of the date hereof."

3dly. The award produced in evidence, is by deed indented, under hand and seal: whereas the award declared upon is only an award "in writing," merely.

Upon this evidence, there was a verdict for the plaintiff, subject to the opinion of the Court, on this question,—“whether there be material variances between the award declared upon, and the award given in evidence.”

Mr. Serjeant Hewitt—*pro quer*’.

This action is an action of debt on the award itself; not an action of debt on the arbitration bond: and on such an action, no more needs be set out, than is material, and enough to entitle the plaintiff to his demand. 1 Leon. 72, the case of *Smith v. Kirfoot*. 1 Salk. 72, the case of *Foreland v. Marygold*. Both which cases are expressly so.

Another rule concerning awards is, that the generality of the words of them may be restrained, so as to be construed to amount to no more than they ought to amount to. One way of doing this, is by averment connecting the award with the submission: as it is said in the case in Aleyn 51, 52, *Roose v. Spark* (first point), "that the words de præmissis have been newly used in pleading awards; in order properly to apply the general words proportionable to the things submitted."

Another way of doing this, is by pleading them according to their legal operation.

Another way of restraining the generality of words is by intendment of law: as was done in 1 Salk. 74, *Simon v. Gavil*.

[280] Another way is by pleading the matter; (which is the proper way for the defendant to take advantage of it:) as in Moore 885, No. 1242, the case of *Lea v. Paine*.

Another way is, that award may be good in part, and bad in part; if relative to distinct things.

To apply these positions—here are four things awarded: which it is true, are not all particularly set forth.

But all that is necessary to this suit, is set forth; the other things are not relative to it. And here is an averment “that no other thing was in dispute.”

The question is, “whether this award produced in evidence proves the declaration.”

Now all that is material in the declaration, upon this action of debt upon the award, is the award of the 48l. and the 28l. costs. So that it is sufficient to prove the declaration.

Mr. Anguish contra pro def’.

1st. Here is an omission of that part which obliges the defendant Nicholson to deliver up a note: which note composes part of the sum, and was in consideration to make up the 48l.

To suppose it otherwise, is inconsistent: because, otherwise, they would not have ordered it to be given up.

He cited 2 Lev. 235, the case of *Adams v. Statham*: where an omission vitiated the award.

Lord Mansfield—after stating the case, said that nothing was clearer, than that in an action of debt upon an award, a man has no need to state in his declaration any more of the award, than supports his case.

If there be any thing by way of condition precedent to the payment of the money, the defendant may set it out in pleading.

This has been the law, so long ago as from the time of the register: where there is a writ which sets forth only so much as is necessary. (V. Register 111.)

[281] Then with regard to the release—the Court will intend that the release shall extend only to the matter under the submission. Besides here they have averred “that there was no other matter in variance.”

Therefore I think there is no material variance between the declaration and the evidence.

Mr. Just. Denison—was as clearly of the same opinion: which he declared to the following effect.

The question is “whether the award given in evidence is sufficient to support the award set forth in the declaration.”

Now nothing is claimed by this action, but the money.

And the question is whether it was necessary, in this action, to set forth any thing more than supported his claim to recover, and shewed his right to this money.

It has been settled that in actions upon awards (which are no specialties,) there is no occasion to set forth the whole award: the plaintiff needs not shew any thing more than what is necessary to support that particular claim; and to intitle him to the thing; and if the defendant will impeach the award for any thing, that is to come on his part.

1 Leon. 72, *Smith and Kirfoot's case*, is expressly so resolved.

Littleton's Rep. 312, 313, *Leake v. Butler*, is a like resolution: where the form of declaring is said to be taken from a writ in the Register, 111.

And this distinction between debt upon the award itself, and debt upon the arbitration-bond, was admitted in

1 Salk. 72, the case of *Foreland v. Marygold*: which was an action of debt, upon bond to perform an award, and 1 Lord Raym. 715, *Foreland v. Hornigold* is the same case: where also it appears to have been an action of debt upon the bond.

Here, the award is, “that Nicholson shall pay the money, and deliver up the note.” And this is an action of debt brought by Perry, upon this award, for the money. It would, as I have already said, have been a quite different case, if it had been an action upon the arbitration-bond. But it is here good, even though on the [282] mere face of the declaration it should appear as a bad award, by appearing thereupon and as there set forth, as if it were only an award on one side. For the plaintiff, in this action upon the award itself, needed only to shew such part as he grounds his action upon.

Then as to the releases—the award “of general releases,” was void, as to other matters not submitted. Here, nothing is submitted, but in this particular action.



And in an action upon the bond, "a release as to all matters under submission," would be a good plea; though the award be an award of "general releases."

But here it is expressly averred, "that there were no other matters in dispute." However, there was no occasion for that averment; because we would not have intended "that there were any other."

Mr. Just. Foster was of the same opinion.

He said it was sufficient in an action of debt upon the award itself, to set forth so much only as is necessary to support the plaintiff's claim: the other part of the award may, perhaps, be performed.

He thought, therefore, that the evidence well proved the declaration.

Per Cur. unanimously (Mr. Just. Wilmot absent)

Let the postea be delivered to the plaintiff.

WRIGHT, EX DIMISS. PLOWDEN, Arm. *versus* CARTWRIGHT. 1757. Lease for years, if lessee so long lives, with remainder over: held that the remainder man shall enjoy during all the residue of the years to come.

[Referred to, *Johns v. Pink* [1900], 1 Ch. 305.]

On a case stated, from the assizes.

Edmund Plowden, being seised in fee, demised on the 5th of October 1676, by deed, (viz. by indenture of lease between him and Elizabeth Cartwright, only,) to the said Eliz. Cartwright for ninety-nine years, if she should so long live; and after her death, if she happen to die within the said term (a) or other end or determination of the said term, the remainder thereof to Rowland Cartwright her eldest son, (then under age,) for and during the residue of the said term, from thence ensuing and fully to be complete and ended: yielding and paying, &c. and doing suit at a mill, &c.; with a penalty for every time that she or Rowland shall grind at another mill; [283] and paying a heriot on the death of either. And it is covenanted that both of them shall repair, &c. and the lessor on his part covenants that both shall quietly enjoy, &c.

Eliz. Cartwright entered and was possessed; and died on the 4th of September 1694. Whereupon Rowland Cartwright entered and was possessed, till the said Rowland died; which happened on 5th November 1753.

The lessor of the plaintiff is heir at law to Edmund Plowden, the lessor. The defendant is the personal representative of Rowland Cartwright.

The question is "whether the term exists:" i.e. whether it continues beyond the life of Eliz. Cartwright. For if the term does not continue beyond the life of E. C. then the lessor of the plaintiff has a title to recover: if it does, then the defendant hath a title, as representative of Rowland Cartwright.

Mr. Aston *pro quer*'.

Argued that the term was expired: it expired on the death of Elizabeth; the limitation over, being void. And he cited Tr. 8. Eliz. Dyer 253 b. pl. 102, which is exactly the same limitation; viz. "to W. Cecil *pro termino* 12 annorum, si tam diu vixerit; et si obierit *infra prædictum terminum*, tunc, &c. The remainders were holden void; because the term is determinable upon the life of W. C." And he also cited Cro. Eliz. 216, Tr. 32 Eliz. The case of *Green v. Edwards*. That was exactly this case. It was a lease to J. S. for ninety years, if he live so long; and if he die within the term, that then his wife shall have it, *durante toto resid' termini prædict'*: it was held void to the wife; and that she took nothing. And he said that 1 Co. Rep. 153 b. *Rector of Chedington's case*, is express and full to the same effect; and was agreed *per tot' Cur'*. And that Co. Litt. 45 b. is express that "term" signifies the estate and interest that passes; and differs from a specification of the number of years: and says, "so note the diversity."

All which cases, he insisted, prove this limitation to be void.

He cited Sheppard's Touchstone of Common Assurances, 274. Where it is said, that if a man makes a lease to A. for eighty years, if he so long live; and if he die within the said term, or alien, that then his estate shall cease; and by the same deed

(a) Term may signify either time or the interest during the time in a demise, and shall be taken in that; which of the two senses will support the intention of the grantor. Same principle. Cowp. 735. Brownl. 63.

the lessor farther lets to B. for so many years as shall then remain unexpired after, &c. for the residue of the said term of eighty years, if he shall so long live; in this case the lease to B. "during the residue [284] of the term," is void: for after the death of A. the term is at an end. But if he say, "for and during the residue of the eighty years," it is good.

Mr. Nares contra pro def'. was beginning to speak—

But Lord Mansfield stopped him; (as not being necessary:) and he himself proceeded thus—

Lord Mansfield—The distinction just cited from Sheppard, (which he takes from *The Rector of Chedington's case*.) makes no difference; if the word "term" may signify the time, as well as the interest: for then it becomes merely a question of construction, "which sense the word ought to be understood in."

So Anderson argued, in *Green v. Edwards*; he said "if the wife had been a party to the deed, durante termina should not be taken for the interest, but for the time." He said, "the word term cannot be taken to mean the interest which the husband had for ninety years." (For if it is so understood, by his death the whole would be determined; and the wife could have nothing: and therefore it could not be used in this sense. But the lessor, by the word "term," must mean the time of ninety years; and the word "term" signifies as well the time or space of ninety years, as the interest.) The other Judges held the limitation by way of remainder to be void, from the uncertainty of commencement: and denied that the wife's being a party would have made any alteration.

The old cases held "that there could be no remainder or substitution of a term after an estate for life, by deed or will." It was a mere possibility. It was void, from the uncertainty of commencement. There was no particular estate. The gift of a term (like any other chattel) for an hour, was good for ever.

The objections were subtle and artificial.

When long and beneficial terms came in use, the convenience of families required that they might be settled upon a child after the death of a parent. Such limitations were soon allowed to be created by will: and the old objections were removed, by changing the name, from remainders, to executory devises.

The same reason required that such limitations might be created by deed: as, for instance, marriage-settlements, to answer the agreement of parties, and exigencies of families. Therefore, to get out of the literal authority of [285] old cases, an ingenious distinction was invented: a remainder might be limited for the residue of the years; but not for the residue of the term.

Now in this case, upon the true construction of the lease, I am clearly of opinion, "that the land is demised to the son for so many of ninety-nine years as should be unexpired at the death of his mother."

There are many maxims of law, that deeds, especially such "as execute mutual agreements for valuable consideration, should be construed liberally, ut res magis valeat, according to the intent:" which ought always to prevail, unless it be contrary to law.

The passage from Coke Littleton, 45, cited by Mr. Aston, defines the word "term" to signify, in understanding of law, "not only the limits and limitation of time, but also the estate and interest which passes for that time."

If in this lease, the word be taken in the latter sense, the widow can only have it for so many of ninety-nine years as she should live; and the son have nothing afterwards.

But it is manifest that an interest was understood to continue after her death, to be enjoyed by her son.

From the course of nature, it could not be supposed that she would outlive the ninety-nine years. Rowland is to pay a penalty for grinding at another mill. He is to pay a heriot on the death of his mother. He is to repair. The lessor covenants "that Rowland shall quietly enjoy:" i.e. for so many years as should not be run, at the death of his mother.

The first sense of the word makes every thing consistent and effectual: the second sense destroys one half of the lease, as repugnant and contradictory to the other. There ought to be no doubt, therefore, in which sense the word should be understood.

Mr. Aston has laid no stress upon the only objection which weighed with Anderson, so long ago as the 33d of Elizabeth: viz. "that Rowland was no party to the lease:"

and rightly. The reason why he was no party, appears from the lease: he was then an infant.<sup>(a)</sup> The mother contracts, and procures this limitation for him. A grant may be made to a person, by a deed to which he is no party. Rowland accepted and actually enjoyed, after his mother's death, from the 4th of September, 1694, to his own death, the 5th of November, 1753. The lease was so intelligible to every unlearned eye, that nobody doubted of his title for sixty years.

[286] Limitations of terms are now of general use. Their bounds are settled. The rules concerning them are certain and established. When they came to be allowed by will, or by declaration of trust, the substantial reason was the same for allowing them by deed. A strained construction should not be made, to overturn the lawful intent of the parties. It was lawful, to secure this lease for the benefit of the mother during her life, and afterwards by way of provision for her son. All the parties undoubtedly intended it. The covenant here, "that Rowland should enjoy from the death of his mother, for the residue of ninety-nine years," is sufficiently certain; and might, of itself, amount to a lease.

Mr. Justice Denison—This must be taken that she should hold it for so much of the term of years as she should live; and Rowland, during the remainder.

The intention of the deed is obvious: and it certainly shews, (upon the whole tenor of it,) that the intention of the parties was "that both should enjoy during the whole term and number of years." And if we can support the intention, by any construction, we will do it.

Mr. Justice Foster was clear that the intention was that both should enjoy during the whole term and number of years; viz. Elizabeth for so long of it, as she should live: and Rowland, during the remainder. All the circumstances shew this: and the reserving a heriot upon the death of Rowland proves the intention to have been "that the term should continue to Rowland, after the death of his mother." And the covenants all along run, "that Rowland shall quietly enjoy."

Therefore he concurred.

Per Cur'. unanimously (Mr. Just. Wilmut absent).

Rule—That the plaintiff be nonsuited.

[287] LANT, ESQ. *versus* NORRIS. Wednesday, 4th May, 1757. [See 1 Hen. Bl. 36.] Covenant to leave demised premises with all new erections well repaired, extends to the new erections only.

P. 29 G. 2, Rot'lo. 609.

The Court full.

[Dictum approved, *Moneyppenny v. Moneyppenny*, 1859-61, 3 De G. & J. 590; 9 H. L. C. 114.]

This was an action of covenant, by Robert Lant, Esq. son and heir of Thomas Lant, Esq. against William Norris, administrator of John Norris, Esq. his late father; which John Norris was assignee of Thomas Wilson: and it was upon an indenture of lease made on 23d January, 1707, by the said Thomas Lant deceased, who was seised of certain messuages, ground and premises (mentioned in the indenture,) of the one part, and the said Thomas Wilson, on the other part; whereby, in consideration of 200l. to be laid out in, upon or about rebuilding upon the ground and premises thereby demised, and other covenants, the said Thomas Lant did demise to the said Thomas Wilson, all that piece of ground, and all the messuages, tenements, houses, &c. thereon standing, in Suffolk Place, in the parish of St. George the Martyr, &c. butted and bounded, &c. from Christmas 1715 for forty-three years, at 17l. per annum, rent.

(a) He might have been a party notwithstanding his infancy, for though he did not execute, that would be no objection, as it is not necessary that a grantee should execute.

It is a settled rule that none can take an estate of freehold in possession by a conveyance at common law, if he be not a party to the deed, Hob. 313; though he may take by limitation over of an use: and by way of remainder a person not party to a deed may take, even though the conveyance be a conveyance at common law.



Thomas Wilson, the lessee, covenants to lay out the said sum of 200l. within fifteen years, in erecting and rebuilding of messuages or tenements or some other buildings, upon the ground and premises; and from time to time, and at all times, all and singular the said messuages or tenements so to be erected, with all such other houses, edifices, &c. as should at any time or times thereafter be erected, &c. to repair, &c. And the said demised premises, with all such other houses, &c. so well repaired, &c. at the end or other sooner determination of the said term, to deliver up, &c.

Wilson the lessee entered. Tho. Lant died 29th May, 1722, seised: and the reversion descended to John Lant, his son and heir.

On 24th March, 1738, Wilson assigned the term to John Norris: who entered.

On the 24th March 1728, John Lant died seised, and the reversion descended to the plaintiff his brother and heir.

The breaches assigned were, first, that after the term came to J. Norris, and after the plaintiff became seised [288] of the reversion; and whilst the said J. N. was possessed, viz. on 1st May 1745, the said J. N. in his life-time permitted all the said demised messuages to be uncovered, &c.; by reason whereof the walls of the same demised premises were out of repair; and goes on to other damages, still calling them (all along) "the said demised premises." 2dly. That the said J. N. did permit six messuages, parcel of the said "demised premises," to be prostrated; and to remain so till his death. 3dly. That the said J. N. on 1st March 1747, did pull down six other messuages then erected and built on the said demised premises.

Plea as to the 1st breach, that the said T. Wilson or his executors did not within fifteen years, or at any other time, lay out 200l. or any part thereof, in erecting or rebuilding of any messuages: and that the said messuages had never been rebuilt. As to the 2d breach, the same plea. As to the 3d breach, "non infregit conventionem." To all the breaches, the same plea as above to the 1st and 2d over again, "that T. W. never laid out 200l." and "that the messuages never were rebuilt;" and "that J. N. after he became assignee, and after the plaintiff became seised of the reversion, 1st March 1753, died intestate, so possessed; and administration was granted to the defendant: by virtue of which, he entered: and being so possessed, before exhibiting the plaintiff's bill, viz. 24th June 1754, assigned the demised premises to one John Townsend, for the residue of the term; who entered, and is possessed."

The plaintiff demurs generally to the 1st plea to the 1st breach, and also to the 1st plea to the 2d breach; especially (a) to the 1st plea to the 3d breach; generally to the 2d plea to the 3d breach; and generally, to the last plea to all the breaches. There was also a plea of non prostravit: and a demurrer to it.

The defendant joins in demurrer, to all the demurrers.

Mr. Wynne, for the plaintiff, urged that the pleas were no answer; and that they neither confessed and avoided the charge in the declaration, nor denied it.

Mr. Gould contra—for the defendant, gave up the pleas; but he objected to the declaration; viz. that the intention of the parties was to confine the repairs to the buildings thereafter to be erected: as it appears that there were no buildings (of any consideration) upon the land, at the time of the lease; nor is there any averment in the declaration "that the lessee" (Wilson) "ever did erect any such." Which averment ought to have been made, in order to have maintained this action: for, [289] without such erection, the defendant could not be obliged to repair. And a plaintiff must shew every thing in his declaration, that is necessary to maintain his action.

The words "the said demised premises" must relate to those in the beginning of the covenant; and therefore only mean and intend "that he should leave them, viz. the new erected and rebuilt edifices, in repair at the end of the lease."

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(a) This plea was bad, if, as I suppose, the cause assigned for the demurrer was, that this plea was too general, though it would have been good if issue had been joined upon it, and there had been a verdict for the plaintiff, 1 Lev. 183. 1 Siderf. 289. Gilb. Hist. of C. P. Ed. 1761, p. 155, and it seems by the stat. 4 and 5 Ann. c. 16, s. 1, it would have been good on a general demurrer: however the other plea non prostravit was a good plea, and was admitted by the demurrer; and therefore that must have been the reason. Mr. Wynne in the next page gave up the 3d breach because issue was offered on it.

The covenant is future ; and the lessor could not have any action upon it, till the end of the term.

It appears by 5 Rep. 21 a. *Sir Anthony's Main's case*, that if a man lets a manor for years ; and the lessee covenants to keep the houses of the manor and whatsoever was within the manor, in as good a state as he found them, during the term : and the lessee makes waste in the houses, and in cutting oaks ; the lessor may bring an action of covenant, before the end of the term for the oaks ; for, for them, it was impossible that the covenant could be performed : but it is otherwise, of the houses.

And with this agrees Fitz. Nat. Brev. 8vo. edition, 324, letter I. the same law. Though if he fells timber, &c. (if he do waste in wood) he may have an action of covenant during the term ; "for that (says the book) cannot be repaired."

He likewise cited 1 Salk. 199, the case of *Grescot v. Green*, where the lessee covenanted for him and his assigns, to rebuild and finish a house within such a time : and after the time expired, the lessee assigned over the premises, the house not being then built and finished according to the covenant : and per Holt Ch. Just. This covenant shall not bind the assignee : because it was broken before the assignment. Aliter, if broken after the assignment : as if the lessee had assigned before the time had been expired. Which case was cited to prove "that the action did not lie in the present case ; because the assignment was made after the fifteen years were expired."

Mr. Wynne—The record is now to be considered as upon a general demurrer to the whole declaration : and I shall rely on the 1st and 2d breaches, and not on the 3d, (which has, I own, received a proper answer, by issue being offered).

Covenants are to be construed for the benefit of the covenantee ; not of the covenantor.

[290] These are buildings demised ; and 200l. is agreed to be laid out in repair of them, or in erecting new ones : then there is a covenant "to repair the buildings to be erected on the demised premises ; and the said demised premises, and others so to be erected, so being well and sufficiently repaired, &c. to leave, &c."

This intimates that the demised buildings, as well as the new erections, were to be kept in repair. Here is sufficient, from whence to collect the intention and meaning of the parties, to be so : which will amount to a covenant. And upon this general demurrer, the Court will not intend that the 200l. were laid out only on the other buildings newly to be erected.

Lord Mansfield—I choose to look into it, and consider it a little. No particular technical words are requisite towards making a covenant.

Mr. Just. Denison—The question only is whether the words "demised premises," are omitted, by mistake, in the former part of the covenant ; or superadded, by mistake, in the latter : for there appears to be a mistake in either one or the other, in the deed itself. The lease is a building-lease.

Now the premises then standing were to be pulled down. Therefore it could scarce be intended to covenant to repair them. The covenant "to repair," is confined to the tenements to be erected : the covenant "to leave in repair" extends to the demised premises, together with all such other as shall be thereafter erected.

Mr. Just. Foster—It is a building and repairing lease.

In order to look into the lease, it stood over, with a

*Curia advisare vult*.

And now, (having considered it till the next day only,) Lord Mansfield said, we are extremely clear, that not only the words of the covenant, but also the intent of the parties, manifestly shew that it was not meant that any of the money should be laid out on the old buildings : but that they were to be pulled down ; and that whatever he should erect, with the 200l. or otherwise, for his own convenience, should be kept in repair.

The words "demised premises" are put in opposition (a) to the buildings that were to be erected thereupon with the 200l.

[291] And the covenant "to deliver up," is agreeable to this construction : that covenant being to leave "the demised premises, together with all such other houses, &c. as should be afterwards erected, &c. so well repaired."

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(a) Lege reference instead of opposition—and see 3 Lev. 265. Skin. 121.

It is therefore clear against the plaintiff, upon the 1st and 2d breach : and Mr. Winn acknowledges it to be against him on the third.

Therefore the Court gave  
Judgment for the defendant.

FRAZER'S CASE. Wednesday, 4th May 1757. Turnkey of a prison not to be articulated as clerk to an attorney.

The Court was full.

This Frazer, being an attorney of this Court, had taken for his article-clerk, one Smith, a turnkey of the King's Bench prison ; a full-aged man, and who still continued to act as turnkey. It did not appear that any money was paid ; or that the master fed, lodged or entertained the clerk, (though the articles indeed covenanted "that he should : " nor did the clerk officiate for Frazer, but in matters relating to the prison. It appeared that Frazer had, since these articles, (which were dated only two years ago, in 1755) become concerned in sixty-three causes, on behalf of the prisoners in the gaol.

This whole matter being disclosed to the Court, upon the application of Mr. Moss, the clerk of the papers of the prison,

The Court were all very clear that these articles were merely collusive ; that the whole was a contrivance between Frazer and the turnkey, to secure the business arising from the prisoners ; that the exercise of the office of a turnkey, in a prison was, both in itself and also according to the intent and spirit of the Act for regulating attornies, a very improper education for the profession of an attorney ; and that these articles ought to be cancelled.

And accordingly, they were, by the express order of the Court,

Cancelled in Court (by master Clerk) and directed to be kept in Court, and not delivered back.

[292] PIERSE, ESQ. *versus* LORD FAUCONBERG. Saturday, 7th May 1757. A right to a track path on each side of the river Tees for towing. [See 3 Durn. 255, 260, 262. *Ld. Raym.* 725. *Bull.* 90, (89) and *Qu?* *Et. Vide Harg.* Tr. 86, 87.]

(Lord Commissioner Wilmot absent, in Chancery.)

This was a trial at Bar, on the civil side of the Court, by a special jury of the county of York.

The question was concerning a right to track or tow vessels, upon the banks of the river Tees (which divides Yorkshire from the County-Palatine of Durham) from Yarum-Bridge up to Low Worsall.

There had been a former issue tried, "whether the river Tees was a navigable river, from Yarum-Bridge to Low Worsall ;" which issue had been found in the affirmative.

And the present trial was a new trial (a second new trial indeed) directed by the Court of Chancery, upon an issue "whether the \* plaintiff had a right to a track-path on each side of the river (alternately according to the course of its banks) for the convenience of towing ; without let or hindrance from or paying any acknowledgment to the respective owners of the soil."

The trial lasted till about two o'clock on Sunday morning : at which time the jury (after staying out about a quarter of an hour) brought in a verdict

For the plaintiff.

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\* N.B. The plaintiff did not claim this, as a distinct peculiar right of his own ; but as a general right claimable by all persons whose occasions led them to navigate this river.



REX *versus* ROGER PHILIPS, Mayor of Carmarthen. Monday, 9th May, 1757. Verdict on an information quo warranto set aside, upon defendant's payment of costs, with liberty to amend his plea. [See 4 Bur. 2132, 2137, 2145. 7 Durn. 703.]

(Lord Commissioner Wilmot absent, in Chancery.)

The defendant had pleaded to an information in nature of a quo warranto exhibited against him, "to shew by what authority he acted as a mayor of this borough," a title of election and swearing under a mandamus pursuant to 11 G. 1, c. 4.

But the swearing was (by mistake) set forth to have [293] been in the same manner as it ought to have been in case the election had been upon the charter-day.

Upon the replication, no less than fourteen issues were joined: which went down to be tried before Ld. Ch. Baron Parker, as Judge of Nisi Prius. But one of the issues (the 9th) was taken upon the swearing thus (erroneously) alledged to be before such persons as were only proper to decide upon the charter-day; (just as if it had in fact been an election under the charter :) which was a mere mistake in the defendant's plea; for his real swearing in fact was right, viz. agreeable to the directions of 11 G. 1, concerning the manner of being sworn under and pursuant to a writ of mandamus. The plea was worded thus, as to his being sworn in; viz. "That after the defendant had been so elected and chosen to be mayor, &c. and before he took upon himself to execute the said office; to wit, at that same meeting and assembly so holden upon the said Friday the said 30th day of May in the 28th year aforesaid in manner aforesaid, he the said Roger Philips, immediately after his said election, did then and there according to the directions of the letters patent of the said late King Henry the 8th take his corporal oath, upon the holy evangelists of God, before John Evans merchant, George Jenkins, Daniel James, William Sears, Lazarus Thomas, Samuel Morgan, John Evans carpenter, John Evans currier, Richard Leigh, George Bayle, Thomas Richard, and Lewis Philipp then and there being twelve discreet and honest men of the burgesses of the said county-burrough, rightly well and faithfully to execute the said office of mayor of the said county-borough, in all things touching and concerning the said office; they the said John Evans merchant, G. J. D. J. W. S. L. T. S. M. J. E. C. J. E. C. R. L. G. B. T. R. and L. P. then being twelve discreet and honest men of the burgesses of the said county-borough then and there appointed according to the directions of the said letters patent last before mentioned, by the said then common council of the said county-borough before whom the said Roger Philips, so elected and chosen mayor of the said county-borough as aforesaid, was to take his said oath: and that he the said Roger Philips was thereupon, then and there, in due manner, admitted into the said office of mayor of the said county-borough. By virtue whereof he the said Roger Philips, on the same Friday the said 30th day of May in the 28th year aforesaid and from thence continually afterwards, for, &c. was mayor, &c. And by that warrant, he the said Roger Philips, on, [294] &c. and from, &c. until, &c. did there use and exercise the said office of mayor, &c. and for and during all the said time, did there claim, &c."

The Lord Chief Baron, who tried the cause, reported that he was opinion, upon the trial, "that upon the 9th issue, the defendant could not give evidence of a different swearing from what he had alledged upon the record;" and "that upon the 10th issue" (taken upon the allegation of being by virtue thereof mayor, &c.) "he could not vary from the title before set out, by virtue whereof he claimed to be mayor." And he had directed the jury to find for the King: and they found a verdict accordingly. And he also reported "that no evidence was entered into, upon any of the issues; and that verdicts were found for the King upon all of them: but that this was agreed to be without prejudice in any future trial."

Mr. Norton, Mr. Morton, and Mr. Price—for the defendant had thereupon moved for and obtained a rule for the prosecutors (who had thus gotten a verdict,) to shew cause "why there should not be a new trial;" upon an insinuation "that the Judge who tried the cause, had misdirected the jury:" which misdirection consisted, as they alledged, in this, viz. "that the Judge had precluded the defendant from giving any evidence to prove his swearing, as set forth in the said 9th issue; the Judge apprehending and so directing the jury, that it could be of no kind of service to the defendant, to be admitted to prove an issue which if proved or even admitted, could not

at all tend to make out his right ; for that if this swearing as under a charter-election were to be admitted, yet still it would not appear in any part of the record, that he was regularly sworn under a mandamus-election ; which was the species of election under which he claimed."

Sir Richard Lloyd, Mr. Serjeant Poole, and Mr. Aston were prepared, as they said, to shew cause, by convincing the Court "that the direction of the Judge was right ; and consequently, that the verdict ought to stand."

Lord Mansfield—The direction of the Judge was certainly right. Therefore, if you should prevail in this application for a new trial, it could be of no service : for, as the record stands, the same direction must be given again.

Yet I am very desirous to cure this slip, if possible : for the merits have never been tried.

Consider whether the verdict may not be set aside ; and the parties admitted to plead again.

[295] The rule was enlarged ; with this addition, viz. to shew cause "why the verdict should not be set aside, and a repleader awarded."

Mr. Serjeant Poole, for the prosecutor, now shewed cause against setting aside the verdict and awarding a repleader. And he alledged that, though there should be a repleader awarded, yet the whole record must nevertheless stand as it is at present.

As to the repleaders in general—he cited 6 Mod. 1, the case of *Staple v. Haydon* —(1st resolution :) it can only be on such an impertinent issue, as the Court can give no judgment upon.

Mr. Norton, Mr. Morton, and Mr. Price—contra—for the defendant—the issues are not all found against us, absolutely ; but without prejudice to any future dispute, except as to the 10th issue.

Mr. Norton, Mr. Morton, and Mr. Price stated the mistake : which they said was thus : viz. the defence set up was "an election of the defendant under a mandamus, issued pursuant to 11 G. 1." And in setting out his oath of office, he avers it to have been duly taken ; and shews it to be an oath, taken by him upon this election, and sets out the right and proper oath of office ; but the plea, it is true, goes on, (following, by mistake, a precedent of a plea of an oath of office taken under an election upon the proper charter-day,) and alledges it to be a swearing at the same meeting so holden, &c. before persons who were only proper to preside upon the charter-day ; viz. (before 12 burgesses, &c.).

Which swearing before these improper persons, they urged to be totally immaterial : and that, for the sake of attaining justice, it ought to be some how or other, set right ; the true question having never been tried, viz. "whether he took the oath of office, agreeably to the directions of 11 G. 1."

Therefore it shall either be amended, or a repleader awarded : for upon the present record, there is no justification at all ; and therefore the issue joined is totally immaterial. The case of *Staple v. Haydon*, 6 Mod. 1, is almost in point. 1 Ld. Raym. 707, S. C. (1 Salk. 173, 216, S. C.).

This is a good plea in substance ; but ill pleaded in point of form.

They ought to have demurred to this part of the plea ; and not to have taken issue upon it : for it is a matter of [296] law, "whether the taking this oath would have justified the defendant." And a verdict cannot make that good, which the Court sees cannot be so in law. Therefore this verdict is utterly void : just like that in Hobart 112, *Tasker v. Salter*.

And such repleaders, in informations, are no novelties. For in 1 Ventris 122, the case of \* *Reynel v. Heale* ; a repleader was awarded, because the issue was mis-joined.

And they offered to pay costs, in order to have this matter set right : and insisted that this is but just and reasonable ; especially, as many other persons' rights depend upon the right of this mayor.

They also cited Cro. Eliz. 245, the case of *Love v. Wotton*—where a repleader was awarded after verdict ; the defendant having mispleaded the statute. The reason of awarding the repleader there, must be "because the true merits had never been tried."

They even urged farther, that it might well be taken, upon the face of the record,

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\* N.B. This is a *qui tam* information, at least ; if not a *qui tam* action : the book is inconsistent with itself ; but the title of the cause shews that it was an action.

"that he was sworn before the proper persons : " it being alledged "that it was at the same meeting then and there so holden."

But they insisted that, at most, this is only form.

As to repleaders in general—they cited 1 Sir J. S. 394. The case of *Rex v. Philips Mayor of Bodmyn* ; where the defendant's title was clearly defective, and confessed an usurpation ; and therefore, as the merits appeared to be against the defendant, the repleader was not indeed there granted : but the general position seems to be, "that it might, otherwise, have been granted."

Mr. Serjeant Poole, Sir Richard Lloyd, Mr. Aston, and Mr. Nares pro Rege—argued that it is needless to grant a repleader, where there is sufficient appearing upon the record, whereupon to give judgment against the party, exclusive of the part which is pretended to be immaterial.

Nor shall a repleader be awarded, where the defendant has set forth a defective title.

[297] Now, certainly, this is a defective title : he appears to be sworn before improper persons ; and does not at all appear to have been ever sworn before the proper ones.

This is not a mere defective manner of pleading ; like Cro. Jac. 434, the case of *Holms v. Broket*—where issue was joined on a plea of payment before the day ; or Hob. 112, the case of *Tasker v. Salter* ; where the issue (upon the way) was in effect no issue at all.

But this is absolutely a defective title ; a swearing before improper persons ; and is like 6 Mod. 1, the case of *Staple v. Haydon*. And they cited Cro. Eliz. 214, the case of *Lacy v. Reynolds* ; where though the issue was immaterial, yet, the plea confessing the words, the Court gave judgment as upon a confession. So, Carthew 371, the case of *Jones v. Bodinner* ; and 1 Salk. 173, S. C. a like resolution. So, 1 Ld. Raym. 390, the case of *Pitts v. Polehampton*.

But if a repleader should be granted as to this issue, yet enough (besides this) will stand upon this record to entitle us to judgment for the King.

Repleaders are never awarded for the sake of the parties ; but for the sake of the Court.

And this is the reason why there are no costs upon repleaders : as appears by 2 Salk.—title Repleader, p. 579, (which is an abridgment of the case of *Staple v. Haydon*, in 6 Mod. 1, and 1 Ld. Raym. 707).

Nor shall repleaders ever be awarded, where sufficient appears upon the record, whereupon the Court can give judgment. They shall not be awarded, only because the party has mistaken his case ; they shall never be awarded, but where the issue is so immaterial that the Court cannot tell how to give judgment. In the case of *Serjeant v. Fairfax* in 1 Lev. 32, it is laid down by Twysden, and agreed by the Ch. Justice and Wyndham, that "an immaterial issue is, where, upon the verdict, the Court cannot know for whom to give judgment ; whether for the plaintiff, or for the defendant."

It depends upon the plea pleaded ; not upon the real merits : for though the issue be improper, yet judgment shall be given ; as is expressly laid down in the same case of *Serjeant v. Fairfax*—1 Lev. 32. "If an improper issue is taken, and verdict given thereon ; judgment shall be given thereupon ; be it for the plaintiff, or for the defendant," Cro. Jac. 288, the case of *Tampion* [298] v. *Newson, and Bridget his Wife* : the plea of the feme, without the baron was no plea at all, nor confessed any thing. In Bro. Repleader 55, it did not appear how much the executors had ; who pleaded "riens inter maines," which was found against them. Cro. Eliz. 245, the case of *Love v. Wotton*, (where the Statute of Usury was misrecited) was a case where no judgment could be given ; for the Court were bound to know the statute ; and that there was no such statute as was pleaded, which was a statute made the sixth of February.

In the present case here is no fault in the pleadings. Therefore where shall the repleader begin ? This case is not the subject-matter of a repleader : this is only a defective title.

It would be an error, to grant a repleader, where the Court can give judgment upon the pleadings already before them.

Now here, the defendant who claims to be mayor has not shewn "that he was sworn before the proper persons : " and the Court cannot presume it. He is asked "quo warranto" he acted as mayor : and his defence is this "by a proper election



and (improper) swearing:" and that "eo warranto," he acted as mayor. But this plainly appears to the Court to be no warrant at all. Therefore the Court must give judgment against him.

And the Chief Baron certainly determined right: for a man cannot plead one case, and then prove another.

Hob. 112, the case of *Tasker v. Salter* is not like this case. This is a fact; on which the jury have judged.

And surely it does not follow, nor can it be taken upon the face of this record, that because he was sworn at that assembly, he must therefore be sworn before the proper persons.

On the contrary, it is most manifest that he has not set out a complete title to exercise the franchise: and therefore the Court must give judgment against him.

The other issues were never proved: and even this bad title, set up by this issue, is found false; viz. "that he was not so sworn in, as he has pleaded."

Judgment shall be given against the defendant, even upon an issue misjoined, if found for the plaintiff. Cro. Eliz. 778, the case of *Dighton v. Bartholomew*. 5 Co. Rep. 43, *Nichol's case*. Cro. Jac. 377, the case of *Edward Maria Wingfield v. Bell*. 2 H. 7, 11 b. *Rex v. [299] Herle*, which case proves that if a man sets up a right, different from his title, it shall be against him; and he shall not set up another title, afterwards.

The Court may here give judgment as upon a confession, when the issue is immaterial, and the mistake not amendable: and there shall in such case, be no replender, Carthew 371, the case of *Jones v. Bodinner*, expressly, 5 Mod. 226, 227, S. C. Cro. Jac. 678, the case of *Johns v. Ridler*: where though the issue was immaterial, yet being found for the plaintiff, it was adjudged for him, upon the defendant's confessing the ejecting.

In the case of *Love v. Wotton*, Cro. Eliz. 245, the Court could not give a complete judgment.

Cro. Car. 25, the case of *Knight v. Harvey, Administrator of Harvey*, M. 1 C. 1, (where the defendant pleaded an impossible judgment, and riens en ses maines, but only to satisfy it; and the plaintiff replying, the issue was found for the plaintiff, and he had judgment;) is a case parallel to the present: for as the judgment there pleaded was a bad judgment, so this is certainly a bad swearing in. Therefore the Court will here give judgment upon the information; as they did upon the plaintiff's declaration there, notwithstanding that impossible issue being found, it being found for the plaintiff.

Here, both the election and swearing in, ought to have been well pleaded: neither is a defence, of itself alone.

And the Court cannot take notice of the fact, otherwise than as it has been pleaded.

Therefore judgment may be given, as upon a confession, in the present case: for the defendant shews no right at all, to act as mayor.

So that, upon the whole, judgment ought to be entered for the King, upon the face of this record. To prove which, they cited 2 Strange 873, the case of *Broome v. Rice & Al* in C. B. as in point: where, though the justification confessed the cause of action, in effect, yet the plaintiff replying "de injuria sua propria absq: tali causa," issue was thereon joined, and found for the defendant; but the verdict was set aside; and judgment ordered to be entered for the plaintiff, and a writ of inquiry of damages to issue.

Mr. Norton in reply.—

The substantial part of this plea, is the "being sworn at this assembly, immediately after the election;" [300] and the persons "before whom the swearing is alledged to have been," may be considered as surplusage. If so, we ought to have been let in, at Nisi Prius, to prove our plea: if it is not so to be taken, we ought now to be let in, either to amend, or to replead.

This would plainly be a good bar, if well pleaded. Therefore the Court will, for the sake of justice, grant a replender.

The title set up by the defendant is an election under a mandamus; and the defendant has accordingly stated an election made pursuant to the directions of the 11 G. 1, and a swearing in, pursuant to it: but he goes on, and particularly shews a swearing in before twelve burgesses, the charter-officers, (which should have been

alleged to be before "the persons directed by the 11 G. 1, viz. the then presiding officer;" and this upon issue taken thereon, is found against him. Now surely this has not tried the merits: this issue was quite immaterial. And therefore there shall be a repleader: and this must be a repleader of our whole entire title.

But they say that "this is a defective title; not a mere improper title: and that therefore judgment shall be given against the defendant."

Now this is not the rule of repladders. Indeed if the bar be evidently not a good justification, it is idle to grant a repleader: but otherwise, a repleader shall be awarded. In Cro. Jac. 5, the case of *Coxe v. Cropwell*, the husband pleaded "not guilty," when no tort was supposed in him; so that this was a case where the real question had not been tried: and therefore the Court granted a repleader.

And the party who makes the first fault, may, notwithstanding that, pray a repleader.

Wherever the Court see, upon the whole record, that the issue joined will not try the true question, the Court will grant a repleader.

The case of *Serjeant v. Fairfax*, 1 Lev. 32, P. 13 C. 2, B. R. is strongly for us. It was a bad plea; it proceeded originally from the defendant; an immaterial issue was joined; and a verdict was \* against him: and yet a repleader was awarded; because the merits had not been determined, and the Court could not therefore know for whom to give judgment.

[301] But they say that "here is sufficient for the Court to give judgment upon."

I answer, that these are not to be taken as independent, unconnected issues; but as one entire title, though consisting indeed of various distinct parts. And he said he could see no reason for the Crown's taking such a number of issues, upon these quo warranto informations: indeed perhaps the single issue of "not mayor," would take in the whole.

Lord Mansfield—General rules are wisely established, for attaining justice with ease, certainty, and dispatch.

But the great end of them being "to do justice," the Court are to see that it be really attained.

In order to discover what was just upon the present occasion, he said he would consider this case in two views; viz.

1st. Upon the mere foot of the swearing, as it is here pleaded and put in issue; and

2dly. What alteration is made by the other issues, and the verdicts upon them, found in the manner as they have here been.

First—If this issue upon this swearing-in, had stood alone, this had been an immaterial and void issue; as it tends to prove nothing, either for the Crown, or for the defendant; and from which, no conclusion can be drawn, either way.

It appears too, upon the record, that this might have been so pleaded, as to have shewn whether he had, or had not a right: (supposing the question to be confined to this single issue).

What is the rule of law then, as to such an immaterial issue joined, and verdict upon it?

It is, "that when the finding upon it does not determine the right, the Court ought to award a repleader: unless it appears from the whole record, that no manner of pleading the matter, could have availed."

The principal cases to prove this are (amongst many others to the same effect).

[302] 6 Mod. 2, the case of *Staple v. Haydon*, (first resolution;) where the Court held "that a repleader is to be awarded, when such an issue is joined, as the Court, after trial thereof, cannot give a judgment; as being impertinent, and not determining the right:" (I lay the stress on these words, "and not determining the right").

Moore 867, the case of *Tasker v. Salter*, (S. C. with Hobart 112). The verdict passed upon a void issue: and the Court awarded a repleader. It was as no issue at all, and impertinent, as pleaded.

Here, it might have been pleaded right: but as there pleaded, it did not conclude; and therefore the Court could not determine the right.

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\* No: the verdict was for the defendant; and the plaintiff moved for a repleader. Indeed Twisden said "that it was the same thing, be the verdict for the plaintiff or the defendant."

So the case in Cro. Eliz. 245, *Love v. Wotton*, (a plea of the Statute of Usury, upon the usurious bond—) there, as the statute was pleaded, the conclusion “that the obligation was taken by usury, &c.” was immaterial: but the statute might have been pleaded right; and then it would have been a good defence. And therefore the Court awarded a repleader.

But there is a later case, (and the Courts have been more liberal of late years, in their determinations, and have more endeavoured to attend to the real justice of the case than formerly;) and this is the case of *Tryon v. Carter*, M. 8 G. 2, which is reported in 2 Strange, 994, and is a very material case. “A bond conditioned for payment of money on, or before 5th December. Plea of payment on 5th December; replication, issue, and verdict for the plaintiff.” This was holden to be an immaterial issue; and a repleader was therefore awarded: though it would have been conclusive, if found for the defendant; but did not conclude, when found for the plaintiff. Therefore, (though that was a slip of the defendant) as it did not determine the question, a repleader was awarded.

The case that has been mentioned, of *Rex v. Philips*, M. 7 G. 1, in 1 Strange 394, is material, for the reason given by Ld. Ch. J. Pratt. For if the justification is such in point of matter and substance, as could not, if put into any form of words, be material with regard to the defendant by way of defence, it is in vain to grant a repleader: it being to no purpose to do so, where the case itself cannot be amended, or would be at all material, if put in any shape whatsoever: which was the case; for it amounted to a confession of the usurpation, as was there holden. And if it did, then he very rightly said “that if [303] the Court should grant a repleader, the defendant could not mend his case: for the plea would stand; and after the formality of a demurrer, the Court must give judgment upon the goodness or badness of it.” And Ld. Ch. Just. Pratt went on, and compared it to an ill justification in trespass, (where no form of words would have made it a defence;) and therefore was of opinion that as the plea was ill, and contained no title to the franchise, the Court might give judgment upon it, as confessing an usurpation. (V. 1 Strange 398.)

Now here, supposing (as I said before) the swearing to be the only issue; it is not a question totally inconclusive, “whether he was, or was not sworn before these persons?” Does it at all conclude to the real question? Is not this, manifestly, a slip? Does it not appear that this plea\* could have been mended? Certainly, it could; viz. by pleading the swearing-in, to have been agreeable to the statute of 11 G. 1, (c. 4, § 4, which directs it to be before the † presiding officer). Therefore, the real justice of the case is, that this slip should not be fatal for ever.

This is a franchise of great importance. It is so, in itself: and, besides, the rights and privileges of many other persons do depend upon it. And these writs of mandamus issuing pursuant to this Act were intended for the settling and preserving of corporations.

If this was the single issue, I think they would be clearly intitled, in this case, to a repleader. Yet

Secondly—it is objected “that here are many other issues, all found for the Crown, as well as this.”

But the issue just now spoken of as immaterial and void is, an issue taken upon an essential part of an entire defence: for the defence here pleaded by the defendant is one entire defence; notwithstanding that the Crown is at liberty to take distinct issues upon the distinct parts of it. And therefore it would be absurd and inconsistent that the finding against the defendant upon the other issues, the other parts of one entire defence, should stand; in case we should grant a repleader upon, or an amendment of this part: for, if that should be permitted, the finding would still be against the title of the defendant, it being set up and pleaded as one entire title.

I agree that if it appeared upon the whole record, “that the defendant was not duly elected,” it would be as Ld. Ch. Just. Pratt says, a vain and idle thing, to grant a repleader.

\* N. B. This plea seems to have been good in form; but insufficient as to fact. See Fortescue's distinction in 1 Strange, 398.

† Vide *Rex v. Charles Malden*, B. R. 11th November, 1767, post, p. 2130. [4 Burr. 2132.]



[304] But if the rest of the issues are only parts of, and dependant upon the whole title; the same reason does not then hold.

The way to do complete justice indeed, is to let in the one side, without prejudicing the other.

If a replader was to be granted, (upon the supposition of this being the only issue,) it must be \* without costs. But as this was a mistake of the defendant; (in which the prosecutor was not to blame,) we ought to do the most complete justice we can, between both.

My Ld. Ch. Baron was right in his opinion, "that he could not admit proof different from the issue joined;" and also "that this issue was connected with the others."

If so, the verdicts were without evidence: and it was agreed "that they were to be without prejudice." Therefore such verdicts ought to be set aside, as without evidence: and not to conclude against the defendant, which would be a prejudice.

Therefore he proposed to set aside these whole verdicts, on payment of costs; and to give the defendant leave to amend his plea.

If it had been upon a demurrer (which there might have been) the Court would have given leave to amend.

This seems to be the true way to come at justice; and what we therefore ought to do: for the true text is "boni judicis est ampliari justitiam; (not "jurisdictionem," as it has been often cited).

This is what I would wish to do, if we can do it.

Mr. Just. Denison—Formerly, verdicts were not used to be set aside: and therefore, at that time, repladers used very commonly to be granted. But they have been less usual of late, since the practice of setting aside verdicts has prevailed.

On repladers, the issue was considered as void; and the verdict too; and consequently, the judgment was, "to replead."

An information in nature of a quo warranto does not differ from other cases.

[305] Here is an entire plea: the replication separates it, and takes issue on different parts of it. The replication ought to have demurred to this immaterial part of the plea: but issue is joined upon it; and there is a verdict upon it in the negative, viz. "that the defendant was not so sworn as he has pleaded." What can the Court do? The issue and verdict are impertinent and void. How then can the Court give judgment, when it does not appear whether the defendant had a right, or not? (I speak now upon this single issue only).

Well then, if you set aside any part of the verdict, you must set aside the whole.

And this used, formerly, to be one issue.

I well remember that case of *Rex v. Philips*, M. 7 G. 1. It went upon an usage to hold over. The point was whether a replader should be granted, when the case could not be varied: and it was holden, that that would have been vain and idle. On the contrary, it was said that it would be a different thing, if the case could have been mended upon a replader. I do not doubt but that there were great numbers of other issues in that case, as well as in this: and yet a replader would have been there granted if the case could have been mended, on the usage.

The whole must be set aside, if part is set aside.

It is said "that this is a defective title."

But it is no title at all: it is only one link of the whole chain.

I think we may set aside the whole verdict upon one of the issues being void. And this is better than granting a replader upon which a writ of error may be brought, and may long depend; which will be a much greater delay of justice.

Mr. Just. Foster—This was an election under a mandamus, upon the Statute of 11 G. 1, in order to settle the peace of the borough.

Here are twelve issues joined, all found for the King; and without evidence, or any of them: so that none of them have been yet really tried.

It is agreed "that in case of a single issue which doth not determine the right, (which way soever found,) a replader may be granted."

[306] The ninth issue, in this case, falls directly within this rule. It is totally immaterial to the question of right.

If therefore the verdicts on the other issues, upon which no evidence was given,

vary the case and stand in the way of a replender, they ought to be all set aside : or otherwise complete justice can not be done.

And I think, as this case is circumstanced, the agreement mentioned by the Lord Chief Baron,\*<sup>1</sup> "that the verdicts were to be without prejudice in any future trial," may without a strain be extended to any future litigation in the cause.

Lord Mansfield—I am now fully satisfied, by what my brothers have said, that the whole verdict may be set aside, on payment of costs, and with liberty to amend the plea.

But that must be upon a particular motion.

And I have no doubt but that we may do this, without the consent of the prosecutors.

Which motions (to set aside the verdict, on payment of costs ; and, to amend the plea, on payment of costs ;) were accordingly afterwards made by Mr. Norton ; and granted, after a faint attempt by Mr. Serjeant Poole to shew cause, and then to get costs as between client and attorney ; in both which attempts, he was unsuccessful : for the rules were both of them made absolute, upon payment of common costs ; obliging the defendant, however, to take short notice of trial.

REX *versus* INHABITANTS OF FREMINGTON. No. 133. Friday, 19th May, 1757.

(Lord Commissioner Wilmot absent.)

See this case at large in the quarto edition of my Settlement-Cases, No. 133, pa. 146.

[307] REX *versus* INHABITANTS OF ALTON. Saturday, 17th May 1757.

(Lord Commissioner Wilmot absent.)

See this case at large in the quarto edition of my Settlement-Cases, No. 134, p. 418.

[314] PAXTON *versus* KNIGHT. 1757. Prohibition not to go after sentence unless defect of jurisdiction be apparent in the libel.

Mr. Norton shewed cause against a prohibition.

This was a question whether a prohibition should be granted, to stay proceedings in an Ecclesiastical Court, in a suit by a Quaker, for a seat in a church ; founding his title upon a prescriptive right : in which suit the Ecclesiastical Court had determined against him. And he now came, after sentence below, for a prohibition. Note—an immemorial prescription was alledged on both sides.

Mr. Norton—against the prohibition, cited 2 *Ld. Raym.* 755, the case of *Jacob v. Dallow.* 2 *Salk.* 551, *S. C.* 5 *Mod.* 436, *S. C.* Cases in *B. R. temp. W.* 3, 233, *S. C.* *Farresley, S. S. C.*(a)<sup>1</sup>

[315] As to prohibitions after sentence—

Hetley 92, the case of *Eaton v. Ayliffe* (which had been cited on the other side,) is a case to which the Court will not pay great attention : it was determined temp. C. 1, and is a loose note ; and even \*<sup>2</sup> Mr. Watson in his *Complete Incumbent* treats it as a case of no authority.

The Court will not, after sentence,(a)<sup>2</sup> grant a prohibition, unless the defect of jurisdiction appears upon the face of the libel.(b)

\*<sup>1</sup> Vide ante, 294.

(a)<sup>1</sup> See also 3 *East*, 478. 5 *East*, 348. 17 *Vin.* 570, 571, as to seats in a church. As to prohibition on account of a prescription, vide 17 *Vin.* 560, pl. 16 and 17, and the notes 561, pl. 18, 19.

A libel for an ecclesiastical duty may be founded on a prescription, and it is not any cause for a prohibition unless it be denied, and then it is. *Palm.* 440. *Noy*, 81.

\*<sup>2</sup> Mr. Just. Denison observed, that the *Complete Incumbent* was not written by Watson ; but by Mr. Place of York.

(a)<sup>2</sup> But that they will, if it appears on the face of the proceedings, see *Salk.* 548. 12 *Mod.* 132. *Godb.* 163. *Comb.* 356. *Mos.* 907. 4 *Bur.* 2037. 2 *Wils.* 195.

(b) This is a clear ground for granting the prohibition if the Ecclesiastical Court

1 Strange 187, the case of *Argyle v. Hunt*—is expressly so in point. And the case of *Stone v. Fowler*, Mich. 9 Annæ—there cited (fo. 188,) is to the same effect. 1 Ld. Raym. 436, is also in point: *The Churchwardens of Market Bosworth v. The Rector of Market Bosworth*; where the Spiritual Court had adjudged against the custom set up; though their law allows a less time, than the common law, to make a custom: but the prohibition was denied. So here, if the Spiritual Court will admit less evidence of a prescription, than the Temporal Courts will; and the prescription is nevertheless found to be groundless; it is certain that the party who sets it up, can have no reason to come for a prohibition, after sentence.\* And his only reason for it can be, (as the Court observed in the last cited case,) to get clear of those costs, which he has by his own vexatious suit, rendered himself liable to; and which (as was there adjudged) he ought to pay.

But the Court seemed to think that if the sentence of the Ecclesiastical Court was a nullity, their award of costs must be so too. And here are reciprocal prescriptions alledged: and the prescriptive right of the one is determined for; though that of the other is determined against. They have adjudged the adverse prescription to be a good one: which they could not try; and which they will establish upon less evidence than the common law requires.

And Lord Mansfield said that though he was very sorry that the Court were obliged to grant a prohibition, (because the party applied for it, only to get rid of paying the costs occasioned by his own vexatious suit;) yet he thought they could not avoid doing it.

Per Cur. Rule for a prohibition made absolute.

[316] REX *versus* JOSEPH CHAPLIN HANKEY, ESQ. Monday, 16th May 1757.  
Information for a challenge denied to the first sender.

(Lord Commissioner Wilmot absent.)

One Ralph Carr an attorney, applied for an information against the defendant, for sending him a challenge.

Upon hearing the affidavits, and the letters that passed between these two gentlemen, the Court thought that Carr himself appeared to have sent the first challenge to the other; at least, that his letters manifestly imported a challenge: which the other clearly so understood, and accordingly accepted, and proposed to fight with pistols.

The Court held, that though the defendant had behaved very improperly; and though it would have been right for the Court to have granted even cross-informations, in case each party had applied for an information against the other; yet they thought that when the aggressor, who gave the first challenge, came and applied for an information against the other who only accepted it, (however improperly and unlawfully;) it was a very different case; and that the Court had no reason to give him this extraordinary remedy, by way of information: but ought rather to leave him to his ordinary remedy, by action or by indictment.

Therefore the rule “to shew cause why an information should not be granted,” was discharged.

did adjudge the prescription insisted on by the defendant to be good; but no such thing is mentioned in the state of the case, and it is very strange if they did: for as the defendant was here respondent, there it was sufficient for them to determine against the plaintiff's prescription; and if that was so, all the cases cited by Mr. Norton, are in point against granting the prohibition; that in Ld. Raym. 755, goes further, for there the Court refused a prohibition after sentence, notwithstanding the Ecclesiastical Court had determined in favour of a suit there founded on usage.

\* *V. Full v. Hutchins*, p. 176, post, pa.



ROBINSON *versus* RALEY. 1757. Demurrer not to be withdrawn after trial of other issues. [S. C. Bath. 188, cited, and concisely but clearly reported, Bull. 93. See also 2 Black. 1022. 1 Durn. 782.]

Tr. 25 G. 2, Rot'lo. 775.

This was an action of trespass. The declaration contained a great number of counts; amongst the rest, one in trespass for breaking and entering the plaintiff's close; and depasturing it with, &c.; and for breaking and entering his free-warren; a 2d count, to the like effect; (but in different years;) so a 3d, 4th, 5th and 6th; and six more, for breaking and entering another close called Sands's Piece; a 13th for taking and carrying away the plaintiff's trees; and a 14th for taking and carrying away his goods and chattels.

[317] The defendant had leave to plead several pleas: and accordingly he pleaded, 1st. The general issue, to the whole. 2d. Plea by leave, (ut supra,) that as to the close called Rabbet-Walks, "that it is one rood of land, parcel of a common-field; and that Mr. Finch, in right of his prebendal estate, and all, &c. have right of common, &c. in certain fields called Middle Fields, whereof the Rabbet-Walks are parcel:" which rights he derives to himself; and so justifies under it. The like plea, to the other five next counts. He pleads, as to the six issues relating to Sands's Piece, the general issue. To the 13th count, he pleads tenancy of another close, under the plaintiff; and justifies under a licence, and avers that it was used for gates, &c. Another plea was a right of common, &c. &c.

The plaintiff, in his replication to the 2d plea to the 1st count, traverses the right of common: and in his replication to the like pleas as to the other five counts, traverses the Rabbet-Walks, being parcel of the Middle Fields. In his replication to the last mentioned plea, he traverses the right of common. All these issues were found for the defendant. To the plea to the 5th count, the replication traverses "that the cattle were the defendant's own cattle; and that they were levant et couchant upon the premises, and commonable cattle." To this there is a special demurrer for cause, (viz. "that the replication is multifarious, and that several matters, specifying them, are put in issue; whereas only one single matter ought to be so;") and joinder in demurrer. To the plea to the 13th count, the replication traverses the licence; (after protesting "that the tree was not used for gates, &c. as is alledged by the defendant's plea"). And to this replication also, the defendant demurs specially; and shews for cause, "that it concludes to the country, whereas it ought to conclude with an averment."

Serjeant Poole, for the defendant, complained of the hardship the plaintiff put upon the defendant in the 5th count, by inforcing the defendant to prove the cattle to be his own cattle, and commonable cattle; and levant and couchant upon the land: which hardship had obliged him to demur.

He argued, that some one fact only ought to be put in issue; not several.

He cited Co. Lit. 126 a. (letters Q. R.). It must be one single certain material point. And so also 8 Rep. 67 b. *Croquet's case* (the last resolution,) lays down the rule accordingly, "that an issue ought to be full and single."

Now here are three distinct facts put in issue, by this replication: any one of which was sufficient.

For if the cattle were not his own, or were not levant and couchant, they were not commonable cattle. The plaintiff might as well have put twenty facts in issue.

This therefore is, at least, a fault in form: and we have demurred specially, and shewn this for cause; "that the replication is multifarious, and that several matters are put in issue (specifying them;) whereas only one single matter ought to be so."

As to the licence—The replication (protesting that the tree was not used for gates, &c.) traverses the licence. To this replication, we have demurred, out of necessity: for though we really have a licence, yet the person who gave it to us (the plaintiff's steward) has denied it; and we apprehended, would do so again, on oath. Therefore we have demurred specially, and shewn for cause "that the replication concludes to the country, whereas it ought to conclude with an averment."

Now they ought to have traversed the licence specially, and to have concluded with an averment. *Croquet's case*, 3d resolution, (fo. 67 a. b.) shews that this licence ought to have been specially traversed, and concluded with an averment. And East.

660 b. bis. 661, 630, 651, and 1 Brown. 353, and Thompson's Entr. 365, and many other precedents, are so.

Indeed where the whole of the plea is traversed, the conclusion may be to the country. But this is not a traverse of the whole. So that this is a departure (by Mr. Robinson) from the common form of pleading.

Mr. Yates contra for the plaintiff.

One part of the duplicity (viz. the cattle not being commonable) is not pointed out by the special demurrer.

However, this traverse is not double: though I agree that it numerally contains several matters; all which together make up the defendant's plea, and make one entire defence. And it is within the reason of *Crogate's case*, 8 Co. 67.

Whereas duplicity is, where distinct matters, not being part of one entire defence, are put in issue. For there are cases where several matters may be put in one traverse: as, for instance, a custom consisting of several parts.

[319] Now all these parts here traversed, make one entire defence: for the cattle must be commonable, levant and couchant, and his own: or else, it is no sufficient defence. To prove which, he cited 1 Ro. Abr. 398, letter G. pl. 2, 3, letters H. and I. throughout. 1 Saund. 227, the case of *Stennell v. Hogg*, and 2 Show. 328, the case of *Manneton v. Trevilian*, in point.

As to the licence, the cause of demurrer shewn is, "that he ought to have maintained his declaration; and that he ought to have concluded with a traverse and averment."

But precedents are both ways. 2 Brown's Entr. 283, concludes as the present does. And whoever has seen the whole of this record will not think that either of the parties has concluded too hastily. He cited the case of *Clarke v. Glass*, Tr. 28, 29 G. 2, B. R. to prove that where the whole contents of the plea are denied, the conclusion must be to the country: but where, only a particular fact is denied, the conclusion must be with an averment. He also cited 2 Lutw. 1399, 1401, the case of *Hustler v. Raines*.

Serjeant Poole, in reply—

1st. As to the two matters making but one entire defence—yet, being variety of facts, they ought not both to be put in issue. *Crogate's case*, 8 Co. 67.

And the common method is, to traverse "that the said cattle were levant and couchant."

As to the case of *Manneton v. Trevilian*, I agree that the cattle ought to be levant and couchant. My demurrer here is in point of form; and is special.

2dly. I do not know but the party may go to issue, in some cases; but I say this is not the common form.

The case of *Hustler v. Raines*, 2 Lutw. 1399, 1401, proves nothing against me.

Lord Mansfield held both these demurrers to be frivolous.

The substantial rules of pleading are founded in strong sense, and the soundest and closest logic; and so appear, when well understood and explained; though, by being misunderstood and misapplied, they are often made use of as instruments of chicane.(a)

[320] As to the present case—It is true, you must take issue upon a single point: but it is not necessary that this single point should consist only of a single fact: here, the point is, the cattle being intitled to common; this is the single point of the defence. But in fact, they must be both his own cattle, and also levant and couchant; which are two different essential circumstances, of their being entitled to common: and both of them absolutely requisite.

So, as to the licence—The licence is the point in question. And this point in question, "whether the licence was given, or not," is put in issue: the whole turns upon this particular proposition. Indeed it may be a different case, where the whole of the plea is not denied; but only some parts of it. But that is not this case.

Mr. Yates has made right and reasonable and intelligible distinctions: and he has cited an express authority.

Mr. Just. Denison concurred.

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(a) This observation seems mal-a-propos, for there is neither sense nor logic in the above distinction, though approved as it seems in the next page, and also by Buller, in Doug. 414.

1st. As to *Crogate's case*—The replication “de injuriâ suâ propriâ absq’; tali causa,” will do, in all cases where matter of title and other things of that kind, are not included in the “absq. tali causa;” and if you admit them, you may then plead de injuriâ suâ propriâ absque “residuo causæ;” traversing that residue. But the rule in *Crogate's case* does not affect this case. For here the question is one single proposition, viz. the measure of the common; and the measure of the common is the levancy and couchancy jointly with the property.

Skinner, 137, is a more sensible report of the case of *Molliton and Trevilian*, than 2 Show. 328. And there the levancy and couchancy, together with the property, were esteemed to be the measure of the common; and not the levancy and couchancy only.

So that nothing more is here traversed, than the measure of the common. The case is in point.

Besides, I think it is within *Crogate's case*.

As to the licence—It is right, and avoids the prolixity of pleading. The old way indeed was otherwise: but it is altered, of late.

And he cited a case (of an alternate way of traversing a corrupt agreement,) which was in M. 5 G. 1, B. R., *Fen v. Alston*—where it was holden “that the plaintiff has a liberty [321] either to reply that the bond was given upon another account,” and to traverse the corrupt agreement with an absque hoc; or to deny the corrupt agreement directly, and conclude to the country. And the case of *Baynham v. Matthews*, 2 Strange, 871, goes upon the very same foundation; and mentions the same alternative.(a)<sup>1</sup>

Mr. Just. Foster. I am of the same opinion.

Mr. Norton, who was also of counsel for the defendant, desired the Court not to give judgment yet; but to give them an opportunity to move for leave to withdraw their demurrers, and amend: which the Court agreed to. And in a few days afterwards, Mr. Norton moved for leave to withdraw the two demurrers, and plead to issue; (upon payment of costs;) and a rule was thereupon granted, to shew cause.

And now Mr. Yates shewed cause, for the plaintiff, against the defendant's being at liberty to withdraw the two demurrers, and plead to issue. And he cited 6 Mod. 102, the case of *Cross v. Bilson*. 6 Mod. 1, the case of *Stuple v. Haydon*. 1 Ld. Raym. 668, the case of *Fox v. Wilbraham*, and 2 Strange, 1002, *The Bank of England v. Morrice*.(a)<sup>2</sup>

Serjeant Poole and Mr. Norton contra, for the defendant—

The merits have not been tried upon these demurrers. We move this at common law; not under any statute. And the Court are not bound down by any certain rules. And they cited 2 Saund. 402, *Rex v. Ellames*, (2 Strange, 976). *Duchess of Marlborough v. Wilmore*, Hil. 4 G. 2, B. R. The case of *Cope v. Marshall*, Tr. 28 G. 2, B. R. (V. ante, 259, S. C.)

The case of *Giddins v. Giddins*, (Tr. 29, 30 G. 2 B. R. was even after the Court had given their opinion.\*

And here is a declaration of twenty counts, manifestly intended to catch the defendant, and to save costs.

If our motion is granted, the contingent damages assessed, will be out of the case, and will be as none at all.

Lord Mansfield—It is admitted to have been done, after a demurrer and argument: but this is after a trial; and without any favourable circumstances.

Now as no case of such an amendment after a trial is cited, I take it for granted that none exists.

[322] These are frivolous demurrers: and the only view of this motion is to get rid of the costs. But the plaintiff would have had his costs, if the defendant had

(a)<sup>1</sup> The distinction was disallowed, per Cur. on Mr. Walker's argument in support of a special demurrer founded on it, without hearing any counsel on the other side; February 8th, 1771, Hil. 11 G. 3, B. R. and in both cases the plaintiff may conclude his replication to the country, as he did in the case adjudged as above-mentioned.

(a)<sup>2</sup> The distinction prevailed formerly, 2 Anders. 6, as it did in the case in Strange, which is reported also in Fitz. 130, and in MS. notes agreeable to Strange.

\* It was after a demurrer and argument only; but the Court had given no opinion; and the rule was made absolute without defence.



done right at first, and joined issue upon these facts ; if they had been found against him.

So that here is neither precedent, nor reason for allowing this motion.

Mr. Just. Denison concurred.

Where the demurrer is first argued, before any trial of the issues, the Court will give leave to amend : as in the case of *Giddins v. Giddins*. But this is an attempt to amend an issue at law, after a verdict has been found on the issues upon facts, and contingent damages found upon the demurrers : of which, there never was an instance. And we do not know where it would end ; nor do I well know how the cause could be again carried down to trial.

If this had at first gone down to issue ; and had been found against the defendant ; it would have carried costs.

The Court cannot help seeing that this is upon record : here are verdicts and contingent damages found. Therefore we cannot help this : I wish we could : because the merits seem to be with the defendant.

The cases of amendment cited are where the whole is supposed to be in paper : or else the Court could not have done it. We have no authority to do this, after it is plainly upon record.

Mr. Just. Foster concurred.

Per Cur' unanimously judgment for the plaintiff upon the demurrers.

[323] ROBERTS *versus* PEAKE. Tuesday, 17th May, 1757. Note of hand with a proviso, is not a negotiable note.

M. 29 G. 2, Rot'lo. 625.

(Lord Commissioner Wilmot absent, in Chancery.)

This was a special case reserved at Nisi Prius at Guildhall, on a trial there before the late Ld. Ch. J. Ryder.

It was an action upon a promissory note, brought by the indorsee, against one defendant only : though the note imported, upon the face of it, to have been made by two persons : and the declaration was upon the note, as if it had been an absolute one, payable on the \* death of a person named in it ; whereas it appeared upon the face of it, to have been given upon two several conditions. For the note, when given in evidence, came out to be thus, " We (naming the defendant Peake and another person) promise to pay to A. B. (a) 116l. 11s. (value received) on the death of George Hindshaw ; provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it."

Signed by PEAKE only.

And yet it was laid in the declaration, merely as a promissory note absolutely and in all events payable on the death of G. H.

Mr. T. Clarke of Lincoln's Inn—pro quer.

The two questions upon this case are—

1st. Whether this be a negotiable note.

2d. Whether this note, given in evidence, supports the declaration ; which is upon an absolute note payable on the death of G. H.

First point—There can be no doubt but that if the note given in evidence had not had the proviso added to it ; but had merely been made payable on the death of George Henshaw ; it had been a good negotiable promissory note, within the statute of 3 & 4 Ann. c. 9, (§ 1).

[324] For the contingency of the death of G. H. is not such an uncertain contingency, as that the event may possibly or probably never happen : and so the note might perhaps never become payable : but it is an event certain and necessary ; and no otherwise, nor in any other respect uncertain, than merely as to the particular time when it will happen. So that it is no more than the ordinary case of a promissory note payable at a future day.

\* V. ante, 226, *Goss v. Nelson*, on a note payable when defendant should come to age ; specifying when that was to be.

(a) It must have been payable to A. B. or order, though not so stated, otherwise this action by the indorsee could not have been maintained.

And to prove this doctrine, and that this is a negotiable note, he cited 2 Strange, 1217, the case of *Cook v. Coleham*, full in point; being "to pay, &c. within six weeks after the defendant's father's death." 1 Strange, 24, the case of *Andrews v. Franklin*, still stronger; being "to pay, &c. within two months after such a ship shall be paid off."

Then as to the proviso or condition, it is made absolutely payable, on George Henshaw's death, an event which will certainly happen: therefore the proviso is repugnant to the body of the note. And he endeavoured to shew a resemblance between this case and that in 2 Salk. 463, the case of *Wells v. Tregusan*; and the case in 21 E. 4, 36, and Brooke, Obligation 58, (S. C. abridged).

Second point—The note produced in evidence will support the declaration.

1st objection is "that the note is only laid, as the defendant's several note:" whereas it imports upon the face of it, to be made by two persons jointly.

Answer. Perhaps one only signed it: or if the other did also sign it, it was, nevertheless, equally the note of the defendant. It is laid, and must be pleaded according to its legal operation. 1 Strange, 76, the case of *Butler v. Malissey* is most strictly in point.

2d objection, "that this is laid as an absolute note, without mentioning the two conditions," (of being payable) "if he shall be able;" or "if Henshaw shall leave either of them sufficient to pay it."

Answer—But I say that this note produced in evidence, which contains these two conditions, will sufficiently support the declaration.

In attempting to support this assertion, he mentioned 6 Mod. 228, the case of *Roberts v. Harnage*, 2 Salk. 659. S. C. 4 E. 4, 29, and 1 Strange, 76, the case of *Butler v. Malissey*, before mentioned.

[325] Mr. Norton, for the defendant, was about to speak: but

Lord Mansfield stopped him, and said, I fancy you will hardly argue this: (meaning that it was sufficiently clear on Mr. Norton's side of the question).

Mr. Norton—This was an action brought by the indorsee; and is under very particular circumstances.

I agree that a note in the name of two, and importing to be made by two persons, may be actually signed by one only and will be good: also that a note may be declared upon, according to its legal operation.

As to the rest—If the Court was clear, he said he would not trouble them.

Lord Mansfield—I am very clear.

This note was payable upon a contingency; but it is not an absolute note. What would it signify, to have put in all these contingencies, if the party was absolutely and at all events bound to pay it upon the death of George Henshaw; most manifestly, it was not intended that he should be bound to pay it upon George Henshaw's death, at all events.

Therefore this is not a negotiable note: for a note payable upon an uncertain contingency, is not a negotiable note.

Mr. Just. Denison concurred.

A note payable eventually upon an uncertain contingency can never be a negotiable note. And if it had been so, yet there ought to have been an averment "that George Henshaw did leave one of them sufficient to pay it;" or "that the defendant was otherwise able to pay it."

And indeed this shews plainly that it is not a negotiable note within the meaning of the Act of Parliament; which means and intends an absolute note payable at all events.

And I think too, that it is a variance in the declaration, from the note itself, for want of setting out these conditions: it ought to have been set out, as it really was.

[326] But indeed one of these points depends upon the other: and I think this note is only eventually and conditionally payable, and by no means absolutely and at all events.

Mr. Just. Foster concurred, both as to the variance: and also that it was not a negotiable note as being payable eventually, and not absolutely.

Per Cur. Judgment for the defendant as upon a nonsuit.

DENN, EX DIMISS. BURGESS, Vid. *versus* PURVIS ET AL. 1757. [See Cro. Car. 110.]

Plaintiff shall recover, according to his title, where he demands more than he has a title to, but not e contra.(a)

This was a special case, upon an ejectment tried at Maidstone Assizes, in August last.

Richard Burges, being seised in fee simple of divers gavelkind messuages, lands, tenements and hereditaments in the several parishes of L. M., B. M. and H. made his will in writing, on 15th Feb. 1735: and thereby devised his said messuages, lands, &c. to his wife Elizabeth for her life; with remainder to his brother Thomas Burges, in tail male; with remainder to William Burges (son of his late brother John Burges) in tail male; with remainder to his own right heirs for ever. And the said Richard Burges died without issue, and without revoking or altering his said will.

And the said Thomas Burges and William Burges are since dead without issue.

On 8th September 1746, the said Thomas Burges made his will: whereby he devised all his real estate in the several parishes aforesaid, to his wife Ann Burges, for her life.

On 6th March 1755, the said Elizabeth, widow of Richard Burges, died.

In Easter term 29 G. 2, the said Ann Burges, the devisee of the said Thomas B. brought her action of ejectment, for a moiety of the above gavelkind lands and premises, upon a supposition "that her testator Thomas, (as the brother of the said Richard,) and William B. (as the nephew of the said Richard,) were the only, heirs of the said Richard, at the time of his decease, according to the custom of gavelkind; and, as such, entitled to the real estate of the said Richard in moieties."

[327] On trial of this ejectment, it appeared, in the course of the evidence, "that the said Richard Burges, at the time of his decease, left a niece (named Mary) the only child of William Burges one other brother of the testator, who, by the custom of gavelkind, was entitled as co-heir together with the said Thomas (the brother) and William (the nephew of the testator,) to the premises in question."

Whereupon, by consent of parties, it was ordered by the Court that a verdict should be given for the plaintiff, as to one third part of the premises in the plaintiff's declaration specified; subject nevertheless to the opinion of the Court of King's Bench, upon a case to be stated upon this point—viz.

"Whether the plaintiff, on her declaration for a moiety of the lands, tenements and hereditaments therein mentioned, can recover one third part of such premises."

Which order of Nisi Prius was afterwards regularly made a rule of this Court.

And it came on now, in the special paper, to be argued.

Mr. Knowler, being counsel for the plaintiff, argued—

That the lessor of the plaintiff must recover according to his title.

And this is so, whether the ejectment be brought for an undivided, or a several and divided part; for the whole, or for part of a thing; for an entirety, or for a moiety.

In Plowd. 420, 424 b. *Bracebridge's case*—the reporter blames himself for not having objected to the verdict. But 3 Bulstr. 184, the case of *Cowper v. Frankline*, and many other cases explode Plowden's notion "that the verdict was liable to objection upon that account."

Here, the declaration is for one undivided part, and the verdict for another undivided part. Which is not an immaterial variance from the declaration, sufficient to prevent the plaintiff's having judgment.

For there is no necessity that the verdict should agree precisely with the declaration. All that is necessary is, that the thing for which the verdict is given, should be comprized in, and be part of the thing demanded by the declaration.

[328] And it could be upon no other foundation, that the case was determined, which is mentioned in 2 Ro. Abr. tit. Trial, fo. 704, pl. 22: where an ejectment was brought of a messuage; and it appeared in evidence, and was so found by the verdict, "that only a small part of the messuage was built by incroachment on the lessor's land; not the residue; and yet the plaintiff had judgment."

(a) In ejectment for an undivided third part, if the lessor proves a title to a fourth part he shall recover the fourth part. *Ablett v. Skinner*, 1 Sid. 229, was cited as a case in point, and it is so as to the execution, 3 Wils. 49.



Here, the declaration is for a moiety ; to which it was then supposed that the lessor of the plaintiff had a right, as devisee of one of two brothers of the testator. Indeed it came out upon evidence, that the testator really left three brothers and co-heirs : so that the lessor of the plaintiff had in fact a title to a third part only. And the verdict is accordingly, for a third.

But the moiety includes the one third. So that what is recovered by the verdict, being contained in, and being less than what is demanded in the declaration, this case must be ruled by the ground I have already mentioned, "that the lessor shall recover according to his title." And in point to prove this, is the case in 1 Siderf. 229, of *Ablett, Lessee of Glenham, v. Skinner* ; where the declaration was of a fourth part of a fifth part ; and the lessor's true title was only to one-third of one-fourth of a fifth part : (which was only a third part of what was demanded :) yet it was resolved "that the verdict should be taken according to the title."

Mr. Burrell, for the defendant, premised that this was a hard case : and therefore deserved favour, and justified the defendant's insisting on all legal objections. Then he urged that the plaintiff must shew a clear title to make such a lease as is confessed by the defendant : and, as he knows his own title, he ought to set it forth as it is.

In the case of *Berrington ex demiss. Dormer v. Parkhurst* ; 10 G. 2, B. R. and in Dom. Proc. May 1738, H. 11 G. 2. The Court held that the plaintiff could not recover ; because the demise was laid before the time of actual entry : and the lease was holden void in its creation.

And if the lease is laid à diè datûs, it will not support an entry upon the day.

Two tenants in common cannot declare upon a joint lease. So is Cro. Jac. 166, the case of *Mantle v. Wollington*.

[329] Comberb. 190, in the case of *Moore v. Pardon*, one habendum to two demises, was indeed holden well enough, on error brought.

3 Lev. 334, 335, the case of *Goodwin v. Blackman*, was an ejectment of the tenth part of a messuage described as being in two parishes ; whereas the whole lay in one of them only : it was holden that the evidence did not maintain the declaration ; which was precisely, of the tenth part of an entire thing.

Hardres, 330. In the case of *Wheeler v. Toulson*, the Court inclined that a demise de herbagio et pannagio, did not maintain a declaration for the land.

And he supposed there might be a difference between trespass and ejectment : and concluded with praying a rule for a nonsuit.

Mr. Knowler in reply—here, the plaintiff's title was not known to her : for she supposed only two brothers ; and it comes out that there was a third.

And the question is whether she can recover under this title.

The plaintiff here stands in the place of a coparcener : and therefore she may bring her action for her part, by herself.

The case of *Ablett v. Skinner*, in 1 Sid. 229, is in point : it is the very case, as to the recovery being less than the demand.

Therefore he prayed that the plaintiff might be at liberty to enter up judgment on this verdict.

Lord Mansfield—This is an exceeding plain case. The rule is undoubtedly right, "that the plaintiff must recover according to the title." Here she has demanded half ; and she appears entitled to a third : and so much she ought to recover.

Mr. Knowler's principles, and his authorities, are both right : and the case of *Ablett v. Skinner*, which he cites from 1 Siderf. 229, is in point.

And so if you demand forty acres, you may certainly recover twenty : every day's experience proves this.

[330] And so it is, in an assise : part may be recovered, on a demand for the whole. And no possible objection can be made to this. For if more is laid, there is no reason, why she should not recover less : though the reverse indeed will not hold ; viz. that if he demands less, he shall nevertheless be entitled to recover more.

Mr. Just. Denison concurred—and said, he thought the case of *Goodwin v. Blackman*, cited by Mr. Burrell out of 3 Lev. 334, 335, was a strange case. And the case therein cited, (p. 355,) 44 Assise 27, of an assise of a mill, and a recovery of only part of it is a strong case \* against it. And that principal case reported in 3 Lev. 334, is

\* It is put as such, by the reporter, who makes a quære as to the authority of the principal case, and cites this old case in order to invalidate the Court's determination.

contrary to all experience. And Levinz there cited several good cases, on behalf of the plaintiff; which the Court did not deny.

Mr. Just. Foster concurred, and said the case in *Siderfin* was in point (1 *Siderf.* 229).

Per Cur. unanimously.

Let the postea be delivered to the plaintiff, in order to enter up judgment for the plaintiff.

WHISKARD, Assignee, &c. *versus* WILDER. 1757. [See 5 East, 301.] Declaration on a bail-bond needs not set forth that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ.

A demurrer to a declaration on a bail-bond.

Mr. Whitaker, for the defendant, objected that the declaration ought to have particularly set forth "that the debt was sworn to by the plaintiff; and that the sum sworn to be due, and for which the defendant was holden to bail, was marked on the writ." For he alledged that without shewing this, here was no sufficient authority to arrest the defendant: and consequently the bail-bond is not good, since the Act of 12 G. 1, c. 29; but void. And he cited 1 *Strange*, 399, the case of *Mills v. Bond*: where the original process was returnable at a day out of term: and it was therefore holden a void process.

Now here it is not shewn, "that the debt was to the amount of 10l.;" nor is the sum due sworn to, or the writ marked: all which are essentially requisite, by the said Act of 12 G. 1, c. 29, sections 1 & 2.

[331] Serjeant Poole, for the plaintiff, argued *è contra*, that the declaration is good, in its present form.

It is an action brought by an assignee of a bail-bond: which he properly sets forth; and then shews the bond to be forfeited: which is the whole that is necessary for the plaintiff to shew.

And if the sheriff has holden the defendant to bail, when he ought not, or improperly; the remedy of the defendant for that, is against the sheriff: but the bond itself is good, and not void; (however voidable it might possibly be by plea).

And he said he would mention a very late case, in proof of his position: which case was, by name, *Nordon v. Horsley*, determined last week, in C. B. It was an action on a bail-bond, taken for more than the sum sworn to; and this Statute of 12 G. 1 was pleaded: but the Court held the statute to be only directory; and over-ruled the plea.

Nor is it usual to insert this in the declaration.

Mr. Just. Denison—It is often done, and often not: I have often seen declarations of both sorts; some, one way; some, the other.

Mr. Whitaker, in reply. My objection is, "that there is not a sufficient authority set forth, for the sheriff to arrest the defendant." And there is no need to plead this: for it is a void bond.

3 Lev. 74, the case of *Graham v. Crawshaw*, proves the bond taken upon an impossible condition, to be contrary to the Statute of H. 6, (23 H. 6, c. 10,) and to be void by it.

And so, this bond also appears, upon the face of the declaration, to be a void bond, as being contrary to the statute.

And 12 G. 1 makes this circumstance essential to constitute a legal process; and must have reference to the Statute of the 23d of Henry 6th.

And this is not like the case of *Nordon v. Horsley* in C. B. where the bail-bond was only taken for a greater sum.

Here, the arrest was void; and consequently, the bail-bond was void too.

[332] Lord Mansfield—This has not been thought necessary to be set forth, till this time, ever since the making of the Act of 12 G. 1. Nor does it, upon reading the Act, appear to be an essential requisite to the validity of the bail-bond, nor in the nature of a condition precedent to it: but on the contrary, the Statute of 12 G. 1 appears to be only directory to the sheriff. So that though the sheriff may be himself answerable for such an omission, yet the bond is not void.

And I think, it is properly likened to the case of taking bail for a larger sum.

In both these cases, the sheriff, (or perhaps the plaintiff,) may be answerable or punishable; but the bond is not void.

Mr. Just. Denison concurred—he seemed to wonder that this point had never yet been determined.

He thought the plaintiff was not, in point of law, obliged to set this out, in order to entitle him to his action: though it certainly has been often done, *pro majori cautela*.

This original action appears to have been an *ac etiam* for 50l. ; and a good precept is set out.<sup>(a)</sup> Therefore the defendant was liable to be arrested. And it is set out “that he was arrested.” This Act of 12 G. 1 does not make the proceedings void, in case the defendant be arrested without affidavit and marking the sum sworn to, upon the back of the writ: it only prohibits the sheriff and plaintiff from doing it. And they may indeed be liable to an action upon the case for it; (though perhaps not to an action of trespass;) but it does not make the bail-bond void.

Therefore I think there is enough set out, in the declaration, to maintain this action of debt upon the bond.

Mr. Just. Foster concurred. The Act of 12 G. 1 is only directory: it does not make the process void. And as this objection has never been taken before, from the time when the Act of Parliament was made; I think it ought to be discouraged now, (after upwards of thirty years).

And if the fact was so, “that there was no affidavit,” the defendant might have been relieved in a much easier method; by applying to the Court, or to a Judge to be discharged upon common bail.

Per Cur. unanimously,

Judgment was given for the plaintiff.

[333] HENRY EARL OF CARLISLE *versus* ARMSTRONG ET AL'. Wednesday, 18th May 1757. Fines payable to the lord of the barony of Gillesland.

(Lord Commissioner Wilmot absent.)

This was a trial at Bar on the civil side of the Court.

Three questions were here to be tried.

1st. Whether, upon the death or alienation of the tenants of the barony of Gillesland in Cumberland, a reasonable arbitrary fine at the will of the lord, be payable to the lord, or not.

2d. Whether the tenants have liberty to let for three years, or mortgage, without licence of the lord, and without paying any fine at all.

3d. Whether they had liberty to exchange, &c. without licence or fine.

But the defendant's counsel said they did not intend to insist on the second question, so that the first and third only remained in dispute.

About six in the afternoon this trial ended in a verdict for the plaintiff, upon all the three issues.

REN *versus* WHITE AND WARD. Friday, 20th May, 1757. It is a common nuisance to make acid spirit of sulphur, and thereby impregnate the air with noisome stinks. [See 1 Hawk. P. C. 199, § 10.]

The defendants had been convicted of a nuisance in erecting and continuing their works at Twickenham, for making acid spirit of sulphur, oil of vitriol, and oil of aqua fortis. The indictment run thus, viz. that “at the parish of Twickenham, &c. near the King's common highway there, and near the dwelling-houses, of several of the inhabitants, the defendants erected twenty buildings for making noisome, stinking and offensive liquors; and then and there made fires of sea-coal and other things, which sent forth abundance of noisome, offensive and stinking smoke; and made, &c. great quantities of noisome, offensive, stinking liquors, called, &c.; whereby and by reason of which noisome, offensive and stinking, &c. the air was impregnated with

(a) Vide Sir T. Jones, 76; and qu. whether the bond might not be avoided by plea of duress? In *Strange*, 643, it was adjudged that the plaintiff, in debt on a bail-bond, need not shew an arrest. In *Str.* 444, and *Fortesc.* 364, it was adjudged that the defendant cannot plead there was no arrest; but in those cases there was a legal authority to arrest.



noisome and offensive stinks and smells; to the common nuisance of all the King's liege subjects inhabiting, &c. and travelling and passing the said King's common highway; and against the peace, &c."

[334] Sir Richard Lloyd—for the defendants—(on Monday 15th November, 1756,) would have moved a mixed motion; viz. both for a new trial and also in arrest of judgment; or, at least, in arrest of judgment first, and for a new trial afterwards. But,

The Court held, that neither of these methods could consist with the general rule of the Court, or with a particular rule, made in this case, to give them leave to move either of these motions on this day, though the four days given upon the *postea* were expired. Whereupon Sir Richard was obliged to begin with the motion for a new trial. And he said that this indictment was laid for making a liquor, from whence the air was impregnated with noxious, hurtful, unwholesome, and stinking qualities: and the English word "noxious" answers to the Latin "*nocivus*." But it appeared, he said, upon the evidence, that the fumes, however offensive and disagreeable to many persons, were by no means in reality noxious, hurtful or unwholesome; but the contrary.

Rule to shew cause: with this addition,—“that the defendants should have three days time to move in arrest of judgment; after the Court shall have given their opinion upon the present motion for a new trial, as upon a verdict against evidence.”

On Tuesday the 23d of the same month, Mr. Just. Denison reported the evidence; which was of great length, he said, there being about seventy-five witnesses on each side: however, he collected the substance of it together in his report. It appeared to be very strong on the part of the prosecution: and he declared himself satisfied with the verdict. And it appeared upon his report, that the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave them head-achs.

Mr. Just. Foster said that “noisome” and “noxious,” were synonymous terms; and that there was no other Latin word for “noxious” but “*nocivus*.”

The rule was therefore discharged, as to setting aside the verdict.

On the Saturday following, Sir Richard Lloyd, Mr. Norton, Mr. Serjeant Hewitt, and Mr. Nares, moved in arrest of judgment; (which was not yet signed). They objected to the indictment; it being laid generally, at the parish of Twickenham; and only said “near the common highway;” but not said to be in the town or vil[335]-lage: it may be upon a heath or common, for aught that appears to the contrary. Though it appears by 2 Ro. Abr. 139, title Nuisance, letter F. pl. 2, *Rankett's case*, that making candles even in a vill, which caused a noisome scent to the inhabitants, has been holden to be no nuisance.

But here, no offence is precisely laid. It charges “that by reason of the noisome, offensive and stinking smoke, the air was impregnated with noisome, offensive stinks and smells:” which are vague, uncertain terms. As to “noisome,” V. Minshew, and Skinner's Etymologicon.

Tremain's Pl. Cor. 195, *Rex v. Brookes* (for keeping a glasshouse) uses the words “unwholesome and dangerous.” Ibid. 198, *Rex v. Cole*, (for a nuisance in keeping a soap-boiler's furnace,) “unwholesome, turpibus, periculosissimis, contagious and infectious.” Here, it is only said to be “noisome and offensive.” It ought to have been laid precisely and particularly. \* 2 Hawk. P. C. 185, 186. “Hurtful” is also a vague term: it ought to have been laid to be insalubrious.

As to the vague term, “near,” there was a case of *Wilkes v. Broadbent*, Pasch. 1745, B. R. where a custom “to lay rubbish near the eye of a coal-pit” was held bad: though that was a civil suit, and the custom found by a verdict. Much more, upon an indictment. And this a lawful trade; and can become a nuisance only by accident, viz. by being so to a town or high-road. It can be indictable only for being exercised in the heart of a town. For, according to 2 Show. 327, *Rex v. Pierce*, “such trades ought not to be in the principal parts of the city; but in the out-skirts.” And the Court will not here presume that this was in the town. Besides hurtfulness is the gist of this indictment. Palm. 198, 199.

Serjeant Davy, Mr. Morton, Mr. Aston, Mr. De Grey, Mr. Stow, and Mr. Thurlow,

\* This relates only to indictments for murder and manslaughter. [S. C. 1 Wils. 63. *Strange*, 1224.]

contra, for the prosecution, answered, that "noisome" conveys indeed a complex idea; but still includes "hurtfulness." It stands in the place of the Latin word "nocivus," and certainly imports a nuisance, 2 Ro. Abr. 139, letter F. pl. 2, *Rankett's case* of a tallow-chandler is as it has been cited: but 1 Hawk. P. C. Pa. 199, c. 75, § 10, wonders at and disputes that determination.

"Near" is sufficiently certain; and was as particular as the nature of the thing would admit: for it was not equally near to all the houses. And after a verdict, it shall be intended to be so near as to be a nuisance.

As to the case of *Wilkes v. Broadbent*—a prescription must be certain: besides, that was laid too extensive and arbitrary. But here, its being laid "at the parish of [336] Twickenham" is sufficient. And in fact, it is a very populous place.

They cited *Jacob Hall's case*, 1 Mod. 76: who had erected a rope-dancer's stage at Charing-Cross. Per Hale, Ch.J. "It becomes a nuisance to the parish." That was the foot he put it upon. And this indictment of ours is laid extensively enough to be a common nuisance; though not a public one: nor did it, in fact, affect other persons than those living and passing near it.

Their objections come too late, after verdict: for it is a mere matter of evidence, "whether it was noxious, or not." And it is plain that the defendants understood the word "noxious" in the sense of "unwholesome;" because they defended themselves upon that foot, and examined many witnesses about the unwholesomeness of the stench. In Cro. Car. 510, *Tohaye's case*, (there cited in the case of *Morley v. Pragnell*,) erecting a tallow-furnace cross the street of Denmark House in the Strand was adjudged a nuisance, and to be removed. Nay, an offensive stench is of itself a nuisance; even though it should not be strictly hurtful. An indictment merely for a stench would have been good; even without any epithets. It depends upon rendering the property of other persons incommodious and uncomfortable to them: and this point is to be tried by a jury, "whether the thing be really such a prejudice or incommodiousness to the neighbourhood, as amounts to a nuisance." And here the jury have found it so.

And as to the place—that also is matter of evidence. The Court can not take notice, ex officio, of the boundaries of the parish of Twickenham. It is the concurrence of people that this point must depend upon. And "near" is the strongest word that we could use, agreeably to the circumstances of this case. And the jury, who have examined it, have found for us.

Sir Richard Lloyd in reply—asserted that the epithet "offensive" alone, would not be sufficient. And as to the word "near," he observed that the jury had not found how near it was. And the laying it generally "in the parish" at large, does not shew that it is a fact indictable: for it might be at a vast distance from any house, or place of resort.

Lord Mansfield thought there was nothing in the objections: which, he said, are reducible to three heads; viz.

1st. That there is no sufficient charge of the hurtfulness;

2dly. That it is not precisely charged, "to whom" the hurt is done;

[337] 3dly. That it only laid generally, "in the parish of Twickenham."

First—The jury have found "that it is to the common nuisance of the King's subjects dwelling, &c. and travelling, &c."

And the word "noxious" not only means "hurtful and offensive to the smell;" but it is also the translation of the very technical term "nocivus;" and has been always used for it, ever since the Act, for the proceedings being in English.

But it is not necessary that the smell should be unwholesome: it is enough, if it renders the enjoyment of life and property uncomfortable.

Secondly—The persons incommoded are sufficiently described: and the offence is charged to be to the common nuisance of persons inhabiting and travelling near, &c. And unless they had been so near as to be hurt by it, the indictment could not have been proved. Whereas in the case of *Wilkes and Broadbent*, it was quite uncertain how near the rubbish might be laid.

Thirdly—It is sufficiently laid, and in the accustomed manner. The very existence of the nuisance depends upon the number of houses and concurrence of people: and this is a matter of fact, to be judged of by the jury. And in the very cases in Tremaine 195, of a glasshouse, and 298, of a soap-boiler's furnace,—they are laid in parishes "apud paroch' &c." Therefore there is no foundation for the objections.

Mr. Just. Dennison—There is a sufficient legal certainty in this indictment: so that the defendants had an opportunity of making a proper defence at the trial.

Upon a former trial, the indictment then before the Court charged the air to be corrupted. This present indictment is better expressed. The word “noxious” includes the complex idea, both of insalubrity and offensiveness. And there was no need to specify particular instances of the effects of it. There is nothing in this objection. And it is also sufficiently charged, to whom the nuisance is done.

As to the laying it in a parish—it is likewise sufficient. In the case of *The King v. Blower*, Hil. 27 G. 2, B. R. the Court declared they would take the vill and the parish to be co-extensive: and they held that there were only two cases where it was necessary to lay a vill; which [338] were upon the Statute of Additions (where you are tied up to the vill), and in appeal of death, upon the Statute of Gloucester, cap. 9, the description of being “prope altam viam regiam,” is the common method. And it is laid ad commune nocumentum: and the jury have found it, as it is laid. Therefore I think it is in legal form.

Mr. Just. Foster—The only question is “whether the fact laid implies a nuisance.” I think it does. Otherwise, the mere laying it to be “ad commune nocumentum,” would not perhaps help it. This is certainly a common nuisance. And “near the highway and dwelling-houses,” is properly alledged, in order to shew it to be so. V. 1 Strange 686, 687, *Rex v. Pappineau*, H. 12 G. 1, B. R. in point, accord. It never was objected that laying a robbery “in or near” a \* highway, is bad: no; it is matter of evidence.

(Note—Mr. Justice Wilmot was absent, in the Court of Chancery.)

So that the Court were unanimous in denying the motion.

Yet N.B. That (according to the usual course in like cases) no rule at all was here taken in the rule-book: only, the counsel for the defendants took nothing by their motion in arrest of judgment.

On Thursday 5th May 1757, on a motion for the judgment (or rather sentence) of the Court upon the defendants, for the offence whereof they stood convicted,—it appearing that the nuisance was absolutely removed; (the works being demolished, and the materials, utensils and instruments, all sold and parted with;) they were, upon entering (each for himself only, and for such as acted for or under him) into a rule “not to renew them,” only fined 6s. 8d. each. But on a dispute afterwards arising, how the rule should be drawn up, it was on Friday 20th May settled by the Court to be thus—“By consent of counsel on both sides, it is ordered that, upon the defendant Ward’s undertaking that neither he nor any other person by his consent or direction or for his use or benefit, shall for the future make or cause to be made in the works lately carried on by the defendant White at Twickenham, mentioned in the indictment in this cause, any acid spirit of sulphur, or preparations of vitriol, or oil of aqua fortis; a fine of 6s. 8d. be set upon the said defendant Ward, for the nuisance of which he has been convicted.” And

The defendant White entered into a like rule, mutatis mutandis.

[339] BOND *versus* ISAAC. 21st May 1757. Person listed surrendered by his bail. [Vide post. 409.]

The defendant being brought into Court in obedience to a writ of habeas corpus applied for by his bail; and it being agreed that he was in custody of the keeper of the Savoy, as an impressed man; the counsel on behalf of the bail, insisted upon their right to surrender him.

The Court (namely Lord Mansfield, Mr. Just. Denison, and Mr. Just. Foster) had no doubt of their right: but only hesitated as to the disposition of him, after he had been surrendered. Lord Mansfield mentioned the clause in the Pressing Act (V. 29 G. 2, c. 4, § 14, p. 175), of not taking him out of the service. Mr. Just. Denison cited two cases: viz. 1 Strange 641, the case of *The Bail of Boise and Sellers*, in this Court; where the defendants were returned to be charged with two civil suits and several Exchequer informations for frauds in the customs: and when the Court was satisfied of the reality of the debts and priority of the actions here, the defendants were surrendered, and committed to the marshal. And a case in Tr. 22,

\* V. 1 E. 6, c. 12, § 10, 3dly.



23 G. 2, *Res v. Chilly*, B. R. where the defendant was returned to be charged with a contempt in the Exchequer: he was surrendered by his bail here; and committed to the marshal; who was immediately served with a new habeas corpus, to remove him to the Fleet.

This man is a soldier now; and by this Act cannot be taken out of the King's service, but upon some criminal matter: (V. the Act, as above). So that it seems that he may be remanded to the Savoy, in the present case.

Mr. Just. Foster—In the cases cited by my brother Denison, the proceedings were grounded on 25 E. 3, c. 19, (which enacts "that the King's debtors shall not be protected from the proceedings of their other creditors against them:") and it was a matter of right. This is an indulgence to the bail, to permit them to bring in the defendant and surrender him. But we cannot take him out of the King's service; this not being a criminal matter: (V. *ut supra*, 29 G. 2, c. 4, § 14), so that we may, after we have entered an exoneretur upon the bail-piece, remand him to the legal custody at the Savoy.

Lord Mansfield—We may first commit him to the marshal; and then remand him, immediately, to the Savoy.

[340] Suppose him to be a soldier at large, (not in custody;) and that his bail were to bring him in, and surrender him; he must be committed to the custody of the marshal upon such surrender; but instantè set at large: and so we may do here. And accordingly,

Per Cur. He was, upon being surrendered by his bail, first committed to the custody of the marshal: but the marshal was ordered to deliver him instantè to the keeper of the Savoy; and he did so, immediately, in Court. And an exoneretur was ordered to be entered upon the bail-piece. V. post.

CAPRON *versus* ARCHER. 1757. Bail shall have time to surrender principal after writ of error brought by him.

Upon a question concerning the terms upon which the bail should have time to surrender the principal, after a writ of error brought—

Mr. Just. Denison and Mr. Just. Foster, the only two Judges in Court, held that it was the allowance of the writ of error, that was a supersedeas to the proceedings below: and that the notice of its being allowed was only to bring the party in possession of the judgment below, into contempt, in case he should persist in proceeding thereupon subsequently to such notice. And therefore, as in the present case, the defendant's writ of error was allowed before the time was expired within which the bail had indulgence to surrender the principal, though notice of such allowance was not given to the plaintiff's attorney till after the expiration of that time; the Court gave the bail the same terms as are usual where they apply within the time indulged to them (by the present course of the Court) for surrendering the principal. And accordingly, the rule to shew cause why the proceedings "upon the writs of scire facias issued against the bail should not be stayed, until the writ of error shall be determined; the bail undertaking to pay the plaintiff the damages recovered by the said judgment, or surrender the defendant into the custody of the marshal of the Marshalsea of this Court within four days next after the determination of the said writ of error, in case the same shall be determined in favour of the defendant in error," was made \* absolute.

[341] PELLY THE YOUNGER *versus* GOVERNOR AND COMPANY OF THE ROYAL-EXCHANGE ASSURANCE. Monday, 23d May 1757. The sails and furniture of a ship taken thereout and lodged in a warehouse, if accidentally burnt by fire before the ship returns from the voyage, shall be made good by the underwriters. (See 4 Durn. 207. 2 Bosan. 431.)

[Referred to, *Rodocanachi v. Elliott*, 1873, 74, L. R. 8 C. P. 669; L. R. 9 C. P. 518; *Pearson v. Commercial Union Assurance Company*, 1876, 1 App. Cas. 502.]

This came before the Court, upon a case reserved on a trial at Guildhall, before

\* For the clearer understanding of the different terms granted to the bail, under different circumstances, see *Myer v. Arthur*, 1 Strange, 419. *Hunter v. Sampson & Al'*,

Lord Mansfield : where a verdict was found for the plaintiff, subject to the opinion of the Court. It was an action of covenant upon a policy of insurance.

Case. The plaintiff being part-owner of the ship "Onslow," an East-India ship, then lying in the Thames, and bound on a voyage to China and back again to London, insured it at and from London, to any ports and places beyond the Cape of Good Hope, and back to London : free from average under ten per cent. upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the said ship : beginning the adventure upon the said ship, &c. from and immediately following the date of the policy ; and so to continue and endure until the said ship, with all her ordnance, tackle, apparel, &c. shall be arrived as above, and hath there moored at anchor twenty-four hours in good safety. And it shall be lawful for the said ship, in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever, without prejudice to this assurance. The perils mentioned in the policy, are the common perils ; viz. of the seas, men of war, fire, enemies, pirates, &c. &c. and all other perils, losses and misfortunes, &c. The premium was seven guineas per cent. with the usual abatement of two per cent. in case of a loss.

The ship sailed, &c. ; arrived in the river Canton in China ; where she was to stay, to clean and refit, and for other purposes. Upon her arrival there, the sails, yards, tackle, cables, rigging, apparel, and other furniture were, by the captain's order, taken out of her, and put into a warehouse or storehouse called a bank-saul, built for that purpose on a sand-bank, or small island, lying in the said river, near one of the banks, called Bank-Saul Island, about two hundred or two hundred and twenty yards in length, and forty or fifty yards in breadth ; in order to be there repaired, kept dry, and preserved till the ship should be heeled and cleaned, and refitted. Sometime after this, a fire accidentally broke out in the bank-saul belonging to a Swedish ship ; and communicated itself to another bank saul, and from thence to the bank-saul belonging to the "Onslow" ; and consumed the same, with all the sails, yards, tackle, cables, rigging, apparel, and other furniture belonging to the "Onslow," which were therein.

[342] It was stated, that it was the universal and well known usage, and has been so for a great number of years, for all European ships which go a China voyage, except Dutch ships, (who for some years past are denied this privilege by the Chinese, and look upon such denial as a great loss,) "when they arrive near this Bank-Saul Island, in the river Canton, to unrig the ship, and to take out her sails, yards, tackle, cables, rigging, apparel, and other furniture ; and to put them on shore, in a bank-saul built for that purpose on the said island (in the manner that had been done on the present occasion by the captain of the "Onslow"), in order to be there repaired, kept dry, and preserved until the ship should be heeled, cleaned, and refitted." And the case further states that it appears that the so doing is prudent, and for the common and general benefit of the owners of the ship, the insurers, and insured, and all persons concerned in the safety of the ship.

The ship arrived from her said voyage, in the Thames, in September 1755 ; (having been unrigged, and put in the best condition the nature of the place and circumstances of affairs would permit.)

Question. Whether the insurers are liable to answer for this loss, (so happening upon this bank-saul,) within the intent and meaning of this policy.

Mr. Williams, for the plaintiff,—after premising, that this question arises upon the construction of a policy of insurance ; that these policies of insurance are of ancient date ; are beneficial, as they tend to divide the risque ; and have been every where encouraged, in trading countries ; made these three divisions of his argument.

1st. He undertook to prove that the plaintiff's demands are founded on strict justice.

2dly. That they are agreeable to both the words and meaning of the policy ; and supported by legal determinations.

3dly. He said he would mention the opinion of foreign lawyers, upon the subject. Indeed it has been objected "that this is not a loss at sea ;" but "a loss at land."

First, the policy is general : it is not confined to losses at sea.

2 Strange, 781. *Everett v. Gery*, 1 Strange, 343. *Richardson v. Jelly*, 2 Strange, 1270. *Cole v. Buckland*, 2 Strange, 872 : (particularly the first and fourth of these cases ; which shew the distinction).

[343] Secondly.—This is not a loss at land: it is what happened upon a sand bank in the river.

Then he proceeded to his three heads or divisions of his argument.

1st. As to the justice of the plaintiff's case—

The insurers have professedly and explicitly insured the ship and all her rigging, furniture, &c. from fire, &c. from her going out to her return: and they must be taken to be apprised of the usage; and to have calculated their premium accordingly. And what has here been done is stated to have been done “for the benefit of the insurers, and of the ship, and of all persons concerned in the safety of it;” and also “to have been prudent.”

If the body of the ship had been burnt in this interim; and these sails and furniture had been saved by being in this warehouse; the insurers would then have had the benefit of this salvage. Therefore they ought, in the contrary event, to be answerable for them, when they were by these means burnt, and the ship not burnt. It was the captain's duty, to perform the voyage in the usual and proper course. And this was so far from being a neglect or misbehaviour in the captain, that he is stated “to have acted prudently, and for the benefit of the insurers, and of all concerned.”

2dly. This is within the words of the policy—it is an insurance from “London to any ports or place beyond the Cape of Good Hope and back; and during the voyage:” and fire is expressly insured against.

And it is also within the meaning and intent of the policy. For this loss has happened within the usual course of the voyage, and of this species of trade. And therefore the insurers are liable. And this is the true distinction. To prove which, he cited 2 Salk. 445, *Bond v. Gonsales*: “deviation or not, must be taken according to the necessity and usage.” *Clayton v. Simmons*, 11th March 1741, at Guildhall. Per Lee, Ch.J. “If the master puts into a port not usual, or stays an unusual time, it is a deviation and discharges the insurer: not, if he does as usual.” *Tierney v. Etherington*, 5 March 1743, per Lee, Ch.J. at Guildhall—The goods were unloaded and put into a store-ship at Gibraltar; and there lost. The question was, whether this was a loss at land; or a loss in the voyage. He held “that policies ought to be construed largely, and for the benefit of the insured; and according to the course of trade and the methods [344] usual at the place:” and as that was the known course of trade at Gibraltar, he held “the insurers to be responsible.” And in Easter term following (P. 1744, 17 G. 2), there was a motion for a new trial: which was refused. Now that was not within the words of the policy: and yet holden to be within the meaning of it.

Where an insurance is for one entire voyage, the contract can not be suspended, and revived again: if it be suspended at all, it is determined. And yet they will hardly argue, that this contract was absolutely determined by this Act that is stated.

3dly. As to the opinions of foreign writers they hold—“that where the assurance is general, the insurer is liable to all loss happening in the usual course of the voyage.”

And to this purpose, he cited, Loccenius, *De Jure Maritimo*, L. 2, c. 5, sect. 10, *De Aversione Periculi*. Whose distinctions turn upon the master's pursuing the usual course of the voyage, Marcellus, *De Jure Mercator*, L. 2, c. 15, No. 148, Roccus, *De Assecurationibus*, No. 138. The insurer is liable for all losses durante itinere.

So that the principles of justice and equity, the strictness of law, and the opinions of foreign writers, all concur in favour of the plaintiff.

Sir Richard Lloyd, for the defendants (the insurers), agreed to Mr. Williams's general principles; and that the insurers were liable for all losses during the course of the voyage. But he denied Mr. Williams's conclusions; and insisted that this policy was certainly confined to losses at sea: whereas this loss was a loss on shore. This is a policy upon the body of a ship; and therefore is manifestly confined to losses at sea only. Besides, these goods are averred, by the very declaration itself, “to have been carried \* on shore.” And its being an insurance “out and home,” does not interfere with this position. As to the supposition “that the ship had been burnt, and the sails, &c. saved;” it is no argument at all: for if they had not been lost, the insurers could not certainly have been liable to pay for them. As to the prudence of

\* Some of the breaches are so assigned.



the captain—it might be prudent with regard to the owners : but this care of them is not to affect the insurers. He is indeed to act his best, for both : but *diverso intuitu* ; and not to serve the one, at the risque of the other. As to the words of the policy—he denied it to be within them ; referring himself to the words themselves.

The cases cited do not affect the present case : and foreign writers have said no more than English ones. For, no doubt, the insurance must be understood to be in the usual course of trade, and *durante itinere*. But the question is, “what is the *iter* insured ?”

[345] This is a common policy of insurance, in the old and ordinary form : and it must be understood, as these policies were understood, before the East-India Company had a being. And the intent of it must be collected from the instrument itself.

Now this is an insurance of the ship with its tackle and furniture, &c. from port to port. And policies must be construed upon the words of them, or from necessary consequences. If any thing beyond the natural import of the words was intended, it ought to have been specified : if not specified, it cannot be supposed.

The Court alone are to judge of the extent of the contract. And these contracts have been construed strictly. A deviation from the particular voyage insured, shall discharge the insurer ; unless a necessity intervenes ; which does, and ought to alter the case. But even that must be within the compass of the voyage described ; for if it happens after a deviation, the insurer is discharged, even though the ship should have returned into the right road again, before the accident happened. Now this present accident did not happen within the voyage insured ; for it happened at land.

But Mr. Williams says “this happened in the course of trade.” My answer is, “that we have nothing to do with the course of trade.” We have nothing to do with any thing but the course of navigation ; which is quite a different thing. The sails, tackle, &c. were insured in the ship ; and if the captain takes them out of the ship and puts them any where else, the insurers are not answerable. And its being for the benefit of the ship, &c. makes no difference. It did not arise from necessity : much less from a necessity arising in the voyage. This act of mere prudence or convenience cannot affect the insurers. And their knowing this to be the course of the voyage, will not prove that they meant to insure any thing at land. They cannot, by their charter, do it ; for that restrains them from insuring at land : and therefore they certainly never intended it. As to the case of *Tierney v. Etherington*, P. 17 G. 2. It was not a common policy. It was thereby agreed “that they might unload, &c. and reship into an English ship.” But no English ship being there, they unloaded upon a store-ship. And this was a peril at sea ; for the ship was lost at sea : so that it strictly and properly was within the voyage. And as to its being the mode of re-shipping, in case no other ship was there ; here is no such agreement in the present case, as was there inserted in the policy : so that it was within the very terms of the policy, in that case. He cited the case of *Fitzgerald v. Pole*, in P. 23 G. 2, in B. R. and afterwards in Dom’ Proc. in May 1752 ; which was an insurance of a privateer for [346] four months : and there the whole cruise was by this Court understood to be insured ; and the insurers were holden here, to be bound, though the ship itself was safe ; and accordingly they gave judgment for the plaintiff. But the House of Lords held them discharged ; as the ship was safe ; and affirmed the judgment of the Exchequer Chamber, who had reversed that of B. R. And there is no inconvenience in my doctrine : because whatever is by the parties particularly meant to be insured, beyond the general meaning of the words, may be specially inserted in the policy ; and then all will be clear : and nothing left to uncertain construction.

Mr. Williams in reply—

This fire happened during the course of the voyage. And this insurance is not merely upon the ship ; but upon the rigging, sails, tackle and furniture likewise ; which in their nature are capable of being carried on shore, and usually are so, upon these occasions, as is expressly stated.

And this is a loss happening in port. It is the proper, and the only port, where the English can clean and refit their ships. And being upon a sand-bank in the river, is a loss at sea, not at land. If the goods cannot be removed from on board one ship to another, the reason of that must be, that the insurer has had only that particular ship in contemplation, on which he insured ; and perhaps the care and caution of the master of it too, as well as the goodness of the ship.

This taking out and depositing the rigging, sails, and furniture, was a necessary act; and is done by all the nations in Europe, except the Dutch; who are stated to consider it as a disadvantage that they are not permitted to do it. And it is stated to be for the benefit of the ship, and of the insurers, and all concerned. And this being the usual course of the voyage, it was unnecessary to particularize or specify this in the policy: it must necessarily have been in the contemplation of the insurers.

And as to the Company's being obliged by their charter not to insure on land—the merchants insuring with them are not obliged to know this: nor do the Company in fact practise it. Besides, if they do it, notwithstanding their charter, they are not the less bound to answer what they have undertaken. And indeed the charter only means to preclude them from insuring houses and buildings at land, (which is quite another thing;) not ships at land.

As to the case of *Fitzgerald v. Pole*, there was no loss of the thing insured: whereas here is a loss of the very thing insured.

[347] Lord Mansfield said it was very necessary that the determinations upon policies of insurance should be fixed and certain: and therefore they would consider this matter, and look into the cases; and then (within the term) give their opinion.

Cur. advisare vult.

Lord Mansfield now delivered the opinion of the Court.

He stated the case minutely, and then the question; which was "whether this was a loss for which the insurers are responsible, within the intent and meaning of the above-mentioned policy of insurance."

By the express word of the policy, the defendants have insured the tackle, apparel and other furniture of the ship "Onslow," from fire, during the whole time of her voyage, until her return in safety to London without any restriction.

Her tackle, apparel, and furniture were inevitably burnt in China, during the voyage, before her return to London.

The event then which has happened is a loss within the general words of the policy: and it is incumbent upon the defendants, to shew, from the manner in which this misfortune happened, or from other circumstances, "that it ought to be construed a peril which they did not undertake to bear."

From the nature, object, and utility of this kind of contract, consequences have been drawn; and a system of construction established, upon the ancient and inaccurate form of words in which the instrument is conceived.

The mercantile law, in this respect, is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.

Hence, among many other, the following rules have been settled.

If the chance is varied or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable: because he is understood to engage that the thing shall be done, safe from fortuitous dangers; provided due means are used by the trader to attain that end.

[348] But the master is not in fault, if what he did was done in the usual course, or necessarily *ex justâ causa*.

The insurer, in estimating the price at which he is willing to indemnify the trader against all risques, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Every thing done in the usual course must have been foreseen and in contemplation, at the time he engaged. He took the risque upon a supposition that what was usual or necessary, would be done.

It is absurd to suppose, when the end is insured, that the usual means of attaining it are meant to be excluded.

Therefore when goods are insured, "till landed;" without express words, the insurance extends to the boat, the usual method of landing goods out of a ship, upon the shore.

If it is usual to stay so long at a port, or to go out of the way, the insurer is considered as understanding that usage. *Bond v. Gonsales*, 2 Salk. 445, was so ruled by Ld. Ch. J. Holt.

If goods are insured on board one ship, to a port; and from thence, on board another ship, the first that can be got; the insurance extends through all the inter-

mediate steps of removing from one ship to the other, as usual. \* For the means must be taken to be insured, as well as the end.

All this has been determined in the case of *Tierney v. Etherington* at Guildhall, 5th March 1743. That was an insurance on goods in a Dutch ship, from Malaga to Gibraltar, and at and from thence to England and Holland, both or either; on goods as here under agreed; beginning the adventure from the loading, and to continue till the ship and goods be arrived at England or Holland; and there safely landed.

The agreement was, "that upon the arrival of the ship at Gibraltar, the goods might be unloaded and reshipped in one or more British ship or ships, for England and Holland; and to return one per cent. if discharged in England."

It appeared on evidence, that when the ship came to Gibraltar, the goods were unloaded and put into a store-ship (which it was proved was always considered as a warehouse;) and that there was then no British ship there. Two days after the goods were put into the store ship, they were lost in a storm.

For the defendant it was insisted that the insurance was only upon the Dutch and British ships: and that it [349] did not extend to the store-ship; which is considered as a warehouse at land, and so not a peril at sea.

For the plaintiff, it was insisted, that this was a loss in the voyage: for the policy is, for all losses at Gibraltar, as well as to and from. If there had been a British ship there, and the goods had been put into a lighter, in order to go to the British ship, and lost in the way; that would have been a loss within the policy. We have liberty to unload and reship, and therefore have a liberty to use all the means in order to do that.

Lee, Ch.J. said—It is certain, that, in construction of policies, the strictum jus, or apex juris is not to be laid hold on: but they are to be construed largely, for the benefit of trade, and for the insured. Now it seems to be a strict construction, to confine this insurance only to the unloading and reshipping, and the accidents attending that act. The construction should be according to the course of trade in this place. And this appears to be the usual method of unloading and reshipping in that place: viz. "that when there is no British ship there, then the goods are kept in store ships."

He added, that where there is an insurance on goods on board such a ship; that insurance extends to the carrying the goods to shore in a boat. So if an insurance be of goods to such a city; and the goods are brought in safety to such a port, though distant from the city; that is a compliance with the policy, if that be the usual place to which the ships come.

Therefore as here is a liberty given of unloading and reshipping, it must be taken to be an insuring the goods under such methods as are proper for the unloading and reshipping. Here is no neglect on the part of the merchant, (the insured:) for the goods were brought into port the 19th and were lost the 22d November.

This manner of unloading and reshipping is to be considered as the necessary means of attaining that which was intended by the policy; and seems to be the same as if it had happened in the act of reshipping from one ship to the other. And as this is the known course of trade, it seems extraordinary if it was not intended.

This is not to be considered as a suspension of the policy, during the unloading and reshipping from one ship to another. For, as the policy would extend to a loss [350] happening in the unloading and reshipping from one ship to another, so any means to attain that end come within the meaning of the policy.

And accordingly, a verdict was given for the plaintiff.

In the Easter term following, a new trial was moved for; but it was refused, by Lord Ch. J. Lee, Mr. J. Chapple, and Mr. J. Denison; Mr. J. Wright indeed being of a different opinion; namely, "that it was a removal at the peril of the insured."

So in the present case, the same reasoning will hold. And in general, what is usually done by such a ship, with such a cargo, and in such a voyage, is understood to be referred to by every policy; and to make a part of it, as much as it was expressed.

The usage being foreseen, is more strongly allowed to be done, than what is left to the master's discretion upon unforeseen events: yet if the master, ex justâ causa,

\* Ut supra.



goes out of the way, (as to refit, or to avoid enemies, pirates, &c.) the insurance continues.

Upon these principles, it is difficult to frame a question which can arise out of this case, as stated.

The only objection is, "that they were burnt in a bank-saul and not in the ship; upon land and not at sea, or upon water; and being appertinent the ship, losses and dangers ashore could not be included."

The answer is obvious. (1st) The words make no such distinction. (2dly) The intent makes no such distinction.

Many accidents might happen at land even to the ship.

Suppose a hurricane to drive it a mile on shore. Or an earthquake may have a like effect. Suppose the ship to be burnt in a dry dock. Or suppose accidents to happen to the tackle upon land, taken from the ship, while accidentally and occasionally refitting; as on account of a hole in its bottom, or other mischance.

These are possible cases. But what might arise from an accidental occasion of refitting the ship, is not near so strong as a certain necessary consequence of the ordinary voyage, which the parties could not but have in their direct and immediate contemplation.

Here the defendants knew that the ship must be heeled, [351] cleaned and refitted, in the river of Canton. They knew that the tackle, &c. would then be put in the bank-saul. They knew it was for the safety of the ship, and prudent that they should be put there.

Had it been an accidental necessity of refitting, the master might have excused taking them out of the ship *ex justâ causa*. But describing the voyage is an express reference to the usual manner of making it, as much as if every circumstance was mentioned.

Was the chance varied by the fault of the master? It is impossible to impute any fault in him.

Is this like a deviation? No: It is *ex justa causâ*; which always excuses.

And yet Sir Richard Lloyd, being pressed in this argument, was obliged to insist, "that it resembled a deviation: which determines the insurance, and discharges the insurer."

Answer. This supposes the parties to insure from London and back again, knowing that the policy would be determined in the river of Canton: which would be absurd. Besides it ought to make a difference in the premium: yet the underwriters have all kept the premium upon other China voyages.

One objection was formed by comparing this case to that of changing the ship or bottom, on board of which, goods are insured: which the insured have no right to do.

Answer. There the identical ship is essential: for that is the thing insured. But that case is not like the present.

Another objection was, "that policies ought to be construed strictly, and not to be extended to cases omitted:" (which latter position is true; and must be agreed).

Answer—But that is not the present case: for this is not a *casus omissus*, but clearly within the view and *bonâ fide* intent of the policy.

The case of *Fitzgerald v. Pole* is no way applicable to the present. The question there was, "whether it was a partial or a total loss, within the meaning of the policy." In that case, there was nothing fixed by usage, or by known and established construction, (as there is in this case:) so that no inference can be drawn from that case, concluding to this.

Here the defendants knew that the tackle and furniture would be put in this bank-saul, as the usual, certain consequence of the voyage at sea; which always made it necessary to heel, clean and refit the ship in the river [352] of Canton. Had the insurers been asked, they must, for their own sakes, have insisted they should be put there as the best and safest method. They would have had reason to complain, if, from their not being put there, a misfortune had happened: in that case the master would have been to blame, and by his fault would have varied the usual chance.

They have taken a price for standing in the plaintiff's place, as to any losses he might sustain in performing the several parts of the voyage; of which this was known and intended to be one.

Therefore we (all of us who \* heard the argument) are very clearly of opinion, that in every light and in every view of this case, in reason and justice, and within the words, intent and meaning of the policy, and within the view and contemplation of the parties to the contract, the insurers are liable to answer for this loss. Wherefore

Per Cur. Let the postea be delivered to the plaintiff.

ANDERSON *versus* GEORGE. Verdict obtained by stratagem, set aside without costs on either side.

Upon a rule for the plaintiff to shew cause "why a verdict obtained by him for 16l. should not be set aside, and a new trial ordered, upon payment of costs."

The case appeared to be, that the plaintiff had sold goods to the defendant: who paid for them by a promissory note of one Hopley, which the defendant indorsed. The plaintiff demanded the money of Hopley: but indulged him with further day of payment, several times, till Hopley broke.

The only dispute between the parties was, "which of them ought to bear the loss of this note." For the plaintiff was paid; if the loss ought to fall upon him, through his neglect or indulgence in giving further credit to Hopley.

There were two counts in the declaration: one, for goods sold; the other, against the defendant as indorser of the promissory note.

When the cause came on to be tried, though both parties came to try the real merits of the question between them, viz. "which should bear the loss of the note occasioned by Hopley's failure;" and the plaintiff's agents had the note in Court; yet finding upon their own evidence, "that the plaintiff had given repeatedly further credit to Hopley," they resorted to a trick and rested their case upon proving the sale and delivery of the goods, which never was disputed. The defendant could not produce the note: it was in the plaintiff's custody. Relying upon its [353] being the only ground of the plaintiff's case, the defendant had not given him notice "to produce it." The count stating it, could not be given in evidence: and the defendant had not entitled himself to prove the contents, for want of notice to produce it. Lord Mansfield told them, at the trial, it was an improper artifice; that no verdict could stand, which was so obtained. But the plaintiff refused to produce the note; and had a verdict of course.

It was now contended, for the plaintiff, that the verdict was regular, and the plaintiff in no fault: for, without notice, he was not obliged to produce the note. Therefore the verdict ought not to be set aside.

The Court thought the plaintiff had taken an unfair advantage, contrary to justice and good conscience. That the rules of practice must be general: but he who abused them in a particular case, should not shelter a trick, by regularity. The plaintiff did not want notice to produce a note he had in Court, and which he had laid in the declaration as his ground of action. Besides, he took a verdict for the price of the goods; though he had received satisfaction, the evidence of which was in his own custody and suppressed.

They not only set aside the verdict; but set it aside without payment of costs: and declared, "the next time that a party should obtain a verdict in like manner, by an unfair, unconscionable advantage, without trying the real question, they would set aside the verdict, and make him pay the costs."

A new trial being ordered, this cause was tried at Guildhall, the sittings after this term: and the defendant had a verdict upon the merits, to the satisfaction of every body; the case being clear beyond a doubt.

### [354] REX *versus* INHABITANTS OF BENTLEY.

See this case at large, in the quarto edition of my Settlement-Cases, No. 135, pa. 425.

The end of Easter term 1757, 30 Geo. 2.

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\* Mr. Just. Wilmot was not present; being engaged in Chancery, as one of the Lords Commissioners.

[357] TRINITY TERM, 30 & 31 GEO. II. B. R. 1757.

REX *versus* INHABITANTS OF GREAT TORRINGTON. Monday, 13th June, 1757.

See this case at large, in the quarto edition of my *Settlement-Cases*, No. 136, p. 428.

[358] V. the next case, *Rex vers. Inhabitants of Keynsham*: which is the same point, and determined on the like concession of the adverse counsel.

REX *versus* INHABITANTS OF KEYNSHAM. Tuesday, 14th June, 1757.

See the last case—S. P.

This case also may be seen at large in the abovementioned book, No. 137. p. 439.

WELLER *versus* GOYTON AND WALKER. Wednesday, 15th June, 1757. Action against two; judgment against one by default; rule for judgment for the other as in case of a non-suit: yet this defendant cannot have his costs taxed as in such a case. [S. C. Sayer's *Law of Costs*, 142. See also 3 Durn. 662.]

Action against two, upon a joint-promise: judgment against Walker, by default; issue joined by Goyton: and the plaintiff neglected to bring it on to trial: and the common rule was obtained, for judgment as in case of a nonsuit.

This was a question on 14 G. 2, c. 17. § 1, concerning the Court's giving judgment as in cases of nonsuit: and it arose upon a doubt of the Master's, "whether he could tax costs as in case of a nonsuit: as there was a judgment by default, for the plaintiff, against the other defendant."

Mr. Lawson moved for the direction of the Court to [359] the Master, that he should tax the defendant Goyton his costs, pursuant to the rule.

Lord Mansfield (though no counsel appeared on behalf of the plaintiff) had a doubt, "whether there could be judgment as in case of a nonsuit, in a case where the plaintiff was not liable to a nonsuit." This Act of 14 G. 2, c. 17, enacts, "that all judgments given by virtue of it, shall be of the like force and effect, as judgment upon nonsuit: and of no other;" (§ 2). And provides "that the defendant or defendants shall, upon such judgment, be awarded his, her, or their costs, in any action or suit where he, she or they would upon nonsuit be entitled to the same; and in no other action or suit whatsoever." (§ 3.) So that the point seems to be "whether the plaintiff could, in this case, have been nonsuited at the trial." For if he could not, then the case of a nonsuit does not here exist: and consequently the Court cannot give judgment and costs, as in case of a nonsuit, when the case of a nonsuit does not at all exist. Now here was a judgment obtained by the plaintiff against one of the defendants, already; how then can the plaintiff be out of Court as to him? but if he is nonsuited in this action, he will be out of Court, as against both defendants.

Mr. Just. Denison seemed to think, also, that the plaintiff would not have been liable to a nonsuit at the trial. And to that purpose, he recollected and mentioned the case of *Greeves v. Roll and Newell*; which is wrong in 2 Salkeld, title Nonsuit, pl. 5, pa. 456.\*

Nothing was taken by the motion.

HALL ET UX' *versus* WOODCOCK. 1757. On error to reverse a common recovery there must be a scire facias against the terre-tenants.

Trin. 1756, 29, 30 G. 2, Rot'lo. 921.

(Lord Commissioner Wilmot absent, in Chancery.)

Error to reverse a common recovery. The error assigned was—"that the vouchee, before the rendering of the judgment, died without issue." Upon the scire faciases previously issued against the demandant in the writ of entry, and against the terre-

\* See S. C. also, at large, in cases in B. R. temp. W. 3, p. 651 (called 12th Mod.), and in 1 Ld. Raym. 716, (both better reported).



tenants, &c. who [360] were returned to have been summoned, &c. and thereupon errors assigned; Lucas, the demandant, comes in and pleads "that there is no error:" and one of the terre-tenants suffered judgment by default. But Woodcock, who was also one of the terre-tenants, praysoyer of the scire facias; and pleads "non-tenure, and that Henry Balguy and his wife are the terre-tenants:" and prays judgment on the scire facias. To this plea there is a demurrer, by the plaintiffs in error; and a joinder in demurrer, by Woodcock the terre-tenant.

Serjeant Poole for the demurrer, viz. for the plaintiffs in the scire facias, and in error.

The scire facias which issued against the terre-tenants is not ex necessitate, nor ex debito justitiæ; but only discretionary in the Court, and only to see if the terre-tenant has a release of errors: but the terre-tenant cannot plead "non-tenure," and "that another person was tenant of the freehold, at the time of the issuing of the scire facias." That other may as well plead (in like manner) to another scire facias to be issued against him, "that a third person is tenant of the freehold;" and so on. And the terre-tenant's title will not be affected by this judgment and recovery: for an ejectment must be brought. The terre-tenant cannot plead in abatement of the writ of error; but only in bar of it. 1 Lev. 72, 130, 146, *Winn v. Lloyd* is so. 1 Siderf. 213, S. C. 1 Keb. 54, 351, &c. S. C. Sir T. Raym. 15, 55, S. C. Dyer, 321 a. is also a strong intimation "that the terre-tenant can only plead in bar of the writ of error." The case of *Winn v. Lloyd* is in point. And the present case must be taken to be a plea put in merely for delay, (as that was).

Mr. Luke Robinson contra for the defendant Woodcock, whose plea was demurred to. It appears upon the whole record, that the plaintiffs in error have no title: and if so, there is an end of the matter.

As to this plea of the terre-tenant, "of non-tenure; and that Balguy and his wife are the terre-tenants"—the fact is admitted by the demurrer: and the plaintiffs in error ought to have taken out a new scire facias against Balguy and his wife. The scire facias against the terre-tenant is of necessity, and not discretionary. For the tenant to the præcipe is merely nominal: but it is the terre-tenant who is the true tenant of the freehold. And the terre-tenant may plead many other pleas besides a release; he may plead "that the plaintiff has conveyed the land to another;" or he may plead "non tenure." That "a scire [361] facias against the terre-tenant is strictly necessary," is proved by 3 Mod. 119,\*<sup>1</sup> *Kingston v. Herbert*. 3 Mod. 274, *Anon.* says, "that there †<sup>1</sup> should be a scire facias both against the heir and against the terre-tenants." (Now here is none against the heir, at all.) Dyer, 321 a. b. proves expressly, "that there ought to be a scire facias to the terre-tenants before the Court proceeds to an examination of the errors." 5 Mod. 209, *Stokes v. Oliver*. A writ of error was brought to reverse a common recovery; and there was a scire facias against the terre-tenants. 6 Mod. 134, *Adams v. Terre-Tenants of Savage*, was a scire facias by the administrator, to warn in all the terre-tenants of Savage, (not naming them:) and fo. 199, was a plea in "abatement:" "that J. S. was a terre-tenant of Savage; and was not summoned." †<sup>2</sup>

But supposing the plea to be bad, yet there is neither heir nor terre-tenant before the Court. And he said he had other objections too. But,

Lord Mansfield said he had better reserve them, till he should see whether this plea to the scire facias would hold. And he asked Mr. Robinson whether he had any authority to prove "that the terre-tenant could plead any thing else but a release."

(Which Mr. Robinson could not produce.)

Serj. Poole in reply—The present question is upon this plea of the terre-tenant. I deny that a scire facias against terre-tenants is ex debito justitiæ. However, we have issued a scire facias against one of the terre-tenants; who has suffered judgment by default. Dyer 321 a. cites the case of *Leyghe v. Colyn & Al'*, 7 H. 8, error to reverse a judgment in assize. \*<sup>2</sup> The cases in 5 Mod. 209, and 6 Mod. 134, are not

\*<sup>1</sup> This case was adjourned; and therefore is no authority.

†<sup>1</sup> The Court there held it not to be necessary, in point of law: but that it was necessary by the course of the Court, and reasonable that it should be so.

†<sup>2</sup> This case stands also adjourned.

\*<sup>2</sup> V. Dyer, 65, 132, 375. All S. P. but not S. C.

applicable to the present case : that in 6 Mod. 134, was in order to bring all the co-terre-tenants in, to make contribution.

If they have a release to plead, let them shew it : if not, it is plainly a plea only for delay.

Lord Mansfield.—By the † established method of proceeding there must be a scire facias against the terre-tenants : otherwise, indeed, it is an irregularity ; but no more.

The terre-tenant has nothing to do with the matter. All that he can do, is only what any amicus Curie may do ; viz. produce a release of errors : but he has nothing to do, in interest. Therefore there ought to be a respond. ouster, in this case.

As to the other objections, it is not proper to meddle with them yet.

[362] Mr. Just. Denison concurred. This is not like a scire facias on the ‡ death of a party : it is only a scire facias against the terre-tenant, who is no party to the record, and has nothing to do with the matter, in point of interest.

In Carthew 111, 112, *The Earl of Pembroke's case*, these scire faciases against the terre-tenants are said, by Lord Ch. Justice Holt, to be discretionary, and “not to be stricti juris ; but yet to have been the constant and usual course of the Court ; and therefore not to be departed from.” And the terre-tenant can only plead a release of errors ; to defend his own possession, or for the sake of purchasers : but he cannot plead in abatement to the writ, when he is no party to the suit.

In the case of *Winn v. Lloyd*, the three terre-tenants pleaded § three different pleas ; which were rejected as frivolous. And so is this ; and ought to be rejected. And it is premature to enter into the errors objected to in the record : for Mr. Robinson is only counsel for Woodcock, one of the terre-tenants.

Mr. Just. Foster was clearly of the same opinion.

Here Woodcock comes in, and says, “he has no interest in the land.” Therefore he certainly cannot be heard, in objection to the judgment, and to shew that to be erroneous : this was no part of the intention of the notice given him by the scire facias. His plea is insufficient : therefore he ought to answer over.

Per Cur. Respond. ouster.

FAR, (Spinster,) *versus* DENN. 1757. If one defendant in ejectment die after issue joined and before trial, the death must be suggested on the roll. [1 Vin. 53, pl. 15.]

Error to reverse a judgment in ejectment.

Mr. Serj. Martin for the plaintiff in error.

This was an ejectment, wherein Denn was plaintiff, and Elizabeth Far and Rebecca Savil Far were defendants : and issue had been joined between the plaintiff and both these defendants. And day was given to the parties, &c. At which day comes as well the plaintiff as the said Elizabeth Far : but the other defendant Rebecca Savil Far, doth not come. And the sheriff doth not return his writ.

Then the death of Rebecca Savil Far is suggested upon the roll, in the usual way. And a new venire is awarded to try the issue against the surviving defendant [363] Eliz. Far : and it is further awarded, “that all further proceedings against Rebecca Savil Far shall cease.” Then it sets forth the record of the postea at the assizes ; and the recovery against Elizabeth Far. And the judgment is “that the plaintiff recover his term against the said Elizabeth Far.”

Errors assigned—“That there is no record of Nisi Prius :” (which Serjeant Martin said, was only done, in order to give them opportunity of objecting to the variances ; ) and “that judgment is given for the plaintiff below, whereas it ought to have been given for the defendant.” Then a certiorari issued, to certify the record of Nisi Prius : which was certified accordingly. And “in nullo est erratum” was pleaded, by the defendant in error.

This writ of error was brought, he said, by the approbation of the Court of C. B. on consent to wave a motion there in arrest of judgment. He cited *Bishop's case*, in

† V. Carthew, 111, 112, accord'.

‡ Which was the case in 6 Mod. 134, & 199.

§ V. Raym. 55, 56, S. C.

5 Co. 37 b. to shew that he was at liberty to make exceptions not assigned for error. Also 1 Salk. 268, S. P. *Carlton v. Mortagh*.

And then he proceeded to make his objections: viz.

1st. The Nisi Prius roll is erroneous, in itself.

2dly. The Nisi Prius record varies materially from the plea roll.

3dly. This may be taken advantage of, after verdict.

4thly. The omission of "quod querens nil capiat per breve," as to Rebecca Savil Far, makes the judgment erroneous.

5thly. The judgment ought not to have been for more than a moiety of the lands demanded.

And first—The death of Rebecca Savil Far, one of the defendants, ought to have been suggested upon the Nisi Prius record. It is not sufficient that this be mentioned in the jurata-part of it. Barnes's Notes, Tr. 7 & 8 G. 2, C. B. fo. 8, *Waldo v. Harrison*: where the jurata in the record of Nisi Prius was amended. Which was done upon the foundation that the jurata-part of the record is not an award of the Court; but only to annex the proceedings. Indeed Rebecca Savil Far is, in that part, said to be dead: but it is only in a parenthesis, and by way of recital. However, that is not the place for a suggestion of the death of parties. And it ought to be a full and positive assertion: for there are to be proceedings upon it.

[364] If any special matter had been suggested, about awarding the venire out of the common course, a copy must have been given. 1 Strange, 235, *Brocas v. City of London*.

This recital did not authorize the Judge to try the cause between one of the parties only. There ought to be a new venire awarded; or it ought to have been awarded against both defendants. For here is no proper suggestion of the death of one of the defendants.

This jurata is wrong. 2 Hawkins P. C. 290.

The death must be suggested. 8, 9 W. 3, c. 11, § 7. But a recital is no suggestion. And this is not a discontinuance; but a mis-trial, (which is not helped by the Stat. of Jeofails).

Secondly—This Nisi Prius record varies materially from the plea-roll: for it is not between the same parties. And small variances are fatal. 1 Ld. Raym. 329. *Doberteen v. Chancellor*, Palmer, 378. *Young v. Englefield*, Cro. Eliz. 340. *Long v. Mitchell*, Viner's Abridgment, 553, pl. 8, of title Error.

Mr. Just. Foster—Brother, Viner is not an authority. Cite the cases that Viner quotes: that you may do.

Serj. Martin proceeded—

Thirdly—This may be taken advantage of, after verdict.

Fourthly—The judgment is imperfect, without these words "quod querens nil capiat, &c."

Lord Mansfield—Would you have it, "that he shall take nothing by the judgment, against a dead person?" However, it is in the entry of the judgment, "that further proceedings shall stay against this dead person."

Serj. Martin—Fifthly—The judgment ought only to have been for a moiety of the premises. My argument arises on 11 G. 2.\* And here might have been two separate records. Both are made defendants by the rule. It is said in 1 Ventr. 335, if every one do not appear, the plaintiff cannot proceed against the rest. And though ejectments be the creatures of the Court, yet the records must preserve as regular a form as other records must: and so it is, even upon common recoveries.

[365] Lord Mansfield—If it be wrong, to award the recovery of the term against the tenant in possession, how would you have had it awarded? for it might have been very inconvenient to award it in moieties.

Serj. Martin—Perhaps the proper method may be, to apply to the Court where the judgment is, "that the execution should be taken out, of such part only as was the possession of the living defendant."

Serj. Hewit contra—

First—The Nisi Prius Record is perfectly right. Even before the statute of 8, 9 W. 3, c. 11, the death of the party might be suggested upon the roll. And here it is done, upon the very next appearance day after the death.

\* See c. 19.



My brother Martin says, "It is only done by way of recital upon the Nisi Prius roll." But it is not necessary to enter it upon the Nisi Prius roll at all; unless to direct the Judge, between whom he is to try the issues, and that he has jurisdiction to try it.

Secondly—Here is no material variance: whereas his cases are cases of material variances. Indeed here is no variance at all.

Thirdly—Here is nothing to take advantage of.

Fourthly—The judgment is perfect enough.

Fifthly—The judgment must be, "to recover the term." Indeed the plaintiff must take care to take out execution for no more than he has a right to, by the recovery. And many of his objections (even if they had any thing in them,) are cured by the statute.

Serj. Martin, in reply, to the same effect, as before.

Lord Mansfield thought there was no difficulty in the objections. They are reducible indeed to three. For the three first are no more than, whether the Judge has jurisdiction to try the cause, between the plaintiff and the living defendant only.

Now the suggestion, and the award, and all the proceedings shew one of the defendants to be dead; and there is an award for the proceedings to stay as to this defendant; and to go on against the other only: and the [366] jury is awarded as against the living one, the other being dead. Both were alive when the issue was joined: and it is properly awarded upon the issue roll: and acknowledged. And the Nisi Prius roll is only for the direction of the Judge, to try it: and it is not traversable on this roll. And the two last points are as plain.

The judgment is right enough: and the execution must be taken out according to the right and justice of what is really recovered.

Mr. Just. Denison held it not necessary to enter and transcribe the very words of the suggestion, from the plea-roll, upon the Nisi Prius roll: and all the continuances; but only enough to shew and notify to the Judge, what issues he was to try, and between whom. It is as properly put in here, in the jurata, as any where else: and it could not be traversed on the Nisi Prius roll. And here is no variance; but only an omission of what was unnecessary to be put in. And there was no need of the "*querens nil capiat per breve*:" there is sufficient without it.

And as to the 5th exception—they might be joint-tenants; and then it is strictly right. But if not, the plaintiff recovers his term; and he must take care not to take out execution for more than he had right to recover.

Mr. Just. Foster was very clear in concurring.

Per Cur. unanimously

Judgment affirmed.

BALL, QUI TAM, *versus* COBUS. Saturday, 18th June, 1757. An information for exercising a trade contrary to 5 Eliz. c. 4, without having served as an apprentice, needs not aver that the defendant did not then exercise the trade at the time of making the Act.

Mr. Whitaker shewed cause against quashing an information, *qui tam*, for exercising the trade of a baker at the parish of Speldhurst in Kent, not having served an apprenticeship: contrary to the 5 Eliz. c. 4.

The 1st objection taken to this information, by Mr. Clayton, on the original motion, was "that Speldhurst does not appear to be a city, market-town, or corporation: it may be a village." For supporting which, he had cited 2 Keble, 583, *Rex v. French*; (1st exception,) which case is also reported in 1 Mod. 26, S. C. *Rex v. Turnith*; and 1 Vent. 51, S. C. But though these are all reports of the same case (which was cited by Mr. Clayton, only out of Keble,) yet Mr. Whitaker alledged that they are inconsistent with each other.

[367] Mr. Clayton contra—The Act was intended merely for the benefit of corporations: and it has \* always been taken, "that it does not extend to any village, or any place less than a city, market-town, or corporation." And it would be extremely inconvenient to the inhabitants of all distant retired villages, if it did.

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\* Rainsford thought otherwise, in 1 Mod. 26.

Lord Mansfield—The question is not now upon the evidence ; but upon the laying the offence. Have you any authority, that it may not be laid at a parish ?

Mr. Clayton—None but that in *Keble* ; (viz. 2 *Keb.* 183).

Lord Mansfield—There is nothing in the Act, that restrains it to be laid in a city, market-town, or corporation ; and this laying it in a parish will not affect the evidence.

Mr. Just. Denison expressed himself in terms exactly to the same effect.

Mr. Just. Foster—Many trades are carried on in villages : most of the cloth-trade in Yorkshire, is carried on in the villages.

Mr. Clayton offered another objection ; viz. that it was not averred “that he did not then exercise the trade,” (namely, at the time of making the Act). But

The Court (without any hesitation) over-ruled this objection. So that, (both objections being over-ruled,)

The rule “to shew cause why the information should not be quashed,” was discharged.

*TARRANT versus HAXBY.* 1757. Prohibition to the Spiritual Court to stay proceedings for restoring a parish clerk granted.

Mr. Norton and Mr. Wynne moved for a prohibition to the Consistory Court of York, to stay their proceedings against Tarrant, the present parish-clerk of St. Osith in York : which proceedings were there instituted at the instance of Haxby the deprived parish-clerk, for the restoration of the said Haxby.

The office of parish-clerk is of a temporal nature : and the fees are of temporal cognizance. There are two cases in Sir J. Strange's Reports, to this purpose ; V. 2 Strange, 942, *Peak v. Bourne* ; and 2 Strange, 1108, *Pitts v. Evans*, C. B. And there is an express case in 2 Brownl. 38, *Gaudye's case* with *Dr. Newman*, C. B. P. 8 Jac. 1. That the office of parish-clerk is lay : and the [368] Spiritual Court have no jurisdiction concerning his deprivation.

This Haxby, they said, was deprived by the parson and the whole parish, for drunkenness during divine service, and other misdemeanors : whereupon the parson appointed Tarrant in his room, against whom Haxby libelled, in the Consistory Court of York ; where there was a monition ; and they were proceeding to restore Haxby. And all this was suggested. Upon which, a rule was granted, to shew cause. And now Mr. Nares was to have shewn cause : but, being satisfied that it was too strong against him, he would not trouble the Court. Whereupon,

The rule for the prohibition was made absolute.\*

*REX versus INHABITANTS OF UFFCULME.* Monday, 20th June 1757.

See this case at large, in the quarto edition of my *Settlement-Cases*, No. 138, p. 430.

[373] *REX versus INHABITANTS OF MILWICH.* Monday, 20th June, 1757.

See this case at large, in the quarto edition of my *Settlement-Cases*, No. 139, pa. 433.

*HARRIS versus HUNTACH.* Tuesday, 21st June, 1757. A note of hand acknowledging the receipt of money, and promising to be accountable for it, will support a count for money lent and advanced.

This was a cause in the civil paper ; and came before the Court, upon a case reserved for the opinion of the Court, in an action upon a general indebitatus assumpsit, in which the plaintiff declared upon two counts ; the first of which was for money lent and advanced by the plaintiff, at the defendant's request ; the second was for money laid out and expended by the plaintiff, at the defendant's request : and

[\* The office of parish-clerk is temporal, and therefore the right to it is not determinable in the Ecclesiastical Court. This is nothing but what has been often determined before. See also *Cowp.* 370.]

the question, upon the case stated, was "whether the evidence supported the declaration."

The case stated—1st. That a note of the defendant's was produced in evidence by the plaintiff in the following words: "3d December 1751. Then received of Mr. Harris the sum of 19l. on the behalf of my grandson: which I promise to be accountable for, on demand. Witness my hand S. Huntbach." This evidence was produced in support of the first count.

On the 2d count—the evidence was, that one Davidson coming to the plaintiff, by the defendant's order, for money to pay the workmen, the plaintiff refused to pay the money, unless the defendant would sign a receipt. Whereupon the defendant wrote the following note, viz. "Mr. Harris, At the earnest request of the gardener, the workmen wanting money greatly, for the work at the woodhouses, this is to certify that it is my request that you pay to Mr. Davidson, on the account of Master Hillier, for the workmen's use, the sum of 15l. As witness my hand S. Huntbach." And a receipt was given by the said Davidson, the gardener, to the plaintiff, on the plaintiff's paying him this 15l. Verdict for the plaintiff—case saved upon this question, viz. "whether the evidence was sufficient to support the verdict."

Mr. Aston for the plaintiff—The first count is for money lent and advanced by the plaintiff, at the defendant's request. And here is a note under the defendant's hand produced, acknowledging the receipt of it, and promising to be accountable for it: which is tantamount to a promise to pay it. And its being added, "on the behalf of [374] my grandson," makes no difference: for there is no remedy against the infant. Therefore it is an original, not a collateral undertaking. In 2 Ld. Raym. 1085. *Buckmyr v. Darnall*, it is agreed "that where no action will lie against the party himself, undertaken for, it is an original promise." In the case of *Reid v. Nash*, M. 24 G. 2, B. R. and Tr. 1751, 24 & 25 G. 2, it was settled accordingly. And here is no remedy against the infant, upon this note.

2d question. Whether the other evidence above stated was sufficient to maintain the second count.

Now the plaintiff could not have maintained an action against the infant, for this money, no more than for the former. The plaintiff refused to advance it, till the defendant wrote thus, "it is my request that you shall pay, on the account of Master Hillier, to Mr. Davidson, to the workmen's use, 15l." And this is an original undertaking "that the defendant will pay the money:" and it was advanced on the account and credit of the defendant.

Mr. Nares contra for the defendant—

The question is, how far a general indebitatus assumpsit will lie upon these facts, and this evidence brought to support them. This is a general indebitatus assumpsit: and indebitatus assumpsit does not lie, but when an action of debt will lie. 1 Salkeld, 23, *Hard's case*, is expressly so. 2 Ld. Raym. 1034, 1035, *Smith v. Ayrey*; "indebitatus assumpsit does not lie for money won at play." 1 Str. 680, *Welch v. Craig*: "it does not lie on a promissory note." No more will it, upon a collateral undertaking. And therefore the present is not a proper count, if the evidence would support it. This cannot be considered as money lent. It cannot be more than evidence of a collateral promise. And why will not an action lie against the infant? I think it will. And then it is exactly within the cases of *Buckmyr v. Darnall*, in 2 Ld. Raym. 1085; and *Reid v. Nash*, where Nash promised to pay 50l. if the plaintiff would withdraw his record: (which was indeed an original promise).

Secondly, on the 2d count—the note only imports a certificate "that the money is proper to be paid." No general indebitatus assumpsit will lie upon this. Here is no evidence of money lent.

Mr. Aston, in reply—

1st. A note of hand acknowledging the receipt, and promising to be accountable, is certainly evidence of money lent. And it is every day's experience, that notes of hand [375] are given in evidence upon general indebitatus assumpsits. And as to inserting "on behalf of my grandson" it makes no sort of difference. 2 Strange, 955, *Thomas v. Bishop*—the addition of "cashier to the York Buildings Company," was holden to make no difference. And there is no privity between Mr. Harris and the infant: nor will any action lie against him.

This is not a promise in aid, or a collateral undertaking; but a sole, absolute,



original promise. Therefore he prayed that the postea might be delivered to the plaintiff.

Lord Mansfield—The question is whether there be evidence of a debt contracted by the defendant, payable to the plaintiff.

The declaration consists of two counts, for two different debts. And there cannot be clearer evidence, than the first note is, of the former debt. And as to the 2d—here is a mansion-house belonging to an infant: which mansion-house has a garden belonging to it. It might not be necessary (in regard to the infant's situation and circumstances) to support this garden, (which might be a pleasure garden :) and no action will lie against the infant but for necessities. It does not appear at all, that there could be any remedy against the infant.

You can bring an indebitatus assumpsit for the debt; and give the note in evidence; and surely, it supports the declaration.

This is said to be a collateral undertaking. But the argument about original or collateral undertakings, depends merely upon the want of sufficiently defining the terms "original" and "collateral:" otherwise, there can be no doubt about them. This is clearly an original undertaking. And the jury have found these notes to be sufficient evidence of the debt: and it is indeed a matter of fact, rather than of law.

Mr. Just. Denison concurred—

Surely, this note is evidence of money lent. And between the plaintiff and defendant, this is certainly an original undertaking: and the money was paid at the defendant's request. And there is no privity between the plaintiff and the infant. The case of *Reid v. Nash* is, in some measure, like this. \* Here is nothing like a collateral request or promise: it is an original undertaking.

Mr. Just. Foster likewise concurred—

[376] The infant was not liable, and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant, to pay the money.

Per Cur'. Let the postea be delivered to the plaintiff.

HAMMOND *versus* BREWER. 1757. The town of Battel excluded out of the Turnpike Act, 26 Geo. 2, c. 54. [See 3 Durn. 514.]

This was a case for the opinion of the Court, from the Sussex Assizes, before Mr. Baron Smythe.

The case states that an Act of Parliament was made in 26 G. 2 (c. 54), for repairing and widening the road from Flimwell Vent in the parish of Ticehurst in the county of Sussex, to the town and port of Hasting in the said county: and it states many other matters not worth noting; as the single question was "whether the town of Battel was meant to be included or excluded."

The question arose upon that part of this Turnpike-Act which gave directions for repairing the road to and from the town of Battel; which town was stated to be lately paved before the Act of Parliament, by the inhabitants; and that it was kept in repair by them, and is now so.

Note. In many other parts of the Act, the roads are described as leading from, to and through such and such towns: but when it mentions the town of Battel it only says "to and from it," but omits the word "through." And the only question was "whether the Act intended to include or exclude the town of Battel itself."

Mr. Knowler was for the plaintiff (of whom the toll had been taken :) and Mr. Harvey, for the commissioners, (the defendant having acted by their authority ;) who had set up a turnpike in the very heart of the town.

The Court was clear that the Act of Parliament intended to exclude the town of Battel; and that it was right and reasonable that it should be excluded.

And Lord Mansfield observed that it was neither [377] usual nor convenient to erect toll-gates in the middle of great towns; (which these commissioners had done :) which might obstruct the necessary intercourse amongst the inhabitants; or even hinder an

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\* And that case was determined upon mature consideration. [S. C. 1 Wils. 305. Bull. 281.]

inhabitant from sending his horses to water without paying the toll. Therefore they ordered the

Postea to be delivered to the plaintiff.

REX *versus* MANNING. Wednesday, 22d June, 1757. Sessions cannot order materials to be dug in a private soil under the Turnpike Act, 29 Geo. 2, c. 67.(a)

Mr. Aston shewed cause against quashing an order of sessions made upon a Road-Act of 29 G. 2, c. 67 (for enlarging the terms and powers granted by former Acts:) whereby the surveyor of the highways beyond Sheppard Shord and the Devizes, &c. is authorised and impowered to dig gravel, &c. or other materials, &c. in, upon or out of and from all and every the lands, fields or grounds in the occupation of John Manning in the parish of All Cannings, in the county of Wilts.

The substance of the order was as follows—It begins with reciting the Act of 29 G. 2, c. 67, empowering the surveyor or surveyors of the highways or roads therein specified, or any other person or persons appointed by him or them, (having first an order from the Quarter-Sessions; six days notice, in writing, of the application for such order, being first given by the surveyor or surveyors, to the owner or owners, occupier or occupiers of the lands and grounds then intended or purposed to be cut, digged or gathered for materials for repairing and amending the highways or roads, or left at his or their places of abode;) to cut, dig, gather, take and carry away any furze, heath, gravel, sand, or other materials proper and sufficient for repairing of the said highways or roads, (if such materials cannot be had or found in or upon any waste or common grounds, in any parish, town, or place adjoining to or lying near the same highways or roads,) in, upon or out of, and from any lands, fields, or grounds, or either of them (not being a yard), garden, orchard, park, paddock, wood, coppice, nursery, or inclosed ground planted with any walk or walks of trees, or avenue to any house;) paying such rates, for such materials, or for the damage done to the owners and occupiers of the ground where any and from whence the same shall be cut, digged, gathered, taken and carried away, or over which the same shall be carried, as the surveyor or surveyors, or other person or persons by them appointed, or to be appointed by virtue of the said former Acts, or the said recited Act, for that purpose, shall think reasonable.

[378] Then the said order of sessions recites, that application had been made to that Court, by the surveyor of the said highways or roads, for an order to cut, dig, gather, take, and carry away furze, heath, stones, gravel, sand, or other materials proper and sufficient for repairing of the said highways or roads, in, upon or out of and from all and every the lands, fields and grounds now in the occupation of John Manning of the parish of All Cannings, in the said county of Wilts, yeoman, (not being a yard, garden, orchard, park, paddock, wood, coppice, nursery, or inclosed ground planted with any walk or walks of trees, or avenue to any house).

Then the order goes on thus—

And the said surveyor having made and given full proof to this Court “that six days notice in writing, of his intended application to this Court for such order, hath been given by him to the said John Manning or left at his place of abode;” and the said John Manning, in consequence thereof, having offered to this Court by his counsel, reasons against such order being made; and endeavoured to support the same by proofs, (which reasons and proofs this Court adjudged to be very insufficient:) and the said surveyor also having made and given full proof to this Court, “that proper and sufficient materials for repairing of the said highways or roads cannot be had or found in or upon any waste or common grounds in any parish, town or place adjoining to or lying near the same highways or roads.”

This Court doth therefore, in pursuance and by virtue of the said recited Act of Parliament, unanimously order that the said surveyor of the said highways or roads,

(a) There are in all Turnpike Acts some exceptions; and in general, all of them are with exceptions of horses going to pasture or for water, to any place in any direction through which the road lies.

As to the execution of powers in general given by Acts of Parliament, vide Irish Case of Tenures, 180, 4 Burr. 2245.

or any other person or persons by him appointed and employed, may, and he and they is and are (by virtue of the said Act of Parliament and by virtue hereof) authorized and impowered to cut, dig, gather, take and carry away any furze, heath, stones, gravel, sand, or other materials proper and sufficient for repairing of the said highways or roads, in, upon, or out of and from all and every the lands, fields, or grounds in the occupation of the said John Manning, in the said parish of All Cannings, (not being a yard, garden, orchard, park, paddock, wood, coppice, nursery, or inclosed ground, planted with any walk or walks of trees, or avenue to any house,) paying such rates for such materials, or for the damage done to the owners or the said occupier of the said lands, where any and from whence the same shall be cut, digged, gathered, taken and carried away, as the said Act of Parliament herein before in part recited doth direct and prescribe.

[379] Mr. Norton's objections to this order upon making the original motion, were only two:

1st. That there ought to have been notice to the owner, as well as to the occupier of the land wherein the gravel was to be dug: although he owned, that the strict words of the Act had not the copulative, but only the disjunctive; viz. "upon notice, &c. to the owner or owners, occupier or occupiers of the land, &c." Yet, he said, that justice required, that the owner should have notice, as well as the occupier; when his property is to be so materially affected; and he argued this to be the intention of the Act. And it is frequent, in such cases, to understand negative conjunctions, as copulative.

2dly. The satisfaction is directed by the Act to be made both to owner and occupier; whereas they have here awarded none at all to the owner of the land, who is the person principally injured. Upon this motion a rule was made to shew cause. After which, nine additional objections were given in, in writing.

Mr. Aston shewed cause why the order of sessions should not be quashed.

1st objection (given in, in writing) is, that the name of the surveyor who applied for the order is not mentioned.

Answer—That is not necessary.

2d objection. That the sessions have not adjudged "that six days notice in writing was given to any person, of the intended application:" the words are only, "the surveyor having made and given full proof to this Court," that such notice was given.

Answer—That it does appear; but if not, yet it is not necessary.

3d objection. That the fact of such notice being given, is not sufficiently set forth; it being only said "that such notice was given to Manning, or left at his place of abode."

Answer—That that is sufficient.

4th objection: (which was Mr. Norton's first). It is not set forth that six days notice in writing of this intended application was given to the owner of the lands.

Answer. Notice to the occupier is enough. So, on [380] a distress—notice may be given either to the tenant or to the owner of the goods. 4 Mod. 390, *Walter v. Rumball*, is so holden by the Court, (pa. 395). And here the owner may perhaps not be entitled: for the Act says, "that the damages, if any, &c." Besides the owner may be at a vast distance from the land. And here the tenant appeared, and made what defence he thought proper.

5th objection. That the sessions have not expressly adjudged "that proper and sufficient materials for repairing the highways were not to be found in any waste or common ground in any place near the said highway:" for it is only said, "the surveyor having made and given full proof to the Court, that, &c."

Answer—The order is agreeable to the Act of Parliament: and it specifies "that full proof was made and given to the Court, of this fact."

6th objection. That it is not set forth "that no proper materials at all, for repairing the highways, are to be found in any such waste or common ground:" but only (in loose and general words) "that proper and sufficient materials for such purpose are not to be found there." Notwithstanding which, it is ordered, "that the surveyor shall cut and carry away all sorts of materials necessary for the repair of the whole road."

Answer—That it is exactly agreeable to the Act.

7th objection. Non constat that any materials proper for such purpose are to be found in any part of these grounds.



Answer—That must depend upon trial. The lands are to be “cut, digged, and gathered for materials.”

8th objection. It is not set forth how far these grounds lie from the highway; nor to what distance all waste grounds have been found barren of proper materials; nor that these grounds are nearer than any waste where such materials may be found.

Answer—The order is worded agreeable to the Act: and these particularities need not be inserted in it.

9th objection. That the powers here committed to the surveyor are uncertain in every branch thereof. For only that particular piece of land which affords the materials, is made liable by the Act. But here all the grounds in the occupation of Manning, (being, as he alledged, a farm of 540l. per annum) are to be dug, at the discretion of the surveyor. And they are also laid under a perpetual incumbrance, or at least one that is absolutely [381] uncertain; for that no time is prefixed at which such grounds shall be emancipate.

Answer—This also is sufficient; being agreeable to the Act.

10th objection: (which was Mr. Norton's second) that satisfaction for such materials is, by this order, awarded to the owner or occupier, but not to both; nor is it certainly defined to which of them: whereas the Act of Parliament is express, “paying to the owners and occupiers.”

Answer—It is sufficient: the Act is disjunctive, in directing the notice; and must here be taken disjunctively and respectively.

11th objection. That the rate of such satisfaction is estimated in the order, only as for the value of the materials which shall be cut or carried out of these grounds; or for the damage done thereby; but not as for both, as it ought, in justice, to be: nor is it certainly defined, for which of the two, the compensation is to be made.

Answer—It is in the words of the Act.

Mr. Norton and Mr. Thurlow, in reply, supported the eleven objections; and urged that these summary authorities given to justices, to the detriment of the liberty or property of the subject, ought to be strictly pursued: and they cited many cases, of what they apprehended to be similar instances, or at least proceeding upon the same principles. Whereas, in the present case, the justices have not (as they alledged) given themselves jurisdiction, by any adjudication of the necessary facts: but have only recited the evidence of them.

Lord Mansfield—said this order was very ill penned; and the justices ought undoubtedly to pursue their authority: but however, he did not agree to all the objections; and particularly to the \* 2d, and † 5th, which are founded upon a supposed necessity that there must be express adjudications; where the recitals and allegations are sufficient, and where conclusions are actually drawn.

As to the 4th objection—he did not think that the Act could mean that it should always be necessary to give notice to the owner; which might be impossible.

But as to the 6th and 7th objections—it is necessary to shew that there were no proper materials to be found in or upon the wastes or common grounds near the [382] highway. Which is not done here. And they are not warranted to dig in the private soil, for all the species of materials; because some of these species are not to be found in or upon the said wastes or common grounds. They ought to specify what can not be found in or upon the wastes or common grounds; and what may be found in the private soil. And they can not dig, to try for it, in the private soil: they should previously know that it is to be found there; or at least have a reasonable prospect of finding it there.

9th. And they cannot make this general order “to dig over all the estate;” and leave this to the discretion of the surveyor: they ought to fix upon the particular part; to determine this themselves, and not leave it to their surveyor. This objection is fatal.

10th. So also is that of the satisfaction: for the satisfaction ought to be awarded to the owner, or to the occupier, or to both; according to the damages sustained by the one, or by the other; or by both.

Perhaps some other objections might hold: but however, here is enough, that I have already mentioned.

Mr. Just. Denison—It is a very imperfect order, and liable to many objections.

\* † The 2d and 5th of those given in writing.

As to the 2d, 3d, 5th, 6th, and 7th, objections—an express and direct adjudication may not be necessary : but many of these foundations or their authority ought, somehow or other, to appear upon the face of the order. Particularly, it ought to appear that notice was given of the intention to dig in some particular place ; for perhaps very good cause may be easy to be shewn against it. But

9th. It can never be right to dig over all the estate ;

6th. Nor to dig in the private soil for such materials as may be found in the waste.

As to the 4th—Notice is not universally necessary to be given to the owner : this may in some cases be impracticable.

But as to the 10th, satisfaction ought to be made to the owner, (if he be damaged,) undoubtedly.

Mr. Just. Foster concurred.

[383] The person that drew this order, has kept to the words, but not to the spirit of the Act.

And as to the 9th objection in particular, undoubtedly, the justices have exceeded their power in ordering the surveyor to dig over the whole estate : this can never be reasonable, nor within their jurisdiction.

Per Cur. unanimously,

Rule for quashing the order made absolute.

COGAN *versus* EBDEN AND ANOTHER. Thursday, 23d June, 1757. A verdict wrongly delivered by the foreman may be amended. [See 2 Bl. Rep. 803.]

On a motion (made the 18th instant,) to set aside a verdict as being given in by the foreman, contrary to the opinion and intention of eight of the jury. It appeared that the defendant justified under a right of a way, over the plaintiff's ground, to two closes of the defendant, viz. Broadmoor, and Three-Acres ; upon which, two different issues were joined ; viz. one, upon the right of a way to Broadmoor ; the other, upon the right of a way to the Three-Acres. And the foreman gave in the verdict, as a general verdict for the defendant, upon both issues. But eight of the jury made affidavit "that it was the meaning and intention of the whole jury, to find the former issue for the defendant ; and the latter for the plaintiff : and that this mistake was discovered by them, an hour afterwards ; but not till the Judge was gone to his lodgings." And upon the Judge's report it appeared that, though there was indeed evidence on both sides, yet the weight of the evidence was (as it appeared to him) on the side of the plaintiff, as to this latter issue.

N.B. The foreman had declined making any affidavit ; because, he said, he should make himself appear a fool, to the Court of King's Bench.

This matter was much litigated by the counsel on both sides. And the counsel for the plaintiff mentioned the case of *Baker v. Miles*, in C. B. in M. 4 G. 2, S. P. where eleven of the jurymen swore "that the foreman had mistaken their verdict ;" and it was thereupon set aside.\*

The Court were all clear that this was a mistake, arising from the jury's being unacquainted with business of this nature ; and from the associate's omission in not asking the jury particularly "how they found each respective issue," and in not making the jury fully understand their own finding ; and that it was agreeable to right [384] and justice, that the mistake should be rectified. And they had no doubt about the fact of this mistake ; from the affidavit of the eight jurymen, confirmed (as they held it in effect to be) by the foreman's declining to make any affidavit at all : especially, as the Judge's notes shewed the weight of the evidence to have been for the plaintiff, as to this latter issue.

And Lord Mansfield and Mr. Just. Denison thought that, as it was a mere slip, there might be some method of rectifying the verdict according to the truth of the case ; from the Judge's notes, if they were sufficiently particular ; without sending the issue to be tried over again, at a great expence.

And the case of *Newcombe v. Green*, in 2 Strange 1197, was mentioned ; where the *postea* was amended by the Judge's notes. And Lord Mansfield said that, at least they could set aside the verdict without costs. But difficulties occurring, how the

\* V. Viner's Abr. title Trial, p. 483. pl. 12.

costs would be, in such case ; as one issue was still found for, and was in truth clearly for the defendant. Therefore

Cur. advis'.

And now Lord Mansfield, seeing Mr. Morton in Court, who was concerned for the plaintiff, and had (on his behalf) moved to set aside the verdict, took occasion to mention this case ; and said they had thought of it ; and he had talked with his brother \*<sup>1</sup> Wilmot too, about it : but, however, he was not now going to give any opinion ; but only to purpose what seemed to him the most proper method of coming at it.

The case of *Newcombe v. Green*, itself, is not applicable to this case. But there is another case, of *Mayo v. Archer*, in 1 Strange 514, 515, where the question was "whether a farmer who bought and sold potatoes could be a bankrupt : " and the special verdict did not set forth the quantities he had bought and sold : though they were proved at the trial. The Court did not there award a venire facias de novo ; but amended the special verdict, in that respect. Which case is more applicable to the present case, than that which was cited ; for here they ordered the special verdict to be amended ; though the plaintiff's motion was only "that a venire facias de novo might be awarded."

But another case has been mentioned to me, which is applicable to the principle of this case ; though not like the particular fact. It is that of *Dayrell v. Bridge*, Tr. 22 G. 2, B. R. Trespass for cutting down an oak-tree—the defendant pleaded several pleas ; one of which was, "not guilty." At the trial, a general verdict was taken down, and so entered. And the Court rectified the verdict, by expunging the finding on all but the "not guilty ; " [385] it appearing that nothing was in question (at the trial) "but whether the place where the tree stood, was parcel of the manor, or not." In the case of *Newcomb v. Green*, several cases \*<sup>2</sup> were cited on the same subject : though the case itself is not the present case.

If the Court sets the matter right they should proceed according to the whole truth of the case. The Judge who tried the cause agrees to the fact disclosed in the affidavit of the eight jury-men : whereas your first affidavit, on which the rule was made, was an affidavit of only four of them.

Therefore what I would propose is that you should make your motion, and have a rule to shew cause, why, upon reading the affidavits of these eight jury-men, the verdict should not be amended and set right, according to the truth of the finding.

Note—Such a motion was afterwards made ; and a "rule to shew cause" granted. But it never came before the Court any more : it plainly appearing that the Court, upon deliberation among themselves, had come to an opinion "that in this shape the verdict might be set right."

REX versus GODDARD WILLIAMS. Tuesday, 28th June 1757. Information to the lord mayor, and certiorari to the sessions quashed. [See 4 Durn. 111.]

Mr. Nares shewed cause (on Wednesday, 9th Feb. last,) against quashing a certiorari to remove, from the Quarter-Sessions of the City of London, an information upon 1 Ja. 1, c. 22, entitled "The Duty of Tanners, Curriers, Shoemakers and of Others Cutting of Leather."

Note. The information runs, throughout "that the informers give the Lord Mayor of London to understand, &c." But the certiorari is directed to the Sessions of the City of London.

Three objections, he said, had been (upon the original motion) taken to this certiorari :

Obj. 1st. The certiorari does not lie, at all.

2d. It is not well directed. (V. infra, & 1 Jac. 1, c. 22, § 50.)

3d. It does not lie, before conviction. 1 Salk. 145. *Dr. Sand's case*, 1 Siderf. 296.

[386] Answers—As to the 1st objection—1 Ld. Raym. 469, *Dr. Groenvelt's case*

\*<sup>1</sup> Whose ordinary engagements were now in the other Court.

\*<sup>2</sup> None are mentioned by Strange, p. 1197. But Cro. Car. 338, *Eliot v. Skyppe*. 1 Salk. 53, *Bold's case*, and a case of *Fry v. Horder*, in Lord Raymond's time, were cited.



proves that a certiorari will lie : for this Court, by common law, may issue it. 1 Salk. 148, *Cross v. Smith*. A certiorari lies to all inferior jurisdictions. 1 Vent. 68, *Smith's case* is to the like effect. Style 351 & 356 in point. 8 Mod. 331,† *Arthur v. Commissioners of Sewers in Yorkshire*. 1 Hawk. P. C. 218, § 79, 80, is very strong in favour of certioraris, where the inferior jurisdiction exceeds its authority.

2dly. It is directed to the justices at sessions, generally. And it is right : for this is an Act of Sessions. 2 Hawk. P. C. 290, § 43, proves this method to be right.

3dly. As to 1 Salk. 145, pl. 5, *Dr. Sand's case*, P. 10 W. 3. The reason given for the opinion is answered by the very next case (pl. 6) in the same book. The case in 1 Siderf. 296. (There are two cases there, in the same page, pl. 19, & pl. 20. Tr. 18 C. 2, which both seem applicable to this subject), stands upon its own bottom. And perhaps the method mentioned in 1 Salk. 145, pl. 6, was not then found out. However, notwithstanding what is there said, yet it will lie to every Quarter-Sessions : and this was at the Quarter-Sessions.

Mr. Norton contra, for the rule (to quash the certiorari) agreed to put it upon 1 J. 1, c. 22, § 50, which clause gives jurisdiction to the Lord Mayor of London for the time being, within the city, and within three miles compass of it.

And this information is here given to the lord mayor, present (it is true) in Court of the aforesaid Court of Sessions : and the informers pray the judgment of the lord mayor ; though it is indeed added "so present in the said Court." Therefore this is not a proceeding at sessions : but a proceeding before the lord mayor pursuant to the Act.

Note—The caption is as at a Court of Sessions : but the information is given to the lord mayor ; and they conclude with praying judgment of the lord mayor, so present in that Court (of Sessions).

Lord Mansfield—The certiorari has manifestly issued, as supposing it to be a proceeding before the justices at the sessions : and they return it as such.

[387] N.B. The return is by "Stephen Theodore Janssen, Esq. Mayor of the City of London, and also one of the justices within written."

The Court thought, the previous question to that of the regularity or direction of the certiorari, depended upon the propriety and validity of the information ; viz. "whether the mayor alone had the jurisdiction, under this Act ;" or "the mayor in sessions."

Mr. Norton—The jurisdiction is in the mayor alone : for he has it even for the space of three miles out of the city ; where the sessions have no jurisdiction at all. It is true that he has here executed this jurisdiction in sessions.

Lord Mansfield and Mr. Just. Denison were satisfied that the propriety of the direction of the certiorari, depends upon the propriety of the conviction ; and they seemed to think that the proper method of bringing this question before the Court, would be for Mr. Nares to move "to quash the information."

Mr. Nares desired to take a day or two's time, to consider of this, and to be better prepared for it. Whereupon it was, at present, adjourned.

And on Monday 23d May, the present rule was enlarged ; and also Mr. Nares (by approbation of the Court, and of the adverse party,) took a rule, agreeable to the above hint, "to shew cause why the information should not be quashed."

And now Mr. Norton and Mr. Williams being ready to shew cause, pro Rege ;—

Mr. Gould and Mr. Nares, for the defendant, proposed their objections, to the information, thus ; viz.

1st. That the jurisdiction is not in the lord mayor ; but in the sessions.

2dly. The remedy is not by way of information ; but ought to be by indictment.

First—they said that the question turned upon 1 Jac. 1, c. 22, § 29, 32, 33, 46, 50. They insisted "that the lord mayor had no authority, by this Act, to appoint triers, where the leather is made and manufactured into wares." And consequently that as this leather [388] appeared to have been manufactured into wares, viz. into saddles, the lord mayor had no jurisdiction to proceed in this summary way ; but that,

Secondly—the proceeding ought to have been by way of indictment ; and not by way of information, which is no common law proceeding. They added

Thirdly—That it is uncertain before whom the information is taken.

If it be understood as taken before the lord mayor, he has no jurisdiction, for the

† A miserably bad book, intitled "Modern Cases in Law and Equity."

reasons abovementioned : but if it be understood as taken before the sessions, it ought (as has been said) to have been by indictment. Whereas it is a rule, that informations ought to be at least as certain as indictments. So is 2 Hawk. P. C. pa. 261, c. 26, § 4.

Mr. Norton, Mr. Williams and Mr. Lucas, for the prosecution—answered, that this is an information brought by the Warden of the Sadlers Company, under this Act of Parliament, of 1 J. 1, c. 22. And

It is not at all uncertain : but is an information exhibited to the mayor only ; and prays the judgment of the mayor only.

And the Act gives him jurisdiction, as well where the leather is manufactured, as where not. And this is a proceeding like the informations in the Exchequer, in rem, for a condemnation.

It is not before the sessions. So that this objection of its not being by way of indictment is out of the case.

Moreover, they urged that the Court would not quash such an information, upon motion ; especially, where a private person is entitled to the penalty ; and none of it belongs to the Crown.

Lord Mansfield—As to the Court's not quashing on motion, but putting the party to demur—that reasoning does hold, where the objection is to the jurisdiction of the Court that has undertaken to proceed.

Now here the question is upon the jurisdiction.

[389] This is agreed, by Mr. Williams and Mr. Norton, to be a proceeding before the lord mayor personally, though in sessions. But the 50th section (which gives him the jurisdiction,) does not give it to him personally ; but in the terms of the common commission of Oyer and Terminer : and the same power is given to him, as to the other mayors, bailiffs, head-officers of boroughs, stewards of leets, &c. Now this must be exercised according to the course of the common law ; i.e. by indictment.

But it is objected “that the sessions cannot have jurisdiction beyond the limits of the city :” whereas this is given to the mayor in any place within three miles of it.

The answer to this is, “that this jurisdiction of the sessions is therefore, by this Act, extended to three miles beyond the city.”

The parallel does not hold, with regard to informations in rem, in the Exchequer : (to which it has been compared). For that proceeding in the Exchequer depends upon the course of the Court of Exchequer : and it is necessary there. For it is not there known, who will claim ; nor does it affect the party : and the person who owns the goods may not perhaps be in Court, or may be unknown, or may not have other opportunity to come in and claim. This is an ancient course there ; as ancient as the Court of Exchequer itself, and by common law.

But here is no sort of incongruity, in the present case, in the goods being forfeited by the party's being convicted of the offence upon an indictment. And here is no colour for the notion of a summary jurisdiction in the mayor, under the authority of this Act of Parliament. Therefore the information ought to be quashed, for want of jurisdiction in the mayor, to receive and proceed upon it.

Mr. Just. Denison concurred. And he agreed with Lord Mansfield that there was no need to put them to demur, in a case where there is defect of jurisdiction : and cited a case of *Rex v. Wesley*, on his own motion, in perjury ; where the sessions had no jurisdiction ; and therefore the Court quashed the indictment.

And as to the jurisdiction—he concurred with Lord Mansfield ; and (at large) gave the same reasons, drawn from the 50th section of this Act : which, he said, manifestly considered the mayor, merely as the head of his [390] corporation, and did not intend to give him a summary jurisdiction, personally. Consequently, they must proceed in the ordinary way, that is, by indictment.

And this very Act of Parliament, gives the sessions the extended jurisdiction as far as within three miles compass of the city : for if it gives the end, it must be construed to give the means too.

And it is not like the proceedings in rem, in the Exchequer. For the justices here may give the forfeiture, undoubtedly, upon an indictment, (after conviction).

This information therefore ought to be quashed ; as it appears that the lord mayor, personally, had no such jurisdiction.

Mr. Just. Foster concurred. He held that the 50th section did not give the

jurisdiction to the mayor personally, and in a summary way; but as the head of a Court: and he said that the whole clause (taken together) plainly shews this. Therefore the proceeding ought to be in the ordinary course, viz. by indictment. And if they have proceeded without jurisdiction, they ought to be stopped; and the information may be quashed upon motion; for as there is no jurisdiction, the reason does not hold for putting the defendant to demur; but we may in such case very properly quash, on motion. Consequently, this information, being of this kind, ought to be quashed.

Per Cur. unanimously—Rule for quashing the information made absolute: and the former rule (prayed for quashing the certiorari) discharged.

BRIGHT, Executor of Hannah Crisp, Widow, *versus* EYNON. Wednesday 29th June, 1757. New trial granted where the jury had drawn a wrong conclusion, on facts admitted on both sides. [2 Ves. 440.]

(Mr. Justice Wilmot was absent; sitting in Chancery, as one of the Lords Commissioners of the Great Seal.)

The plaintiff's counsel moved for a new trial, upon payment of costs; and obtained a rule "to shew cause why this verdict should not be set aside, upon payment of costs."

Lord Mansfield said that he did not choose, in any cause tried before him, to conclude the matter by a short report, "that he was satisfied, or dissatisfied, with the verdict." He would state the case particularly to the Court; and reserve declaring his opinion of the verdict [391] (which he had not yet intimated, either at the trial or since,) till he had heard the counsel on both sides.

This was an action upon the case, brought by the plaintiff as executor of Hannah Crisp widow, deceased, against the defendant, upon a promissory note in the following words (all of the defendant's own writing,) which was proved and read: "I acknowledge to have borrowed of Mrs. Hannah Crisp, this 29th day of September 1753, the sum of 60l. for which I promise to pay 5l. per cent. per annum, and to be accountable for the whole, six months after notice given for that purpose. John Eynon, September 29th, 1753."

The defendant set up a discharge by a writing in the following words: "I promise unto John Eynon, that, in consideration of his paying unto me, interest for sixty pounds he has of mine, during my life, after the rate of 5l. per cent. per annum, that then the said sixty pounds, at my decease, shall be his, and his note for the same shall be void and of none effect. Witness my hand, this 10th of October 1753, Hannah Crisp." The body was all his own hand; but he called two witnesses who said they believed the name subscribed to be the hand of the testatrix: but their knowledge of her hand was very slight; one of them having only seen her sign a receipt.

He alleged that she gave this discharge, in consideration of a marriage between him and Rebecca Bright his now wife, (sister to the plaintiff).

He produced a will, in his own custody, bearing date the 11th of August 1753; by which the testatrix had made the said Rebecca Bright her executrix and residuary legatee.

This marriage was not till May 1754: the testatrix died in April 1756.

It came out, upon his own evidence, that the testatrix was not worth 200l. and that she paid 5s. a week or at the rate of 13l. a year, for her board. He could make no proof of the consideration alleged: the farthest that any of his witnesses went, was to say "that the testatrix seemed to approve the match."

The plaintiff, in reply, insisted "that the signature was forged." Josias Bright swore, that the defendant's wife did not know the defendant had borrowed any money from the testatrix, till after she was married. After she was acquainted with it, she pressed him to [392] pay the money, out of a legacy of 150l. from one Sarah Hart, which he received: for the testatrix might call it in. The defendant bid her not be uneasy: "for I must have six months notice."

Several witnesses proved, that Hannah Crisp, about Michaelmas 1754, talked of calling in the money upon this note, and lending it to other persons.

That in 1755 and 1756, she ordered letters to be wrote to the defendant, for the



money. When she gave these orders, she produced the defendant's note, and said, "the interest was not enough to maintain her."

It was proved, that the defendant entered a caveat at Doctor's Commons in April 1756 : and when he found she had made a will in favour of the plaintiff, and consequently revoked that which was in favour of his wife, he was very warm, and mentioned a note from him to her ; and declared he would not withdraw his caveat, unless it was given up.

The plaintiff examined no witness to say the signature was not her hand. By way of rejoinder, they called witnesses to the defendant's character : who gave him a good one.

The defendant instructed his counsel to say, that he always understood the gift to be revocable by Hannah Crisp during her life ; but if she did not revoke or call in her money during her life, then the debt was to be discharged.

The principal question made at the trial was, "whether this latter note was forged, or not" And, as to that, the two witnesses who believed it to be her hand, were not opposed by any witnesses to the contrary : the reason given was, that the plaintiff had no opportunity of getting it inspected.

His Lordship said, he left two questions to the jury : (1st.) "Whether the name of the testatrix was forged ;" (2d.) If they took it upon the evidence laid before them, to be her hand, then "whether it was not obtained by fraud, and without her knowing the contents and effect of the writing she signed."

The jury found for the defendant.

Lord Mansfield intimated nothing, then, as to his own opinion of the case ; and professedly avoided doing it now, till he should have heard the counsel.

[393] They were accordingly heard. And they who shewed cause against the rule, went very much at large into the propriety and rise of granting new trials. They urged, that a verdict ought to be conclusive, where evidence of any sort was given, on both sides. That the forgery here was the only question : if the plaintiff objected fraud and imposition, he must go to a Court of Equity for relief.

Lord Mansfield—Trials by jury, in civil causes, could not subsist now, without a power, somewhere, to grant new trials.

If an erroneous judgment be given in point of law, there are many ways to review and set it right.

Where a Court judges of fact upon depositions in writing, their sentence or decree may, many ways, be reviewed and set right.

But a general verdict can only be set right by a new trial : which is no more than having the cause more deliberately considered by another jury ; when there is a reasonable doubt, or perhaps a certainty, that justice has not been done.

The writ of attaint is now a mere sound, in every case : in many it does not pretend to be a remedy.

There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter, before the trial ; and imbibed prejudices, without knowing it. The cause may be intricate ; the examination may be so long as to distract and confound their attention.

Most general verdicts include legal consequences, as well as propositions of fact : in drawing these consequences, the jury may mistake, and infer directly contrary to law.

The parties may be surprized, by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer.

If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial. And it is done in a way very favourable to [394] the parties for whom the wrong verdict is given : it is, upon payment of costs.\* Whereas in other cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance.

It is not true "that no new trials were granted before 1655 ;" as has been said from Style 466.

\* 5 New Abr. 240. 2 Burr. 1224, 1228.

In *Slade's case*, M. 24 C. 1 (which was in 1648,) in B. R. reported in Style 138, the Court was moved for judgment, formerly stayed upon a certificate, made by Baron Atkyns, "that the verdict passed against his opinion." Bacon, Justice said, "judgments have been arrested in the Common Pleas, upon such certificates." Hales, of counsel with the defendant, prayed that the judgment in that case of *Slade* might be arrested, and that there might be a new trial; "for that it had been done theretofore in like cases." Indeed that case, as there reported, represents Rolle, Justice, to hold "that it ought not to be stayed, though it have been done in the Common Pleas: for that it was too arbitrary for them to do it." And he adds "you may have your attaint against the jury; and there is no other remedy in law for you: but it were good to advise the party to suffer a new trial, for better satisfaction."

In the case of *Wood v. Gunston*, Michaelmas 1655, Banc. Sup. Style 466, (which was an action upon the case, for speaking scandalous words of the plaintiff, and a verdict for the plaintiff, with 1500l. damages,) the defendant moved for a new trial. And Glynn, Chief Justice, said "it was in the discretion of the Court, in some cases, to grant a new trial: but this must be a judicial and not an arbitrary discretion. And it is frequent in our books, for the Court to take notice of the miscarriages of juries and to grant new trials upon them. And it is for the people's benefit, that it should be so: for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them; but it cannot be so intended of the Court." And in that case, a new trial was ordered, upon the defendant's paying full costs; the judgment standing as a security to pay what might be recovered upon the next verdict.

The reason why this matter cannot be traced further back, is, "that the old report books do not give any accounts of determinations made by the Court upon motions."

Indeed, for a good while after this time, the granting of new trials was holden to a degree of strictness, so intole [395]-rable, that it drove the parties into a Court of Equity, to have, in effect, a new trial at law, of a mere legal question; because the verdict, in justice, under all the circumstances, ought not to conclude: and many bills have been retained upon this ground; and the question tried over again at law, under the direction of a Court of Equity. And therefore of late years, the Courts of Law have gone more liberally into the granting of new trials, according to the circumstances of the respective cases. And the rule laid down by Lord Parker, in the case of *The Queen against The Corporation of Helston*, H. 12 Ann. B. R.\* seems to be the best general rule that can be laid down upon this subject, viz. "doing justice to the party," or in other words "attaining the justice of the case."

The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances.

This power may be exercised at much less expence of time and money, therefore more beneficially for the subject, by the Court of Common Law where the cause has been tried.

Of late years, new trials have been granted not only after trials at Nisi Prius, but also after trials at Bar. And it is at least equally reasonable to do it after trials at Bar, as after trials at Nisi Prius, (if the justice of the case demands it;) or, indeed, rather more so, as the latter must be done upon what could have actually and personally appeared to a single Judge only, whereas the former is grounded upon what must have manifestly and fully appeared to the whole Court.

I come now to the present verdict; and should be sorry that the question depended upon my being satisfied, or dissatisfied: and therefore I have stated the whole.

If the matter in dispute was of great value, I will not say that all the suspicious circumstances might not be a ground for a new trial; to give the plaintiff an opportunity of getting the instrument inspected by persons acquainted with her hand; though I think upon the evidence laid before the jury, the verdict, in that respect, was right.

What I go upon is the apparent manifest fraud and imposition in obtaining the discharge from the testatrix, if she really signed it.

Fraud or covin may, in judgment of the law, avoid every kind of Act: many instances are put in *Fermor's case*, 3 Co. 77.

\* See Lucas's Reports, pa. 202.

[396] "What circumstances and facts amount to such fraud or covin," is always a question of law. Courts of Equity, and Courts of Law, have a concurrent jurisdiction, to suppress and relieve against fraud. But the interposition of the former is often necessary for the better investigating truth, and to give more compleat redress.<sup>(a)</sup>

The writing, upon the face of it, speaks imposition. It purports being for consideration. She releases the principal, in consideration of 5l. per cent. during her life: which is only legal interest, and the precise rate he was obliged to pay by his note. The defendant has set up another consideration, not expressed: which is not only not proved by him, but disproved by the evidence on both sides.

He now contends, and his counsel have argued, "that it was intended to be revocable by her during her life; and therefore was only in the nature of a legacy." That power "to revoke" is omitted; the writing, all of his own hand, and kept in his own custody; and if it was in the nature of a legacy, it is revoked by the subsequent will.

The testatrix never imagined she had stripped herself of this money: in her circumstances, it would have been madness. The defendant, during her life, did not dare to say, even to his own wife, "that the testatrix had given him this money."

He did not dare to claim it, immediately, after her death: but would have compounded, by withdrawing his caveat, to have got his note delivered up. No answer was attempted, by proof, to the apparent imposition. Upon his own case stated by himself, and the evidence on both sides, the transaction to get her hand to this writing must have been fraudulent: and if it be so, the law says "he shall not avail himself of it."

The attention of the jury was artfully drawn to the heinous charge of forgery, only. And I left the question of fraud to them, without any express direction "that the circumstances spoke fraud apparent." The same jury might, upon reconsideration, find a different verdict. I dare say, they meant to do right.

But the merits of the case appearing to me in this light, I am clearly of opinion that there ought to be a new trial.

[397] These are my sentiments: my brothers will judge whether I am right, or not.

Mr. Just. Denison concurred in them.

He added, that it would be difficult perhaps to fix an absolutely general rule about granting new trials; without making so many exceptions to it, as might rather tend to darken the matter, than to explain it: but the granting a new trial, or refusing it, must depend upon the legal discretion of the Court; guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice.

In the present case, he said it appeared to him, "that the testatrix, Mrs. Crisp, had been imposed upon." And he held "that fraud was sufficient to invalidate this her defeazance (the subsequent note of discharge signed by her,) even in a Court of Common Law." For proof of which, he cited *Throughgood's case*, 2 Co. 9, where it was holden, "that the deed of an unlettered layman, into the execution whereof he is deceived, by its being wrong read to him, or falsely explained to him, (though by a stranger to the party to whom the deed is made,) shall not bind the unlettered person who made it."

Mr. Just. Foster agreed to the propriety of what had been said; as to such cases in which the juries give verdicts against evidence; and even as to cases where there may be a contrariety of evidence, but the evidence, upon the whole, in point of probability, greatly preponderates against the verdict: (which, depending on a variety of circumstances, is matter of legal discretion, and cannot be brought under any general rule:) but in all cases where the evidence is nearly in æquilibrio, he declared that he should always think himself bound to have regard to the finding of the jury;

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(a) A Court of Equity may in some cases give relief against the bar of the Statute of Limitations, where a Court of Law cannot. *Booth v. Lord Warrington*, 28th April 1714, in Dom. Proc. This seems to have been admitted by the case; but by the questions put to the Judges, it seems as if, even in that case, an action of disceit or some other action might have been maintained at law; and if so, that is a case rather in confirmation of, than in contradiction of the generality of the extent of Lord Mansfield's opinion.



for "ad quæstionem \* facti respondent juratores." In such a case, it is not the province of the Judge, to determine: it ought to be left to the jury.

Fraud will invalidate, in a Court of Law, as well as in a Court of Equity. We all remember the case of *Wyndham v. Chetwynd*, P. 1755, 28 G. 2, in this Court: where the Court directed the jury to find "non devisavit," though there was a devise in fact; but it was obtained by fraud, and therefore considered as no devise at all.

And he agreed with Lord Mansfield and Mr. Justice Denison, that, in the present case, the defeasance or discharge (the subsequent note) was obtained from Mrs. Crisp by fraud; and that it appeared, upon the whole of the evidence "that it was so obtained:" and that the jury have drawn a wrong conclusion from facts admitted on both sides.

[398] Therefore he thought the verdict ought to be set aside.

Per Cur.\* unanimously,

The rule for setting aside the verdict was made absolute.

\* Note, Mr. Justice Wilmot was absent (in Chancery).

Mr. Gould, of counsel for the plaintiff, moved that it might be without costs: but he was answered by Mr. Justice Denison and Mr. Justice Foster (Lord Mansfield being now gone,) that this was directly contrary to the terms upon which he himself had moved it. And accordingly they only ordered the verdict to be set aside,

Upon payment of costs by the plaintiff.

Memorandum—The cause never came on to be tried again. Probably, the defendant acquiesced in the opinion of the Court, and paid the money.

A BLACK MERCHANT OF BOMBAY *versus* DORRELL. 1757. An East-India merchant being bound at Bombay in a bond to appear in this Court to answer the demands of another merchant there, permitted to appear here accordingly.

Mr. Dorrell, who came from Bombay, and had a dispute with a black merchant there, of a civil nature (concerning property,) had, upon his leaving Bombay, entered into a bond conditioned for his appearance in this Court at his arrival in England, to answer to any demand, that might be made against him by or on behalf of the said black merchant in that country: and also to abide by the determination of the Mayor's Court there, or else to appeal therefrom to the King in counsel.

Serj. Hewitt moved, on behalf of Mr. Dorrell, that he might appear in this Court, in such method as the Court should judge proper, in order to prevent the forfeiture of his bond.

The Court, after requiring notice to be given to the East-India-Company (who did not oppose it,) admitted his appearance; and directed that he should enter into a recognizance (with sureties) in the penalty of the bond, to answer the demands expressed in the condition of the said bond; which he was to do before one of the Judges of this Court; as his sureties were not now present.

Note—This rule was taken on the civil side (of the Court).

[399] REX *versus* MIDDLEHURST. 1757. Order of sessions on the stat. of 11 Geo. 2, c. 19, for preventing frauds by tenants confirmed. [See Sayer, 304.]

Mr. Norton shewed cause against quashing an order of two justices, and an order of sessions confirming it, made in pursuance of the Act of 11 G. 2, c. 19, § 3, for the more effectual securing the payment of rents, and preventing frauds by tenants,) against one Thomas Middlehurst, for wilfully and knowingly aiding and assisting in fraudulently removing and conveying away five cows, &c. or in concealing the same.

Mr. Gould, who had moved to quash these orders, founded his motion upon two objections; viz.

1st objection. The whole adjudication refers to the complaint of one Thomas Weston; wherein there is no charge upon Chesterton the tenant, at all: nor upon the defendant Middlehurst, for aiding and assisting him; neither is it stated "that Chesterton the tenant did remove the goods."

2d objection. The Act creates two offences, viz. assisting in removing, and assisting

\* See Trials per Pais, pa 447, (the last paragraph of the book,) extremely strong, on this subject, in favour of juries.

in concealing the goods. Now it is not specifically charged upon the defendant Middlehurst, that he wilfully and knowingly did either one of these two things: it is only alledged that he wilfully and knowingly did one or the other. In 1 Salk. 371, *Rex v. Stocker*, an indictment for forging or causing to be forged, was holden ill; because the charge was in the disjunctive. 2 Hawk. P. C. 225, § 60. An indictment charging a man disjunctively, is void: for the offences are distinct: and it appears not, of which of them the defendant is accused. So here, it does not appear, which of the two offences the justices have convicted him of.

And 2 Ld. Raym. 1265, *Queen v. Bains*, proves that the Court will make no intendment against the defendant.

Upon which objections, he obtained a rule to shew cause "why the orders should not be quashed."

And now Mr. Norton shewed the following cause against quashing them.

As to the 1st objection—"that it is not described sufficiently, what the offence is." He answered that this is an order; and the Court will not intend it to be ill. To prove which he cited *Rex v. Bissax*, Tr. 29 G. 2, B. R.

[400] As to the 2d—The charge being in the disjunctive, "that he wilfully and knowingly aided and assisted the tenant in removing the goods, or in concealing the same." He said, the crime and the punishment are the same upon both: and the defendant was heard.

Mr. Gould for the defendant, replied—

1st. It is not at all stated "that the tenant did remove the goods."

2dly. The aiding and assisting in removing, is a different offence from aiding and assisting in concealing: and here it is only charged in the alternative.

Lord Mansfield—Upon indictments, it has been so determined, "that an alternative charge is not good;" as "forged or caused to be forged:" though one only need be proved, if laid conjunctively, (as "forged and caused to be forged." But I do not see the reason of it: the substance is exactly the same; the defendant must come prepared against both. And it makes no difference to him, in any respect.

But this is an order: and, being good in substance, needs not be literally so strict.

Mr. Just. Denison thought also, that the cases upon indictments are very nice. But this is not an indictment, but an order: and therefore, being good in substance, needs not be so strict in form, as an indictment must be. And either aiding or assisting in removing, or aiding or assisting in concealing, is equally an offence: and these are the very words of the Act. It is only form; and does not at all vary the defence or punishment. I am not therefore inclined to the same strictness as was observed in the case of *The King v. Stocker*, 1 Salk. 371.

Per \* Cur. Rule discharged:

And consequently both orders affirmed.

The end of Trinity term 1757, 30 & 31 Geo. 2.

#### [401] MICHAELMAS TERM, 31 GEO. II. B. R. 1757.

MASTERS *versus* MANBY. Monday, 7th November 1757. Land-waiter at the Customs not an ambassador's menial-servant. [See 3 Wils. 34. 3 Durn. 80.]

Mr. Norton moved that the defendant might be discharged upon common-bail, as being a menial servant to a public minister, (viz. messenger to Baron Haslang,) on 7 Ann. c. 12.

But the defendant was not able to make out a case sufficient to induce the Court even to grant him a rule to shew cause. He not only had been formerly a trader, and a bankrupt; (upon which indeed no stress was laid, and it appeared that he had not traded at all, since he had obtained his certificate under the commission;) but was confessedly a land-waiter at the Custom-House in London, and officiated there as such: though he swore to the hiring, and also to the having sometimes executed this service to the baron, as his messenger.

\* Mr. Justice Foster was out of Court; and Ld. Commissioner Wilmot, in Chancery.

Yet, upon the whole, Lord Mansfield was clear that this man could never be esteemed a \*<sup>1</sup> *bonâ fide* domestic of a foreign minister : and the other Judges concurring, the motion was denied.

BENNET, QUI TAM, &C. *versus* SMITH. Monday, 14th November 1757. Non pros. obtained against a common informer not set aside.

The Court refused to set aside a non pros. regularly obtained by the defendant, against the plaintiff, who was only a common informer, (who sued for a penalty of 10,000l. upon the Statute of Usury ;) though the plaintiff offered to pay the costs of setting it aside.

For, though Lord Mansfield seemed to think that [402] the case might perhaps have borne a different consideration, in case the plaintiff had been the party really injured, and had sued in order to come at justice and reparation for such real injury ; yet not only his Lordship himself, but

The whole Court now \*<sup>2</sup> present were clear and unanimous that where a mere common informer, who sued for punishment only, had been guilty of a slip or mistake which put him out of Court and intitled the defendant to enter a non pros. against him, they would not exercise their discretionary power, in setting aside this non pros. thus regularly obtained, and restoring the mere common informer to an opportunity of proceeding for the sake of punishment only.

And they distinguished the present case from cases of amendment : which indeed the Court would not scruple to make, even in cases of *qui tam* actions, where there was any thing to amend by ; and which they had frequently done, in some instances that were mentioned or at least hinted at : as, in particular, the giving leave to change the county, in a *qui tam* action, on Mr. Norton's motion, not many terms ago.

REX *versus* ROBERT CHAPPEL. Tuesday, 15th November 1757. Rule to shew cause granted for a criminal information upon producing copies of letters.

A motion was made by Mr. Burland, and supported by Mr. Norton, for an information for sending a challenge, by letter, to Mr. Hamilton of Wells ; but they only produced copies, not the originals of the letters wherein the challenge was contained.

The Court made a rule to shew cause, upon reading the copies only of the letters ; (such copies being sufficiently verified).

REX *versus* WILLIAMS. Wednesday, 16th November 1757. Information in nature of *quo warranto* will lie for holding a Court of Record, and presiding therein in the absence of the bailiffs, the defendant not being one of them. [1 Black. 92, S. C.] [S. C. Sayer's Law of Costs 242. Bull. 211. And see 5 Durn. 377.]

This was a cause in the Crown-paper, upon a writ of error directed to the justices of the great session in the county of Denbigh, upon a judgment given there for the King against the defendant after a verdict, upon an information brought against him in that Court by the prothonotary and clerk of the Crown there, at the relation of John Mostyn, Esq. according to the form of the statute in that case made and provided.

The information sets forth the incorporation of the town of Denbigh, by letters patent dated 14th May 15 C. 3, which gave them power to have and hold within the borough a Court of Record, on every Friday in every second [403] week throughout the year, to be held before the bailiffs of the said borough for the time being, or one of them.

Then it alledges the acceptance of these letters patent by the corporation.

It further shews, that by virtue of these letters patent, the said Court of Record, from the time of making the said letters patent, to the time of exhibiting the information, ought to have been held within the said borough on every Friday in every

\*<sup>1</sup> V. post, pa. 1478, and pa. S. P.

\*<sup>2</sup> Mr. Just. Foster was not in Court.



second week through the year, before the bailiffs of the said borough for the time being, or one of them.

Then it charges that Friday the 13th day of December 25 G. 2, was a day on which the said Court of Record ought to have been so held within the said borough, by virtue of the said letters patent. That the defendant (well knowing the premises aforesaid) on the said 13th day of December 25 G. 2, at the borough of Denbigh aforesaid in the county of Denbigh aforesaid, in the absence of John Hosier Gentleman and David Williams Gentleman, who then and long before and afterwards were the bailiffs of the said borough, and of each of them, did wrongfully and unjustly presume to hold and did hold that Court of Record within the said borough, without any legal warrant, right or authority whatsoever; and did then and there preside therein; he the said Thomas Williams (the defendant) then not being one of the bailiffs of the said borough.

Plea—that he did not hold the said Court of Record in the said information supposed to have been held by the said Thomas (the defendant) nor did preside therein, in manner and form as by the information is charged against him. (Upon which, issue is joined).

And the defendant further saith, that at the time mentioned in the information, he had not, nor hath any warrant, right, power, or authority; but wholly disclaims to have any warrant, right, power, or authority whatsoever to hold the said Court of Record, or to preside therein; and this he is ready to verify. Wherefore he prays judgment, and that he of the premises aforesaid may be discharged and dismissed by the Court, and so forth.

Upon the issue joined, the jurors find that the defendant, on 13th December, 25 G. 2, at the said borough of Denbigh, in the absence of John Hosier Gentleman, and David Williams Gent. who then and long before and afterwards were the bailiffs of the said borough, and of each of them, did wrongfully and unjustly presume to hold, and [404] did hold the said Court of Record in the said information mentioned, within the said borough, without any legal warrant, or right, or authority whatsoever; and did then and there preside therein; (he the said Thomas Williams then not being one of the bailiffs of the said borough;) as in the said information is alledged.

The judgment of the Court is “that the defendant do not in any manner intermeddle with or concern himself in and about holding of the said Court of Record within the said borough, in the said information specified; but that he be absolutely forejudged and excluded from holding the said Court for the future; and that in order to satisfy our Sovereign Lord the King, for and on account of the usurpation aforesaid, he be taken, and so forth; and that the said John Mostyn, the relator above-mentioned in this behalf, do recover against the said Thomas Williams the sum of 14l. 12s. 11d. for his costs by him laid out and expended in carrying on his suit in this behalf, according to the form of statute in such case made and provided.”

The assignment of errors is—

1st. General—viz. That judgment is given for the King against the defendant: whereas by the law of this kingdom, it ought to have been given for the defendant.

2dly. Special—viz. And also in this, that it appears by the said record, that judgment in the plea aforesaid was given “that the said John Mostyn, in the said plea named the relator therein, recover against the said Thomas Williams 14l. 12s. 11d. for his costs laid out in that suit:” whereas, by the law of this realm, no judgment ought to have been given, in the plea aforesaid, for those or for any other costs in that suit. And therefore in that respect also, there is manifest error.

To this assignment of errors there is a joinder in error, in the name of the King’s coroner and attorney in this Court.

Mr. Madocks, for the plaintiff in error—

Objected, that this was not a case within 9 Ann. c. 20: and that therefore there could not, nor ought to be any judgment for costs.

That Act takes in only two cases: 1st, where an office is usurped: and 2dly, where he has had a title, but unlawfully holds and exercises the office: but the whole is confined to offices in corporations; and the words [405] “said offices and franchises” are tied up to offices in corporations, or to the franchise of being a freeman. (See sections 4 & 5.)

Whereas this information is only for holding a Court in the borough, in the absence of the two bailiffs; he not being one of the bailiffs of the borough. So that

this is no direct charge of usurping the office of bailiff. And an indirect charge is not sufficient: 2 Hawk. P. C. 261. "Whatsoever certainty is requisite in an indictment, the same, at least, is necessary also in an information." 1 Salk. 375, *Rex v. Knight*; and 1 Ld. Raym. 527, *Rex v. Knight and Burton*, S. C.; prove expressly "that argumentative informations are naught."

This is only a charge of doing a single act; which act belonged indeed to the office of bailiff: but it is no charge of his claiming the office of bailiff; nor could the right to the office of bailiff be tried upon this information. And this, he said, was a new case: for the common way is to charge the defendant directly with usurping an office; whereas this only charges him with facts that may indeed be evidence of such usurpation of the office of bailiff, but does not charge him with a direct usurpation.

Secondly. It cannot properly be called an information in nature of a quo warranto at common law: for it does not charge him with exercising the office at the time of exhibiting the information.

"Non usurpavit," generally and alone, is not a sufficient plea to an information in nature of Q. W. at common law. Godbolt, 91, *Sir Jervis Clifton's case*; and 3 Leon. 184, *Sir Gervase Clifton's case*, S. C.\*1

This information only charges him with holding the Court upon a particular day.

On the whole, therefore, this information is not good at common law: no more is it, upon the Act of Parliament.

Mr. Hall contra, pro Rege.

This statute-judgment, "for the costs," is good: and so also is the common-law judgment, "of ouster of the franchise."

1st. The Act of 9 Ann. c. 20, ought to be liberally construed.

This information is an information for usurping the office of one of the bailiffs of the borough of Denbigh. The facts charged upon the defendant amount to an usurpation of the office: though the word "usurp," is not indeed made [406] use of. It is not necessary to use this or any other technical term. Therefore this usurpation of the office of bailiff, is here sufficiently alledged.

But, at least, it is a charge of an usurpation of or intruding into a borough franchise: which is a case within the Act. The preamble and body of the Act prove this.

This is for holding and presiding at a Court in a corporation: which certainly is a corporation-franchise. And the defendant, by his manner of pleading, has considered this as an information on the Act, for a borough-franchise: for he first pleads to the particular charge, and then disclaims.

But, at least, this case shall be taken to be within the equity of the statute: which was made for the benefit of the common-wealth. Which point he endeavoured to prove, from several instances of extensive constructions of statutes; and particularly of statutes giving costs. For the latter, he cited Cro. Eliz. 257, pl. 36,\*2 *Haselip v. Chaplen*. And he said, that the Court often ordered costs, even where the statutes had not given them.

As to the case of *Rex v. Knight*, the facts there charged were not sufficient to support the conclusion: it was an imperfect defective information. But here, it is positively alledged "that he held this Court without any legal warrant, right, or authority whatsoever."

And this may be made good by intendment. Raym. 34, 35, *The King v. Read*, Siderf. 91. *Rex v. Cover*, Cro. Jac. 473.

Secondly—As to the not charging the defendant with exercising the office at the time of the information; one single act is sufficient.

Upon the whole, this case is either within the words, or at least within the intent of the Act.

Mr. Madocks in reply—There is no express, but only a circumstantial charge, of exercising the office of bailiff.

The equity of every statute stands upon the foundation of the statute itself. Now this Act is certainly confined to offices in corporations, affecting the rights of election of members to Parliament: and was not intended to take in rights of holding Courts or fairs in corporations; though the words of the title are indeed general, "The

\*1 This case was not determined; V. Godbolt, 93.

\*2 Adjournatur.

Rights of Offices and Franchises in Corporations and Boroughs." But the body of the Act confines the word [407] "franchises" to the rights of being free: and the body of the Act is the part to be regarded.

And here is no charge of intruding into the whole office: which is an entire thing. The usurpation of part cannot be an usurpation of the whole of an office.

Secondly—The information ought to be good in itself and upon its own strength, independent of the plea. This is an information only for doing this single act six years ago.

Lord Mansfield—1st. The Act is meant to extend to all officers of corporations, as such; and, as far as relates to all the corporate rights of the burgesses and freemen, it is very legally, clearly, and correctly drawn: but it is not within the reason or meaning of the Act, that it should extend generally to all offices or franchises exercised without authority from the Crown, within a corporation. It was meant to be confined to such franchises as were claimed in instances affecting those rights between party and party.

The title cannot control the body of the Act.

And the equity of an Act can be carried no further than to what was within the view and intention of the Legislature, and the mischief meant to be prevented. Whereas here is no such equity, to bring the present case within the Act.

Here is no charge of usurping or exercising or claiming the office of bailiff. I do not say that any particular technical words are necessary. But here are none that are at all tantamount: it is not even said that he held the Court "as bailiff." There is no argument neither, or inference, "that he did so:" rather indeed, the contrary; for it seems implied in the very charge, that if they had been there, he could not have held it.

No fruit is obtained of this trial, but as of an usurpation upon the Crown and for an offence or misdemeanour: here is nothing relating to the interest of any private persons. And the manner of pleading proves nothing: for he was obliged to plead so, in either case.

Therefore, as a statute-judgment it is wrong.

2dly. But as to the common-law part of the judgment—Mr. Madocks's objection will not hold. For he may [408] certainly be punished for one single offence; though he goes no further. So that this part of the judgment is right.

Mr. Just. Denison concurred, that the statute-part of the judgment, as to the costs, is wrong: but the common-law part, viz. the judgment of "exclusion from the future exercise of the franchise," is right.

As to the former—the charge is not within the Act of Parliament of 9 Ann. c. 20.

The information sets out the charter; which gives power to the bailiffs to hold this Court in the corporation, and it calls upon the defendant to know by what authority he held it in the absence of the bailiffs. But surely, this has no relation in the earth to the office of bailiff; nor will it be said that he could, upon this information, have been ousted of the office of bailiff. It was not, in the present information, necessary to set out as part of the charge upon the defendant "that the Court ought properly and regularly to have been holden before the bailiffs:" it had been enough, to have asked the defendant "by what authority he claimed to hold this Court of Record;" (without mentioning the presence or absence of the bailiffs, at all).

There are numbers of offices which a man may usurp, and be liable to an information for usurping; which are not franchises in corporations. But these "franchises" mentioned in the Act, mean corporate rights or rights to freedom in corporations. The words of the Act are plain, that this is not a case upon which the informer can recover costs.

The proceeding indeed may be, at common-law, for punishment. Therefore this latter part is right. But the judgment as to costs ought to be reversed.

And the mention of a relator is no more than surplusage, and may be rejected; and therefore will not hurt the common-law judgment.

Mr. Just. Foster was clear too—

1. That this case was not within the Act: which never intended to give costs in cases of this kind. The word "franchises" in the Act, means only freedoms and rights to be members of the corporation.

[409] This Act was drawn with great care and attention: (Judge Powell was the person who drew it). And there is no reason to extend it beyond its intention.



2dly. The judgment at common law may be very right.

Mr. Just. Wilmot declared himself extremely clear in both points.

Per Cur unanimously—

The common-law judgment, viz. as to the ouster, was affirmed: but the judgment for costs (which was founded upon the statute,) was reversed.

BOND *versus* ISAAC. Monday, 21st November, 1757. Scire facias against bail, after an exoneretur ordered, though not entered, irregular. [See 5 East, 462.]

The exoneretur which had been ordered to be entered (V. ante, 339, 340,) was not actually entered on the bail-piece, (by the omission of the proper officer who ought to have entered it:) but the plaintiff himself was apprised of the surrender; though his attorney swore that he (the attorney) had no notice of it.

The plaintiff's attorney not being apprised of the surrender of the principal sued out scire facias against the bail; who paid the money: but they were sued out into London (where the original cause of action was;) and not into Middlesex, where the surrender was made, and where the bail-piece remained.

The bail had applied, upon both these irregularities, (viz. 1st, the plaintiff's being apprised of the surrender and order of the Court; and 2dly, the scire facias not being sued out into Middlesex;) that the scire facias might be set aside for irregularity, with costs; and the money restored.

Mr. Norton was counsel for the bail, and had moved as above.

Sir Richard Lloyd, for the plaintiff, now shewed cause.

The Court was clear, on both points, that the scire facias were irregularly sued out; and granted Mr. Norton's motion, by making the rule absolute, as prayed: excepting only, that they omitted the costs; because it would have been to no purpose to have ordered them, as the plaintiff himself (who was apprised of the surrender) was gone abroad; and the attorney, (not being apprised of it) had not acted with any ill design or intention to oppress.

[410] SHEEPSHANKS ET UXOR *versus* LUCAS. Tuesday, 22d November, 1757. Judgment in error, for the reversal of a common recovery. [Yelv. 57. 2 Lev. 38. Post, 413. 9 Vin. 550, pl. 3.]

P. 29 G. 2, Rot'lo. 622.

Error from C. B. to reverse a common recovery. The wife of Sheepshanks claiming to be entitled (in common with others) to a remainder in fee (under the will of one Broadbent) after the death of one Thomas Pierson, tenant in tail, who was vouched in this recovery; her husband and she bring this writ of error; and the error assigned is "the death of the vouchee, before judgment:" concluding with an averment.

"In nullo est erratum"—is pleaded, (which confesses the error assigned, to be true in fact).

Serjeant Poole for the plaintiff in error.

Without doubt, a person intitled to a remainder after an estate-tail, may have a writ of error to reverse a common recovery suffered by the tenant in tail. 3 Co. 3 b. *The Marquis of Winchester's case*, is expressed to this purpose; and gives the reason of it, at large. Pigott, of Common Recoveries 169. "If the vouchee die before judgment, it is error." 1 Ro. Abr. 742, title Error; letter A. pl. 3. 1 Ro. Abr. 747, title Error, letter K. pl. 1. 1 Ro. Rep. 301, *Holland et Al. v. Lee*. Bridgman's Rep. 71, *S. C. Holland et Al. v. Jackson et Al.* Palmer, 224, *Darcy v. Jackson*, S. C. Dyer, 90 a. 40, 188.

We claim under a devise by the will of one Broadbent, in remainder after an estate-tail given to Pierson. *Wynne v. Wynne*, H. 17 G. 2, B. R. is in point to this case—It was a writ of error by a remainder-man in tail: and the very same error was assigned, as is here. There, indeed, the fact (of the vouchee's dying before judgment) was denied: and it was, upon trial of the issue, found "that she was alive at the beginning of the term; but died before the return of the summons ad warrantizandum." And the relation of law, (which was in that case insisted upon,) was not permitted to prevail. And the entry of her appearance at the said return (which was there

entered on the record) was holden not to be contrary to the allegation of her death before such return: because such her appearance was only entered as by attorney; whose authority ceased by her death. So that the error there assigned was not an assignment contrary to the record.

[411] Mr. Luke Robinson, contra, for the defendant in error. Common recoveries are now considered as common assurances; and are therefore to be favoured and supported. Even another warrant of attorney shall be presumed though one already appears upon the record.

1st objection. No one can maintain a writ of error upon a judgment, but one who is either party or privy. But this plaintiff in error is neither party or privy to, nor injured by the judgment here complained of. It does not appear that Broadbent, under whose will she claims the reversion, was ever seised in fee of the estate: and therefore it does not appear how he had a right to devise the estate in the manner he has done. They ought to have shewn in their writ of error, "that he was seised in fee:" which the defendant might have reversed, if it had been so alledged.

2d objection. No scire facias or warning has been given to the heir: who may be an infant, or may have many things to plead. Bernard Lucas, the recoveror, is the only defendant; who is only nominal, but has no real interest.

3d objection. It appears upon this record, that Bernard Lucas has judgment to recover against Thomas Cowper: but Thomas Pierson is no party at all to the writ. Therefore Thomas Pierson (who only came in as vouchee) had nothing to do with a judgment against another man. Consequently Pierson's death before judgment is no error: it can be only an irregularity. And no judgment is given at all, against Thomas Pierson; the recovery is against Thomas Cowper; who is indeed to have recovery over, in value, against Thomas Pierson, &c. but this recovery over in value, against Pierson, is not the judgment upon which this writ of error is brought. This writ of error does not tally with the judgment of which it complains.

4th objection. This error is not well assigned: for it is an error in fact; and therefore ought to conclude to the country; which this does not. *Yelverton*, 58, *Rex v. Gosper and Shire*. "When a man assigns error in fact, he ought to put himself en pais." And the plea of "in nullo est erratum" confesses nothing but what is well pleaded. And that case is word for word the same with this, as to the conclusion of the assignment of errors: and there was a "*hoc paratus est verificare*," as well as here is.

[412] Serj. Poole, in reply—

1st. It is enough, if we suggest matter sufficient to shew that we are privy to and affected by the erroneous judgment. It is sufficient for us, to shew the devise of the remainder to us; without any necessity of shewing that the devisor was seised in fee.\* And the precedents are so.—*Wynn v. Wynn* was so. *Sir John Dinely Goodyere's case* was so. *Darcy v. Jackson*, *Palmer* 224, is so determined, "that the title needs not to be set out, as in a proceeding to recover lands." And all the entries are so.

2dly. The scire facias is brought against the proper person: which is the recoveror.

3dly. Pierson appears by his warrant and vouches: and there is judgment over, in value, against him.

4thly. There never was, nor properly can be, such a conclusion to the country. Here is a new matter of fact introduced: which the other party perhaps will not controvert. We cannot conclude to the country till the other party denies it.

As to the case in *Yelverton*—if it be as cited, yet, it can never be supported. The assignment of an error in fact always concludes with an averment.

Lord Mansfield was clear for the plaintiff in error, on all the points.

1st. The writ of error needs not to set forth a complete title: it is only required of the plaintiff in error, to shew the connection and privy between the person against whom the recovery is had, and the person who brings the writ of error. This is not like a proceeding to try the right of the land, or to recover the land itself. The precedents are so: and none are produced to the contrary.

2d objection. No authority or reason is produced, for a scire facias to the heir.

3d objection has no weight in it: and the case of *Wynn v. Wynn* is in point against it.

[\* S. C. 1 Wils. 35, 42.]

4th objection. The conclusion with an averment, is right ; and gives an opportunity to try the fact by the country, if the defendant in error chooses it : which is all that is requisite.

[413] So much as to the form. And

As to the merits—it is extremely clear that a remainder-man ought to have this chance to the benefit of the entail : viz. to see that all the proper and requisite forms should be gone through, before he is barred of it.

It is plain that judgment ought not to be given against any man, after he is dead. And there could have been no judgment against the tenant to the praecipe in a common recovery, without a judgment likewise over, in value against the vouchee : they are all entered at one and the same time, and are part of the same proceeding.

Mr. Just. Denison concurred—

1st. This general allegation is sufficient, surely, in the writ : he needs not shew a complete title. Nay, even in a formedon, I do not know that the title needs to be completely and fully set out in the writ. And *Wynn v. Wynn* is an authority, on this head.

2dly. A scire facias to the heir was not necessary ; nor any warning to him : the recoveror has the legal right ; and must be taken by the Court, to have the real interest.

3dly. The death of the vouchee, before judgment, is error in a common recovery ; and may be assigned for such. *Wynn v. Wynn* was in point, as to this.

4thly. The case in Yelv. 58 is so far true, (and can mean no more than) that it ought to be put in a method of being tried by a jury. And here the plaintiff in error has done so : he says “ he is ready to verify it.” So that the defendant in error might have put it in issue, if he had pleased. But he has chosen to plead “ in nullo est erratum : ” which confesses the fact, and puts the matter of law upon the judgment of the Court.

As to the merits—the remainder-man has a right, both in law and justice, to reverse the recovery, if it be erroneously suffered.

Mr. Just. Foster and Mr. Just. Wilmut declared their clear concurrence in opinion with Lord Mansfield and Mr. Just. Denison.

Per Cur. clearly and unanimously judgment reserved.

[414] WINDHAM, ESQ. *versus* CHETWYND, ESQ. Friday, 25th November 1757. A will of land attested by three interested witnesses good. [S. C. 1 Black. 95. Bull. 265.]

Pasch. 28 G. 2, Rot'lo. 53.

A special verdict upon a will of land, dated the 14th of May, 1750, and a codicil of the same date, made by Walter Chetwynd late of Grendon, Esq.

The special verdict—at which day, before our lord the King at Westminster come as well the said William Wyndham, Malachi Lindon, Catherine Lindon, Thomas Stephens, alias Walter Paris, alias Walter Chetwynd, Susannah Blachnell, Henry Perrot, George Huddleston, and James Crofts by their attorney, as the said William Henry Chetwynd by his attorney. And the jurors, &c. being summoned, &c. do come, &c. and being elected, &c. do find, as to the first issue joined between the said parties, that the said Walter Chetwynd was, at the time of making the said writings, importing to be his last will and codicil, of sound mind. As to the third issue, they find that the testator did not, by the said writing importing to be his last will, devise to the aforesaid William Wyndham and his heirs any lands or tenements in the county of Warwick, in trust or for the benefit of the said Thomas Stephens, alias Walter Paris, alias Walter Chetwynd. And as to the fourth issue, the jury find that the testator did not, by the said writing, importing to be his last will, devise to the said Catherine, now Catherine Lindon the wife of the said Malachi Lindon, an annuity of 200l. by the year, for the term of her natural life. And as to the second issue, the jury find that the testator was in his life-time seised in fee, of certain lands, tenements, &c. in the several counties of Warwick and Stafford, of the yearly value of 3100l. and being so thereof seised, he the said Walter Chetwynd, in his life-time, signed, sealed, and published a certain paper-writing bearing date the 14th of May, 1750, purporting to be his last will and testament, and likewise another paper-writing purporting to be a codicil indorsed on the said first-mentioned paper-writing, and of



the same date; (which will and codicil it sets out in hæc verba :) and in the former, there is a charge upon the residue of his real and personal estates, for the payment of all his just debts, legacies, and incumbrances; and that the said paper-writings were so signed, &c. by the said Walter Chetwynd, in the presence of Stafford Squire, Robert Baxter, and Josiah Higden; who likewise attested the same at his request, in his presence, and in the presence of each other. And they further find that the said Stafford Squire and Robert Baxter, being attorneys at law, were, in or about the year 1747, employed by the said Walter Chetwynd to solicit a private Act of Par-[415]-liament "for sale of the estates late of Henry Fleetwood, Esq. deceased, in the county of Lancaster, for raising money to discharge incumbrances affecting the same, &c." And that the said Stafford Squire and Robert Baxter charged the said Walter Chetwynd debtor in their books, for the fees and expences of passing the said Act: and which charge continued so, until and after the death of the said Walter Chetwynd. And that at the same time of the said signing, sealing and publishing of the said several paper-writings, and also at the time of the death of the said Walter Chetwynd, there was due and owing to the said S. S. and R. B. for the said business done, the sum of 318l. and that some time after the death of the said Walter Chetwynd, the said S. S. and R. B. delivered a bill for passing the said Act to the trustees nominated and appointed in and by the said Act of Parliament for the purposes therein mentioned: and afterwards and before the examination of the said S. S. and R. B. in this cause the said S. S. and R. B. received from the said trustees, at several different times, several sums, amounting in the whole to 302l. 4s. 8½d. and that the said trustees were willing to have paid the remainder, if it had not been for a miscalculation. And the jury further find that in the said private Act of Parliament there is contained a certain clause for payment of the expences attending the said bill: (which clause they find in hæc verba). They further find that at the time of the signing, sealing, publishing, and attesting the said paper-writings, there was a current account open and subsisting between the said S. S. and R. B. and the said Walter Chetwynd, for other business, exclusive of the expences of passing the said private Act: on the balance of which account, if stated at that time, the said S. S. and R. B. were indebted to the said Walter Chetwynd in the sum of 138l. 14s. 10d. They further find that at the said time of the attesting of the said writings, and also at the time of the death of the said Walter Chetwynd, there was due and owing from him to the said Josiah Higden, his apothecary, the sum of 18l. 5s. 5d. on simple contract: eleven pounds whereof were so due on 25th December 1749, and before the last sickness of the said Walter Chetwynd. They also find that the said Walter Chetwynd died on the 17th of May 1750, without issue, and seised, &c.: and that the said William Henry Chetwynd is the only brother and heir at law of the said Walter Chetwynd. They further find that his real estate at the time of signing, &c. and also at the time of his death, was subject to certain mortgages made thereof, by the said Walter Chetwynd to the amount of 19,000l. And of 5000l. more, made by the said Walter Chetwynd's late father. And that the said Walter Chetwynd owed at the time of his death, by bonds, the sum of 1600l. and by simple contract 2874l.: and that his personal estate then amounted to 13,972l. and was sufficient to pay [416] all the simple contract debts and bond debts of the said Walter Chetwynd. And that the several real estates so in mortgage were of value more than sufficient to satisfy the several incumbrances affecting the same. The jury further find that on the 2d of August 1750, the said William Henry Chetwynd filed his bill in Chancery against the said William Windham, &c. for the obtaining a decree and recovery of the said lands, &c. and thereby contested the validity and due execution of the said paper-writings. That answers were put in, and amendments made to the bill; and other answers put in: and the said William Henry Chetwynd prosecuted the said suit in Chancery with all due diligence. The jury further find that the said William Windham, as executor of the said Walter Chetwynd, paid to the said Josiah Higden the said sum of 18l. 5s. 5d. after the death of the said Walter Chetwynd and before the examination of the said Josiah Higden in this cause: and that the said J. H. had not, at the time of his examination in this cause, any demand upon the said Walter Chetwynd. But whether upon the whole matters aforesaid by the jurors in form aforesaid found, the said paper-writings or either of them were or was duly executed by the said Walter Chetwynd, so as to pass lands or tenements, or not, the said jurors are wholly ignorant; and therefore pray the advice, &c. &c.

This case was argued twice: 1st, on Friday the sixth of May last, by Sir Richard Lloyd for the plaintiff, and Mr. Clayton for the defendant; and again, on Friday the 18th instant by Mr. Serjeant Prime for the plaintiff, and Mr. Norton for the defendant.

The principal objection insisted upon by the counsel for the defendant, was "that the subscribing witnesses to the will were not, at the time of their attestation, credible witnesses:" and consequently, this was not a good will of lands, within the Statute of 29 C. 2, c. 3, for Prevention of Frauds and Perjuries; as not being attested by three credible witnesses.

In proof of which, they urged many arguments, and reasoned from several cases: and amongst others, they cited two cases as in point; viz. *Hilliard v. Jennings*, reported in 1 Ld. Raym. 505, Comyns 92, Carthew 514, and Cases in B. R. temp. W. 3, page 277; and *Holdfast ex dem' Anstey et Ux' v. Dowsing*, in 2 Strange 1253.

But it would be unnecessary to prefix either the <sup>\*1</sup> arguments of the counsel, or the authorities upon which they relied; as Lord Mansfield entered into the case so very minutely, in delivering the opinion of the Court upon it.

After the Court had taken some time to consider of it, they all agreed that the will was duly attested by three credible witnesses. And now,

[417] Lord Mansfield delivered the opinion of the Court, to the following effect.

The doubt made by this special verdict sprung, after the cause of *Anstey v. Dowsing*, out of the general question then much agitated, "whether a benefit given to a subscribing witness by the will, either under a general or particular description, should annul his attestation, as at the time of his subscribing; and make the will wholly and absolutely void, for want of form, as much as if he had never attested at all; though at or after the testator's death, he might be disinterested, and competent to be examined in support of the will."

This general point is the basis of the objection to these subscribing witnesses. Unless the defendant can support it, he has no ground to stand upon. But though he should succeed in the general proposition, the application to this case may fail, from the particular circumstances, and the kind of benefit objected.

The question does not depend upon the construction of any words of the statute. The statute is silent as to the capacity of the witnesses: it declares no incapacity; it requires no qualification.

The epithet "credible" has a clear precise meaning. It is not a term of art appropriated only to legal notions; but has a signification universally received. It is never used as synonymous to competent. When applied to testimony, it presupposes the evidence given.

After the competence of a witness is allowed, the consideration of his credibility arises; and not before. Persons undoubtedly credible cannot be witnesses, under particular circumstances; persons manifestly incredible may be, and often are witnesses.

In Acts of Parliament which direct convictions upon the oaths of witnesses, the epithet "credible" is added: but by no means intended to signify "competent:" that is implied in the term "witness." But it is intended, (from abundant caution,) to declare, that though competent witnesses swear positively, their credibility is to be weighed; and if the magistrate thinks the evidence not credible, he ought not to convict.

In this sense, it was very unnecessary to add the epithet, here, to subscribing witnesses. And yet to make the essential solemnity of the will depend upon the credibility of the subscribing witnesses, is so absurd; that their credibility has always been held to make no part of the necessary form.

[418] If they all swear that the testator did not execute: if they had, at the time the worst characters, and had committed the most infamous actions; yet their attestation answers the necessary form; because the testator meant to comply with the law, and might not know them to be bad men.

The 3d rule or caution in making wills, given at the end of *Butler and Baker's case*,<sup>\*2</sup> is—"at the time of the publication of the will, call credible witnesses to subscribe their names to it." Lord Coke certainly meant "persons of credit and character."

<sup>\*1</sup> See a short summary of them, in Dr. Burn's Ecclesiastical Law, pa. 532.

<sup>\*2</sup> 3 Co. 36 b.



From hence, and from the usage in Penal Acts directing convictions, I am persuaded that the epithet was inserted here, as a word of course, and misapplied. Had the operation or effect of the word, in this particular case, been attended to, it never could have been inserted; because, in the natural and obvious sense, the meaning must be rejected, from the consequences it would have: and in any other, it has no meaning at all; for, suppose it to signify competent, competence is implied in the term "witnesses."

This whole clause, which introduces a positive solemnity, to be observed, not by the learned only, but by the unlearned; at a time when they are supposed to be without legal advice in a matter which greatly interests every proprietor of land; where the direction should be plain to the meanest capacity; is so loose, that there is not a single branch of the solemnity defined or described with sufficient certainty to convey the same idea to the greatest capacity.

There have been litigations, and contradictory opinions, upon almost every part of the form; as "what is signing by the testator? whether the witnesses are to attest *uno contextu, uno eodemq; tempore*? whether they are to see the testator sign? whether they ought to know that he signs it as his will? whether he ought to publish it as his will?" A very little precision and a very few words, might have prevented all these questions.

In a clause not the most accurate, I can easily believe that the usual epithet "credible" slipped in, as of course, without attention to the impropriety of using it on this occasion.

It has been said "that this Act of 29 C. 2, c. 3, was drawn by Ld. Ch. J. Hale." But this is scarcely probable. It was not passed till after his death: and it was brought in, in the common way; and not upon any reference to the Judges.

[419] But what sense soever is put upon this word "credible," the statute leaves the question just as it was: for it does not declare who are, or are not credible: or, (if it is supposed to mean competent,) who are competent, or who are incompetent.

Their competence could not be referred to any law then established: because there was, there could be, none applicable throughout to this new case. The necessity of subscribing witnesses to any instrument, never had existed before, in this country. There never could have arisen, in the law of England, a question, "concerning the competence of a witness, at the time of his knowing the fact, he came to testify;" but only "whether he was competent at the time of his examination."

The time of examination could not possibly be the criterion upon which the validity of the will was to depend. The witnesses might not live to be examined: their incompetence to be examined, might arise long after their attestation.

"What objection therefore to the subscribing witnesses, should be sufficient to avoid a will, as informal," was left to be judged of as cases should arise: by general principles, by analogy to the law of witnesses in other instances, and by arguments drawn from the nature and fitness of the thing with regard to justice, convenience, and the intent of the statute.

When solemn determinations, acquiesced under, had settled precise cases, and become a rule of property; they ought, for the sake of certainty, to be observed, as if they had originally made a part of the text of the statute.

I will therefore consider the general question, in two views:

1st. Supposing there had been no judicial determinations relative to the capacity of subscribing witnesses since the statute;

2dly. Upon the foot of the judicial determinations that have been since the statute. And

3dly. In the last place, I will consider the particular case now in judgment, under all its own circumstances.

First—Considering the matter at large; let me observe that the power of devising ought to be favoured.

It is a natural consequence of property, and the right a man has over his own. It was a right by the law of the land, before the Conquest, and down to about the time of [420] Henry the 2d—it ceased, consequentially only, by the introduction of feudal tenures: because, originally, every species of alienation was contrary to that system.

As soon as the power of alienation *inter vivos* was indulged, testaments followed, indirectly, as declarations of uses.



The Statute of Uses accidentally checked this form of devising. Therefore the Statute of Wills was made.

The 29 Car. 2, c. 3, (which gives a rise to the present question,) did not mean to restrain testamentary dispositions of land: the reasons to encourage that power were increased.

The policy of tenures, from whence arose the impediment to wills, was abolished; but had left many consequences remaining, which made testamentary dispositions of land, more reasonable than they were among the Greeks and Romans, or here before the conquest.

The eldest son only is heir, ab intestato. Among collaterals, not all the next of kin, but one often is heir; to the exclusion of many in the same, and many in a nearer degree. Simple contract creditors had no right to be paid their debts. Money invested in land could not be traced. Much land was in trust: where the widow had no right to dower.

In personal estates, the succession ab intestato is subject to all debts, and governed by natural family equity.

In real estates, the succession is governed by political consequences of a positive system: which make the testamentary power often necessary, to enable a man to do justice to his family, and his creditors.

The Legislature meant only to guard against fraud, by a solemn attestation; which they thought would soon be universally known, and might very easily be complied with. In theory, this attestation might seem a strong guard: it may be some guard in practice. But I am persuaded, many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it.

I have had a good deal of experience at the delegates; and hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested. I have heard eminent civilians who are dead, and some now living, make the same observation.

[421] Suppose the subscribing witnesses honest: how little need they know? They do not know the contents; they need not be together; they need not see the testator sign; (if he acknowledges his hand, it is sufficient;) they need not know it to be a will; (if he delivers it as a deed, it is sufficient).

For these and many more reasons, it is clear that Judges should lean against objections to the formality. They have always done so, in every construction upon the words of the statute: a fortiori ought they to do so, in raising a consequential system, not prescribed in words. And still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled; and be no preservative against fraud.

At the time this Act was made, the law rejected no witness to prove a will; unless at the time of his examination, his testimony tend to support his own title, and enable himself to hold or recover an interest under it.

In the Ecclesiastical Court, the probate is conclusive to every body as to every part. If a legatee came to prove it, he intitled himself to his legacy. But if the legacy was contingent, and at the testator's death could not take effect; if he had the same or a greater interest, though the will should be set aside he was a witness: a release, payment, or tender, made him a witness.

In the Courts of Common Law, where the witness had a charge upon land devised to another, he was just in the case of a personal legatee. If he had as great an interest the other way; if his interest at the testator's death could never take effect; if there was a release, (of which several authorities were cited;) and I will add, as by necessary consequence, if there was payment or tender, he was a witness.

Nice objections, of a remote interest which could not be paid or released, though they held in other cases, were not allowed to disqualify a witness in the case of a will: as\* parishioners might prove a devise to the use of the poor of the parish for ever.

Before the statute, no man could, in a Court of Justice, intitle himself, by his own examination, to a devise. So, after the statute, no man should intitle himself, in a Court of Justice, to a devise, by virtue of his own subscription, which at the time of subscribing, he could not have proved by his examination.

\* V. 2 Sid. 109, M. 1658, *Townsend v. Row*.

[422] The disability of a witness from interest, is\* very different from a positive incapacity. If a deed must be acknowledged before a Judge or notary public, every other person is under a positive incapacity to authenticate it: but objections of interest are deductions from natural reason, and proceed upon a presumption of too great a bias in the mind of the witness, and the public utility of rejecting partial testimony.

Presumptions stand no longer than till the contrary is proved.

The presumption of bias may be taken off, by shewing the witness has as great, or a greater interest the other way; or that he has given it up.

The presumption of public utility, may be answered, by shewing that it would be very inconvenient, under the particular circumstances, not to receive such testimony.

Therefore from necessity, the course of business, and other reasons of expedience, numberless exceptions are allowed to the general rule.

The presumption of bias arises as at the time of subscribing. But it may be answered.—If part is devised to a subscribing witness, the presumption is answered, by shewing he was heir at law: or that the devise is void; or that he has renounced it.

Where is the reason to say that a witness who does not know the contents of a will during the testator's life, and at his death takes no benefit, was biassed at the time he subscribed, or can be biassed at the time of his examination?

During the life of a testator, devises are mere possibilities; no interest can vest till his death. The presumption of bias from the possibility, is answered by the fact when it becomes an interest. His swearing when he is totally disinterested, is conclusive, that the possibility is not to be presumed the corrupt cause of his subscribing.

For the sake of third persons, it is wise and just, to allow the objections thus to be purged: otherwise, many settlements by will must be overturned, to the ruin of families.

It is natural and usual to give legacies to servants, and tokens to friends.—Persons under these descriptions are most like to be witnesses. Ought such trifles to overturn unavoidably the most deliberate dispositions of the greatest estates? Which may be attended often with this family distress, that a man may have given his money to one part of his family, and his land to another: in which case, the will would be good as to the money, and void [423] as to the land.

If the Legislature had said so, that would have been a positive rule: but it is contended for, by construction, and to guard against fraud.

It is no guard, even in theory, in the case of legatees: because, they may, in another shape, attest the devise which charges the land with their legacies.

It is settled, "that where the land is once charged, (and it always is an auxiliary fund,) with the payment of legacies, by a solemn devise, the legacies may be given, altered, or revoked by a subsequent will unattested. The fraudulent legatee might attest the charge, and get his legacy in a codicil unattested.

Let a will be ever so fair, a slip in form is fatal; which is a certain mischief. But if a will be fraudulent; though it is allowed to be formal, it may be set aside upon evidence and circumstances.

Neither reason nor policy require the objection to be carried farther than I have laid it down; agreeable to the law before the statute, and the universal maxim, "*testis in propriâ causâ non est adhibendus.*"

But if judicial determinations, acquiesced under, and become a rule of property, since the statute, have extended the incapacity further, they must be adhered to. Which brings me

Secondly, to consider the judicial determinations since the statute.

All the determinations agree exactly with these principles.

In many instances, the presumption of bias from a legacy, at the time of subscribing, has been allowed to be taken off by a release. Authorities in print have been cited to shew "this was considered as a settled point:" and I verily believe it was so, from the authority of the oldest and most eminent practisers in Westminster-Hall: and therefore I give credit to the dictum of Powys in Viner,\* "that it had been solemnly agreed by the Judges, that, where a person had a legacy given, and did release it, he was a good witness to prove the will."

I know that before the case of *Anstey v. Dowsing*, a will [424] of a very great estate was liable to the objection; and the heir at law would have contested it: but

\* See Viner's Abridgment, title Evidence, page 14, No. 53.



as it was certain the witnesses would be paid, or release, no opinion that he took, encouraged him to think it worth his while.

Mr. Fazakerly and Sir Thomas Bootle have told me, they took it to be settled: and indeed the number of wills where the objection lay and never was taken, demonstrated it.

There is not a single determination which carries the incapacity farther than the rule I have laid down; viz. "that a person shall not, in a Court of Justice, intitle himself to a devise, by virtue of his own subscription, which at the time of subscribing he could not have proved by his examination."

That is the case of *Hilliard v. Jennings*. That is the resolution and judgment of the Court in the case of *Anstey v. Dowsing*. There, the defendant was a devisee; subject to an annuity of 20l. a year to Eliz. the wife of John Hailes, for her life, for her separate use: and there did not appear to be any personal estate. Her interest was a charge, in the nature of legacy, to be paid by the defendant out of the estate devised to him: and being for her separate use, it was a trust: and the defendant was her trustee. Upon the validity of the devise to the defendant, her annuity depended. If he succeeded, her title followed of course; for he must take the land, as the testator gave it, subject to the charge and trust: and upon the devise to the defendant being found good at law, a Court of Equity must, of course, have decreed the trust. So that she was the cestuy que trust of the party to the cause; and either way, the judgment would immediately affect her interest.

In matter of evidence, husband and wife are considered as one; and cannot be witnesses, the one for the other. The husband cannot be witness for his wife, in a question touching her separate estate.

There was no release. There could be no payment, or tender, without the interposition of a Court of Justice; because the value depended upon incertain estimation; but no attempt had been there made towards paying, or tendering the value of the annuity.

This brought it precisely to the case of *Hilliard v. Jennings*: the witness, in a Court of Justice, was to support a devise to himself, by virtue of his own subscription: (for the case is the same, as if the wife had been the witness, or the husband the devisee of the annuity).

It is true that Ld. Ch. Lee, in\* delivering his opinion, argued as if the objection of benefit from the will to the witness, at the time of subscribing, could not be answered or taken off by any subsequent fact: which he grounded upon the authority of the Roman law, from the Digest, and Code; where it is said "conditionem testium tunc inspicere debemus cum signarent, non mortis tempore." But the sense of this passage was not enough considered.

"Conditio testium" here means the positive capacity of the witnesses; their rank, or quality, as freemen, citizens, adult.

There never was a time, in the Roman law, when interest under the will was any objection to subscribing witnesses.

To explain this a little farther—

The essence of the Roman testament was the appointment of an heir, to represent the testator.

Before the Twelve Tables, the testamentary heir might be made two ways; in procinctu, as Plutarch describes at the siege of Corioli; or in the form of a legislative act, in comitiis calatis.

The Twelve Tables gave an absolute power to every man, to make the law of his own succession: but prescribed no form.

As a testament was an alienation of the testator's property and family after his death, the form of mancipation per æs et libram, used in other transfers of property or family, was followed in this: the heir was supposed to buy, and the testator to sell his succession and family, for and as representing their families. The ceremony was transacted with all the symbols of a sale; in the presence of the officer who held the balance, and of five freemen, citizens of Rome, fourteen years of age at least, solemnly required to bear witness.

These ceremonies and symbols were invented before instruments in writing: and

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\* That opinion was delivered by Ld. Ch. J. Lee, on Tuesday 22d April 1746. P. 19 G. 2.



this imaginary sale, *per æs et libram*, was used in alienations, adoptions, and almost every species of change of dominion, or property strictly so called, ("*proprium est quod quis librâ, mercatur et ære,*") and in many other contracts.

Subsequent laws and usages especially after testaments came to be in writing, took away the ceremony of the symbolical sale, added two witnesses more, and prescribed forms of attestation; but left the condition of the witnesses, [426] the same: they must be freemen, Roman citizens, adult, & testabiles. Yet, by an equitable construction, general reputation was sufficient: as where the witness, whom every body considered as a freeman, really was a slave.

This was the *conditio testium*, and must exist at the time of subscribing: as much as where there is a custom to surrender into the hands of two copyholders out of Court, they must be copyholders at the time.

Though in other cases, the objection of interest to a witness, was allowed: it did not incapacitate witnesses to a will.

While the testament *per æs et libram* continued, neither the testator, or heir, or any of the families of either, could be witnesses; because they were to be supposed the parties to the contract.

When the symbolical sale ceased, and testaments were in writing and secret, the heir himself was a sufficient subscribing witness. Afterwards, though the will was open, and he knew the contents, he was a sufficient subscribing witness: as appears from Cicero for Milo, speaking of Cyrus\*—"Una fui; testamentum simul obsignavi cum Clodio; testamentum autem palam fecerat, & illum hæredem & me scripserat."

Justinian Inst. lib. 2, tit. 10, § 10, recites the heir having been allowed to be a witness; but forbids it, (not upon the foot of his being interested,<sup>(a)</sup> but) "*ad imitationem pristini familiæ emptoris; quia hoc totum negotium, testamenti ordinandi gratia, creditur hodie inter testatorem & hæredem agi.*" But in the next section (§ 11), he expressly allows the *cestuy qui trust*, and legatees, to be subscribing witnesses: "*quia non juris successores sunt.*" And yet the heir might be merely a trustee for the whole inheritance to be delivered to the *cestuy qui trust*; and the legatee might exhaust the whole estate.

This abundantly shews that the passage from the Code and Digest did not relate to witnesses being interested.

And the Code and Digest are consistent with the Institutes, on this head.

The Code, Digest, and Institutes are all one connected work.

The Code was first published in the third year of Justinian: the Digest was compiled before the Institutes; but published a month after, in the seventh year of Justinian.

[427] The proposition, "that any kind of interest at the time of subscribing, could not afterwards be taken off;" and the application of this passage, in support of it, was much agitated in Westminster-Hall, and the whole kingdom.

A gentleman at the Bar, pursuing the proposition through all its consequences, hit upon this point—"that a charge upon land for payment of debts, would defeat the will, if a subscribing witness was a creditor at the time of subscribing." As soon as it occurred to him, he mentioned it to me. There had been many such devices: but the question, "whether the witness was a creditor," never had been asked, at law, nor by interrogatories in Chancery, framed to establish or impeach a will.

If the general rule was right, the deduction seemed very plausible.

He put this point in issue, in Chancery; and examined to it, in behalf of the heir, in several cases. Lord Hereford's will was one of the first: this was another.

A case soon happened which brought the general proposition flung out by Ld. Ch. J. Lee, under judicial examination. On the 10th of February 1746, the Earl of

\* 6 vol. 4to. Oliv. edit. p. 253, sect. 18.

(a) This is not true; but directly the contrary, and would appear so, not only clearly from the comment, but even from the text of Justinian, if it were fairly cited; for several material words are omitted: and yet from this imperfect quotation, it appears that Justinian forbid the testimony of the heir, because even after the abolition of the testament, *per æs et libram*, and when he wrote *hodie*, the whole is *creditor inter testatorem et hæredem agi*: and therefore the known rule of justice that none shall be *testis en re propria et causa*, applied when Justinian wrote, as it did in the case of testaments, *per æs et libram*.

Ailesbury died; having made a will, 15th May 1746, \*1 of his whole estate, real and personal, charged with debts and legacies: the three subscribing witnesses, as being in his service at his death, had legacies; one, 30l. a year for life: the other two, pecuniary legacies. All three released the 12th of February 1746.

He had made a former will, on the 20th of December 1744, attested by three disinterested persons; under which, the three subscribing witnesses to the last will would have had the same legacies.

A bill was brought in Chancery, to have the latter will established, notwithstanding this doubt; and stating the whole matter. Notwithstanding the will of 1744, which the testator had revoked, (as he thought effectually,) and might probably have cancelled; it was a benefit to the witness, at the time of subscribing, to have a legacy under the last will.

The cause came on to be heard, the 5th of November 1748; and I was of counsel, in it.

I had taken the liberty to ask Mr. Justice Denison, "whether the judgment of the Court, in the case of [428] *Anstey v. Dowsing*, went upon the general proposition." He told me it did not; but upon the particular circumstances. As to himself, he was not of opinion, "that an objection of benefit, at the time of subscribing, might not be taken off, by being disinterested, at, or after the death."

I mentioned this to the Lord Chancellor, who had got from Ld. Ch. J. Lee, a copy of the opinion he delivered: and he was clear, "they were good witnesses." (a) At the death of the testator, it was indifferent to them, which will prevailed: besides, they had released. (b) He declared the last will, of the 15th of May 1746, to be well proved, established it; and decreed the trusts.

There is another matter touched in that opinion delivered by Ld. Ch. Just. Lee, which interferes with the rule I have laid down, in its full extent: viz. "that a subscribing witness who is a several devisee, which devise as to him must be void, shall not by his subscription authenticate the rest of the will." But, for this, no authority is cited. In the case of *Hilliard v. Jennings*, the whole land was devised to William Hilliard. And I am satisfied that Ld. Ch. J. Holt took the distinction, "that the will might be only void, quoad the devise to the witness:" because Carthew, (pa. 514) who was counsel in the case, and has reported it the most correctly, hints an expression of that kind, viz. "that it was void quoad the devise of the lands to the plaintiff;" and Ld. Raymond, in the case of \*2 *Baugh v. Holloway*, says expressly, "that Ld. Ch. J. Holt so determined."

The validity of the will, as to the personal estate, was not before the Court; and never could come before the Court, because that question belonged to another jurisdiction. The case in judgment was of a devise to the witness only. Ld. Ch. J. Holt might, very properly, throw out something to guard against inferences from their present determination, to the case of a devise to a third person.

I have looked into the Register-book, for that case of *Baugh and Holloway*; and find the state of it to be this—Richard Baugh died, leaving Elizabeth his wife, and two sons, named John and George; having first made his will, dated 11th June 1707, whereby he devised certain premises to his youngest son George, his heirs and assigns, charged with the payment of 200l. which was due on bond to Lancelot Baugh, the testator's younger brother. And the said testator also devised certain other lands, to the said George, with a proviso, that on the said George's [429] attaining twenty-one, and having 1000l. paid him, then all the said premises should return to his eldest son John. And in case both his said sons should die under twenty-one and unmarried, then the said testator devised the said first-mentioned premises to his wife Elizabeth,

\*1 I believe this is right; notwithstanding the correction of the editor of Ld. Camden's argument, in his p. 21 of his 1st part. N.B. May, 1746 was prior in time, to February, 1746.

(a) The heir or executor named in a testament, cannot be a witness to it, for it is his own affair, Strahan's Domat, vol. 2, page 21. This is warranted by reference to the Digest, and the Institute, De Testamen. Ordinam. par. 10, 11, though the last part only is referred to by Domat.

(b) This made them good witnesses, if they had not released: consequently this is no authority that the release would have taken off the objection.

\*2 1 Peere Wms. 557, 558.

her heirs and assigns, charged with the payment of the said 200l. to the said Lancelot Baugh, and also with the payment of 150l. to the said Lancelot Baugh's children; and devised the said last-mentioned premises to his brother Edward Baugh, his heirs and assigns. Both the testator's said sons died without issue, under age: and Elizabeth Baugh possessed and enjoyed the said premises under the said will, and afterwards died, 20th October 1714; having first made her will, and devised the said first-mentioned premises to Catherine Rawlins, charged with the payment of her debts, and also subject to the said charge made by her husband's will. Catherine Rawlins entered, and enjoyed the said premises, and died; having made her will, dated 26th May 1716, and devised the said premises to Anne Oxenden and Elizabeth Holloway as tenants in common, charged with the payment of the debts and legacies appointed to be paid thereout by the said Richard Baugh, and also of the debts, &c. of the said Elizabeth unsatisfied by the said Catherine Rawlins. The said Anne Oxenden and Eliz. Holloway claimed the said premises, as only children of John Holloway by Anne his wife, and as co-heirs at law of the said Eliz. Baugh and Cath. Rawlins. Lancelot Baugh filed his bill, and claimed as uncle and heir at law of John Baugh the surviving son of his brother Richard Baugh; thereby impeaching his said brother's will.

The order is stated right in 1 Peere Wms. 558: and on searching the register's book, it could not be found to have come on again. Therefore it is reasonable to think the heir must have been advised to drop it.

Devises of lands differ extremely from wills. They are no appointment of an heir; they create no representation; the devisee does not stand in the place of the devisor, as to simple-contract debts: and till the \*<sup>1</sup> Statute of King William, the devisee was not liable to specialty debts, (because he was considered as an alienee, and not as the heir). They are conveyances or dispositions *mortis causâ*: and that is the reason why a man cannot devise lands which he shall afterwards acquire.

One devise may be void, (as in the case of this very will;) and the devise of another estate, good. There is no probate of the whole instrument: every several devisee must make out his title, in a distinct cause, and *de novo*, against every new party.

Upon legal principles, there is great weight in the dis-[430]-tinction said to have been made by Ld. Ch. J. Holt: and the authors referred to by Swinburne are strong, upon the reason and fitness of the thing.

The danger of fraud from the imagination "that four witnesses might \*<sup>2</sup> divide the estate among them," seems very chimerical. That very contrivance would overturn the will. If it would not, they might as well execute their scheme, by four devises in four paragraphs, severally attested.

Thirdly—In the third and last place, I proposed to consider the present case under its own circumstances.

These witnesses are in the nature of legatees; not several devisees.

The presumption of "interest at the time of subscription" is not taken off, at the death, by the principal funds being more than sufficient: it is taken off, before the trial, by the debts being paid.

But the benefit at the time of subscribing was nothing. It does not appear the principal funds then were deficient. The legacy is a bare possibility, upon a contingency; which contingency never happened.

But I will go farther, I think a charge "to pay debts" ought not to incapacitate subscribing witnesses; although they wanted and claimed the benefit of it. Every honest man should make that charge in his will: he who omits it, is said to sin in his grave.

Fraud cannot be presumed, from inserting a clause which it would be iniquitous not to put in.

No man would resort to wicked and fraudulent practices, to get his debt charged upon land by the will of his debtor: if he suspected the debtor's circumstances, he would not stay till his death or trust to a revocable security.

\*<sup>1</sup> 3, 4 W. & M. c. 14.

\*<sup>2</sup> By contriving to attest, each for the three others, as to the lands devised to those others: though none of them could be a good witness as to the devise to himself



The presumption of fraud in this case would be against justice and truth : and the public inconvenience so great, that hardly a will could stand.

This charge ought to be in every will.

The persons attendant upon a dying testator, and therefore most common witnesses, are generally in some degree creditors ; such as servants, parson, attorney, apothecary, &c. : and the disallowing such persons to be witnesses can not answer ends of public utility.

Upon the whole we are all of opinion that this will is duly attested by three witnesses.

Judgment for the plaintiff.

[431] REX *versus* STRONG. 1757. [S. C. Sayer's L. C. 217.] Penalty for exercising a trade, contrary to the statute, paid into Court without costs.

Mr. Clayton had moved (on the 19th instant) that the defendant might be at liberty (without paying any costs) to pay into Court 40s. being the penalty for his exercising the trade of a grocer, for the space of one month, contrary to 5 Eliz. c. 4 ; whereof he had been convicted upon an indictment found at the last Cumberland Assizes ; (which proceedings the defendant had removed hither by certiorari :) and that thereupon the recognizance might be discharged : and he founded his motion upon the authority of *Rex v. French*, Pasch. 24 G. 2, B. R. *Rex v. Fisher*, Tr. 24 G. 2, B. R. (both, on the motion of Mr. Ford ;) in which cases this was done ; because by 5, 6 W. & M. c. 11, § 3, no costs are payable, but upon indictments brought by the party grieved, or upon prosecutions by justices, &c. or other civil officers prosecuting as such. And so it was also, in a former case, of *Rex v. Mary Incedon*, M. 20 G. 2, B. R. A rule was made to shew cause. And now, Mr. Norton not objecting to this motion, (being satisfied with the cases cited—)

The said rule was made absolute.

JENKIN *versus* WHITEHOUSE AND ANOTHER. 1757. Prohibition to the Spiritual Court, to stay proceedings on the will of a married woman, executed under a power contained in her marriage settlement.

Mr. Madocks moved for a prohibition to the Consistory Court of the Bishop of Coventry and Lichfield, to stay proceedings in a cause there, relating to the will of a married woman, who was a midwife by profession, and had, by her marriage settlement, a power given her to make a will for the disposition of her personal gains in that profession. He said this was not a will, properly speaking : a feme-covert can not make a will ; and cited 1 Mod. 211, *Anonymous*, as in point. Also in a case of *Rex v. Dr. Bettesworth*, upon the application of Miles Barnes, Esq. against Diana Robson, daughter of Diana Elwick formerly Diana Robson and late wife of Governor Elwick, on 27th November 1751, M. 25 G. 2, B. R. this Court agreed “that the Spiritual Court could not treat it as a will, by granting probate of it ;” though it is true, in that case, the Court did not even make a rule, “to shew cause why a prohibition should not go ;” because [432] they thought the Spiritual Court had taken the right method, viz. annexing the paper or instrument purporting to be Mrs. Elwick's will, to an administration granted to her said daughter Mrs. Diana Robson, upon the renunciation of the executors. And so 1 Salk. 313, *Shardelov v. Naylor, and Farresley*, 147, S. C. shews “that this is not a will, nor proveable by the Ordinary.”

And the case of *Burnet v. Holgrave*, in Equity Cases Abr. p. 296, shews that this is not in its own nature testamentary.

And he said that the administration granted to the husband had been brought into the Spiritual Court, pendente lite there : which he prayed might be re-delivered to him ; and that this last clause might be added to the rule.

Lord Mansfield—That is going too far : we will not add that.

In a cause of *Ross v. Ewer*, in Chancery,\* there was a power to a feme covert ; “to appoint by will.” Lord Chancellor held clearly, “though such will operates as an appointment, it must be proved in the Spiritual Court :” and he would not proceed, till the will was so proved. It was not material for him to consider of the precise form

\* 5th July 1744. [3 Atk. 156. 2 Vez. 63, 64. 7 Mod. 147.]

in which it was to be proved ; whether by a strict probate, or by granting administration with the appointment in nature of a will annexed : and therefore that point was not entered into. But the fact, "that the paper was her will, in case she had a power to make one," must be established by the Ecclesiastical Court : for such an appointment is in the nature of a will, and attended with all the consequences of a will.

As to the determination in the case of *Burnet v. Holgrave*, "that money appointed, under the execution of a power, by such a will should not lapse ;" it was very fully considered, and contradicted in the cause of *The Duke of Marlborough against The Earl of Carlisle, Earl Godolphin, and Others*, in † Chancery.

The cases cited or referred to by Mr. Madocks, shew that administration may be granted, with the appointment annexed : which proves it to be testamentary. For nothing can be annexed to an administration, but a testamentary disposition ; which is proved and established by the Ecclesiastical Court in that form.

But if the question be, "whether the wife had a power to make an appointment in the nature of a will, and thereby to deprive the husband of any benefit which by law would devolve upon him in consequence of her [433] death," that is a question proper to be considered here : and if she had no such power, this Court will grant a prohibition. And so far, the case in 1 Mod. 211, cited by Mr. Madocks, goes expressly.

It seems right, therefore, to grant a rule "to shew cause why there should not be a prohibition : " and then the case will be better understood, under all its circumstances.

The Court granted a rule to shew cause : but it never came on again.

REX *versus* STEPHENS. Saturday, 26th November 1757. Quo warranto not to be granted after great lapse of time. [See 4 Durn. 283.]

Mr. Cox moved for an information in nature of a quo warranto against the defendant John Stephens, Esq. to shew by what authority he acted as one of the aldermen of the corporation of St. Ives in Cornwall.

The fact upon which the information was prayed, was the defect of the defendant's title : which stood as follows :

John Noall was elected alderman in June 1728, without being then a burgess or assistant ; (which was a necessary previous qualification :) and the said John Noall was, the next year, elected mayor. And all the succeeding mayors and aldermen were elected under Noall and his successors in the mayoralty, (each, under his respective predecessor ;) and likewise by aldermen claiming under Noall's said defective election ; till in September 1741, the defendant was elected alderman, by such defective electors as aforesaid ; and in November 1742, he was, by the like and no better authority, elected mayor. And it was sworn that by the constitution of the said borough, there can be no due election, of a mayor or alderman, without a legal mayor presiding at such election.

Note.—Noall died, a year ago, in quiet possession of his office of alderman.

The Court were clear and unanimous in refusing to grant this information ; by reason of the staleness of the defect of title, assigned as the foundation for it ; which was of no less than twenty-nine years standing. For they thought it would be of very ill consequence to corporations, if the Court should, after so many years acquiescence, *quieta movere*, and call corporators to [434] account for acting under such elections, depending upon the prior rights of others, whose rights had never been before objected to : which must occasion infinite confusion in corporations.

And they said that though there was indeed no statute nor even \* fixed rule of limitation, as to the length of time which should suffice to quiet the possessors of these offices ; yet the Court, in their discretion, ought to refuse granting these motions, after a great length of time.(a)

[435] And Lord Mansfield observed that there was no direct and express limitation

† 26th Nov. 1750.

\* V. post, pa. 1962, 17th November, 1766, the *Winchelsea* causes, it was fixed to twenty years.

(a) There is no Statute of Limitations that bars an action upon a bond ; but a jury may presume the debt to be discharged, where no interest appears to have been paid for sixteen years : but shewing the party not in circumstances to pay, or a recent acknowledgment, the jury must say the contrary. Cowp. 109.

of time, when a bond should be supposed to have been satisfied: the general time indeed was commonly taken to be about twenty years: but he had known Lord Raymond leave it to a jury upon eighteen years.

Mr. Just. Foster mentioned a case of *Malmesbury*, not so strong as this case: where an information was denied.\*

And Mr. Just. Denison mentioned a like case in † Leominster: in which he himself was counsel.†

Per Cur. unanimously,

The motion was denied.(a)

REX *versus* INHABITANTS OF LOWER SWELL. 1757.

See this case abridged, in the table; and at large in the quarto edition of my *Settlement-Cases*, No. 140, pa. 436.

[436] COCKERILL, Assignee, *versus* OWSTON. Monday, 28th November, 1757.  
Bankrupt liable to judgment on a bail-bond. [See 1 Bosan. 450. Str. 1043, 1160.]

The question was whether a bankrupt's certificate, obtained after judgment in an action upon a bail-bond, against the bankrupt himself, (for the bail were not at all concerned in this motion,) should discharge the bankrupt from this judgment upon the bail-bond, as well as from the original debt: (which the plaintiff's counsel agreed that it did discharge him from).

Note—The defendant had paid the money into the sheriff's hands, upon being taken up by a ca. sa. in order to procure his liberty. So that the motion was "that the money might be restored to the defendant, with costs." And the Court had granted a rule "to shew cause," upon Mr. Luke Robinson's motion: against which rule, Mr. Clayton now shewed cause.

The Court held, that the certificate obtained subsequent to the bringing of this action upon the bail-bond, (though such certificate was founded upon an act of bankruptcy prior to the bringing this action upon the bail-bond,) did not discharge the bail-bond; although it discharged the original debt: for that this was a new and distinct cause of action.

Indeed such certificate shall discharge the proceedings depending against bail in

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\* In a case of *Rex v. Mayor of Bridgwater*, M. 6 G. 1, B. R. An information was refused, after thirty-five years acquiescence under the new charter.

† But the Leominster case (which was *Rex v. Spencer*, 1st June 1741, Tr. 14, 15 G. 2, B. R.) was not determined upon this point; (far from it, indeed:) it was refused for the insufficiency of the affidavit, and not properly proving the bye-law on which the motion was grounded.

(a) Michaelmas 1766. A rule was made that no information in the nature of a quo warranto shall be granted on a cause arising above the distance of twenty years; cited on a rule to shew cause, &c. *Rex v. Hawes, Mayor of Winchelsea*, Hil. 1763. And that length of time alone, less than twenty years, would not be sufficient to refuse granting an information; but the objection to Dawes being, that he was not a resident, nor paid scot and lot in September 1747, when he was made a freeman, which by the usage of the borough, was necessary to entitle him to be admitted to his freedom, the Court at the distance of nineteen years, as this was, would not grant the information to try these facts.

The rule was to shew cause why an information should not be granted against him, for usurping the franchise of a freeman, which the Court said was a fairer way of applying, than it would have been to have applied for an information for usurping the office of mayor: though the Court were of opinion, that as the freedom of the city was a necessary qualification to entitle him to be chosen mayor, in an information against him for usurping the office of mayor, the want of this qualification, to be made free at the time he was made so, might be given in evidence; and in that they were very clear, though in this case, it would make no difference if it were not so. But the cause was argued again the next day, and stood over to Trinity term, and then the rule was discharged.



an action upon the old debt, who are not already fixed: so it has been lately determined. V. ante, pa. 244, *Woolley v. Cobbe & Al.* (which is the case they hinted at).

Rule discharged: and ordered that the sheriff pay the money to the plaintiff.

The end of Michaelmas term 1757, 31 Geo. 2.

[437] HILARY TERM, 31 GEO. II. B. R. 1758.

ROSE *versus* GREEN. Thursday, 26th January, 1758. Prisoner being carried through another county with permission of the sheriff, and calling upon his attorney, is not escaping within stat. 21 Jac. 1, c. 19, s. 2, so as to make the party a bankrupt. [S. C. Bull. 39.]

This case came before the Court upon a reservation by Lord Mansfield at Nisi Prius at Guildhall, for the opinion of the Court "whether the defendant became a bankrupt, on the 31st of March, or on the 6th of May;" which particular day was to be indorsed upon the postea, agreeably to such opinion.

This Mr. Green having been arrested for debt in Kent, on the 31st of March, was afterwards, on the 6th of May following, brought up by an habeas corpus, in order to be turned over: and, on the road to the Judge's chamber, was permitted (at the desire of himself and his father) to call at his attorney's house (Mr. Penfold's) upon Garlick Hill in the City of London, which was out of the county of Kent; and was carried thence (by a habeas corpus) directly to a Judge's chamber, to be bailed; and accordingly was bailed, but was instantly there surrendered by his bail, in discharge of themselves, (who had just before bailed him:) and thereupon committed, eo instante, to the King's Bench prison; where he lay above two months, viz. from the said 6th of May till the 15th of July next following.

Sir Richard Lloyd, Mr. Caldecott, and Mr. Bainham argued that this was an act of bankruptcy from the time of the first arrest: taking it either of these two ways; viz. either 1st, as a lying in prison two months after having been arrested for debt; (under 21 J. 1, c. 19, § 2). Or 2dly, as an escape out of prison, (under the same clause,) this arrest being for above the sum of 100l.

[438] 1st. If a trader surrenders himself in discharge of his bail, and then lies two months, it is a bankruptcy from the first arrest. *Smith v. Strary*, 2 Ann. 1 Salk. 110, at Nisi Prius at Guildhall—Ld. Ch. J. Holt so inclined, and gave his reason for it: which case was subsequent to the case of *Corn v. Colman* in 1 Salk. 109, (where indeed the Court held otherwise). *Tribe v. White*, P. 17 G. 2, C. B. was a distance of more than nine months between the putting in bail, and the surrender.

2dly. His being in London was an escape: and the debt being above 100l. this escape is an act of bankruptcy from the first arrest.

Mr. Norton and Mr. Burrell, contra—The question upon the case stated at the trial, and reserved for the opinion of the Court, is, "whether he shall be a bankrupt, from the 31st of March, when he was first arrested: or from the 6th of May, when he was surrendered and committed to the marshal; (in whose custody he lay from the 6th of May till the 15th of July)."

As to the 2d point—this was not a wilful escape in the prisoner: but he was carried out of the county by the sheriff. And surely this act of a third person shall not make a man a bankrupt. Nor indeed can a permissive escape suffered by the sheriff, or any act of the sheriff, make a man a bankrupt; who is, in many respects, considered as a criminal.

As to the 1st point—when a person is once admitted to bail, his lying in prison subsequent thereto, viz. the first day of his doing so after being surrendered, shall be the time to which his bankruptcy shall relate: and not the time of the first arrest, upon which he put in bail.

The case of *Duncomb v. Walter* in 1 Ventr. 370, is ill reported there. So, in 3 Lev. 57, it is ill reported. It is also reported in Sir Tho. Raymond, 479, and in Skinner, twice; viz. fo. 22 & 87, 88. In which last, it appears to be solemnly settled, "that the relation to make a man a bankrupt ought to be upon an actual lying in prison, and not upon putting in bail only."†

† N.B. None of these reports of this case are well drawn up, except Sir Tho. Raymond's; and that is only an argument with an adjournatur.

*Came v. Coleman*, 1 Salk. 109, is S. P. viz. "that the bankruptcy shall only be from the time of such first arrest, upon which he lies in prison: not where he puts in sufficient bail." And in 17 G. 2, *Tribe v. Webber*, C. B. per tot. Cur. the same point was resolved unanimously. The case of *Smith v. Stracy* in 1 Salk. 110, 111, is only an opinion of Ld. Ch. J. Holt, at Nisi Prius.

And it is admitted that the present defendant was at [439] large, at a time intervening between the arrest and the surrender. But even allowing him to have remained in custody of the Sheriff of Kent, yet the two months can only run from his first lying in prison. There must be some time (more or less) between his being bailed, and his being committed to the marshal. Therefore he was only a bankrupt from the 6th of May.

Sir Richard Lloyd was beginning to reply: but the Court thought it unnecessary.

Lord Mansfield observed that where positive laws fixed and described what should be looked upon as acts of bankruptcy, they ought to be construed according to their intention, and so as to answer the ends of public benefit, which the Legislature had in view.

In thus construing this Act of Parliament, he held this case not to be such an escape as that the man should be thereby rendered a bankrupt and a criminal. For the Act clearly intended such an escape made by a prisoner, as shews that he means to run away, and thereby defeat his creditors. But this is not such an escape; and certainly, a man shall not be made a criminal, where he had not the least criminal intention to disobey any law whatsoever. There is no escape at all, in the sense of this Act of Parliament: he remained substantially in custody, notwithstanding his being thus carried into another county.

Where bail is really put in, the bankruptcy only relates to the time of the surrender. The most substantial trader is liable to be arrested; and the mere being arrested is no presumption of insolvency; the presumption from his lying in prison two months, without being able to get bail, is a very strong one. But this sort of bailing is a mere form, to turn the defendant over from one custody to another: the bail never justify.

And upon cases of superseding actions by reason of the plaintiff's not proceeding upon them within two terms, being merely turned over from one custody to another, is always considered as a continuance of the same imprisonment. And so I think it is, in the present case, upon the present circumstances: notwithstanding what I have declared as my opinion, upon the general principle, and upon a fair and substantial bailing. Therefore in the present case, I think, the bankruptcy has a relation to the first arrest.

Mr. Just. Denison concurred, clearly, in both points. Can it ever be called an escape within the meaning of this [440] Act; when the man by permission of the sheriff passes through another county, in being carried to a Judge or to the Court? Can this be esteemed a criminal act of the man himself? Most certainly not.

Nor can this formal bail put in without justification, and only in order to be surrendered, (which is a mere matter of form,) be considered as being out of custody, within the intent and meaning of this Act. No: it is a continuation of the same imprisonment: and has relation to the first arrest and imprisonment.

Mr. Just. Foster was clear on both points: and expressed himself to the same effect, as Lord Mansfield and Mr. Justice Denison had done.

Mr. Just. Wilmot also most clearly concurred. And he laid it down, "that these Bankruptcy-Acts were to be construed according to their real intention."

1st point. The general principle of the cases cited is right: but the reason of them is strongly against the present one, as it stands circumstanced. Here is not a single moment, in which the man is out of custody: it is a mere form of changing his prison.

And the very \* Act itself distinguishes between common bail (or no bail at all,) and sufficient bail. Now this bail, in the present case is, in effect, no bail at all.

2d point. The acts which render a bankrupt a criminal, must mean an escape against the consent of the sheriff; a running away, and breaking his prison: certainly not such as this was, under the consent of the sheriff.

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\* The words of it are, "or procure his enlargement by putting in common or hired bail." V. § 2.

Cur. ordered the postea to be indorsed, "that Green became a bankrupt on the 31st of March."

WARING *versus* GRIFFITHS, ET AL. Friday, 27th January, 1758. A right of burial in the chancel may be prescribed for as belonging to an ancient messuage. [See 5 Vin. 29, pl. 8. 17 Vin. 280, pl. 4. 3 Durn. 767.]

This was a case reserved upon a trial at Nisi Prius.

The plaintiff's action was founded upon a prescriptive right of burial of any person dying in his house at Oswestree, in the chancel of the church of Oswestree: in the exercise of which the defendants had disturbed him. And they themselves acknowledged that they had disturbed him in it.

[441] The case stated was, in short, this: that the plaintiff was seised of a messuage, &c. in Oswestree, &c. and had such a prescriptive right of burial belonging to it; and that the defendants did disturb him in burying, &c. and were wrong-doers: but (it was also stated) that 2s. was due to the parish of Oswestree, for every person buried in the chancel of that church.

Mr. Aston, on behalf of the plaintiff, argued that here were two cross prescriptions; and that the two prescriptions were distinct and collateral: one, for the plaintiff to bury, &c. the other, for the parish to receive a payment of 2s. &c. for it: and therefore it was not necessary to alledge the latter, in the declaration, it being only a collateral recompence. And he cited Cro. Eliz. 546, & 563, *Lovelace v. Reynolds*, a prescription for common; and found that he had common, paying for it, &c. So that that was part of the prescription; a condition precedent; it was paying for it, every year, a penny to the plaintiff. But it was holden to be otherwise, where there are two prescriptions; one, for the commoner: the other, for the lord: as in the case in Cro. Eliz. 405, *Gray v. Fletcher*, where the prescription was found; and "that he and all those, &c. had used to pay for it, every year a hen and five eggs." 5 Co. 78, *S. C. Gray's case*—and there, the terre-tenant was adjudged to have a remedy for the recompence. And therefore this was holden to be only collateral, and as two prescriptions; and therefore need not be alledged, the prescription being perfect without it. So here, it need not be alledged: but they may have their collateral remedy; as, in the Ecclesiastical Court, they may have. In proof whereof, he cited 1 Ventr. 374, *Anonymous*. Where it is said "that the remedy for a duty of this kind is in the Ecclesiastical Court."

And this fee is not to be paid till after the burial: and therefore the non-payment of it cannot defend the wrong-doer, who is a stranger. So, in an action against a stranger, for disturbing his seat, or sepulture in a church, it is not necessary to shew any title in the plaintiff. 3 Lev. 73, *Ashley v. Freckleton*: though in such an action against the Ordinary himself, it is necessary to shew some cause; as building, repairing, &c.

*Kewick v. Taylor*, Pasch. 25 G. 2, B. R. It was solemnly determined "that in the case of a stranger and wrong-doer, it was not necessary to alledge more than his own right and a disturbance."

He mentioned the two following cases, viz. 2 Lutw. 1517, *Bennington v. Taylor*: and 3 Lev. 92, *Chafin v. [442] Betsworth*, which (as he said) are like this case. They were disturbances, by strangers, in erecting stalls in a market-place: and no title is shewn. So, in case of a free fishery.

And the finding is quite immaterial. For this collateral claim is no part of the plaintiff's prescriptive right. Palmer 82, the case of *The Corporation of Maidenhead*, in a claim of a market, &c. *Mayor of Northampton v. Ward*, Mich. 19 G. 2, B. R.

Mr. Hall contra for the defendant argued that it was part of the prescription; and that it ought to have been alledged, even against a wrong-doer, "that this 2s. was payable to the parish, for every person so buried." This is a prescription upon a condition precedent. It is an entire prescription: the payment of the 2s. is parcel of the prescription; and it ought to have been so laid and alledged. Prescriptions are against common right, and ought to be proved, as laid: and the plaintiff must prove it as laid; even against a wrong-doer. And if the evidence fall short of the prescription pleaded, it will be against the person who pleaded it. In proof of which position, he cited these cases—*Carthew*, 241, *Rex v. The Inhabitants of Hermitage et Al.* The



prescription was not proved as laid, because there was an exception. Palm. 326, *Countess de Devon v. Eyre*. Which was a prescription pro ovibus generally (instead of ovibus suis :) the proof failed. Hobart 209, *Mitchell v. Montmor*. The prescription failed, because it was laid too large. Cro. Eliz. 415, *Boraston v. Haas* : a custom pleaded generally, but found with an exception : it is against the pleader. Carthew, 117, *Murgatroid v. Law*. The case of *Potwater* mentioned by Popham in *Gray's case*, 5 Co. 78 b. and Cro. Eliz. 405, laid generally, found "paying 6d. by the year" was ill laid. *Lordlace v. Reynolds*, Cro. Eliz. 546, 563, allows *Gray's case*, and the case of *Potwater*, 2 Ro. Abr. 720, title Trial, pl. 30, in prohibition—the plaintiff declared upon a prescription about lambs ; and the jury found farther, &c. it was holden that the plaintiff ought to have rehearsed the whole of it : and that for not doing so, he had failed in his prescription.

Now here, the payment of 2s. is part of the prescription and must be as ancient as the right ; which is "to bury in the chancel, any person dying in his house ; \* paying 2s. for each person." Which is a condition precedent, and therefore ought to have been alledged. Forrester, 166, *Sir John Robinson v. Comyns*, "there are no technical words to distinguish conditions precedent, and conditions subsequent." *Acherley v. Vernon*—per Ld. Ch. J. Willes. (See this in Lucas 518.) Watson 709.

[443] The churchwardens had no remedy, but by interruption ; and being stated as a fee for burial, it ought to be paid before burial.

The Court will not direct a person to be turned over on ha. cor. till the goaler's fees be paid. Hawk. P. C. 151, s. 31, is so. So, in cases of the fee of gloves on pleading pardons. 1 Siderfin, 452, *Rex v. Webster*. "The pardon is not to be allowed, till the fees be paid, viz. the gloves to the Court and officers." Sir T. Jones 56, B. G. presented gloves to all the Judges according to custom. Kely. 25. Gloves are a fee due, on pleading a pardon.

We are not the churchwardens, I agree ; but wrong-doers. (And then he disclosed their provocation : which, he said, was in defence of the bones of one Mr. Griffiths, a former possessor of this messuage ; which Mr. Waring was turning out, in order to make room for a servant of his own). But the plaintiff had no right to the soil : and therefore he ought to have set out his title. And here, he ought to have proved his case ; as he has laid it. 3 Mod. 48, 52, *Hebblethwaite v. Palmes* ; per Ch. Justice, (at the end of the case,) "the plaintiff ought to prove his prescription : or else he must be nonsuit." And the same prescription ought to be given in evidence, as is laid.

*Gray's case* is best reported by Lord Coke, in 5 Co. 78 b. 79 a. And that case turns upon the remedy, which the terre-tenant has for the recompence. And according to the case of *Potwater* there mentioned, (paying 6d. yearly,) here could have been no remedy for the 2s. fee, but by a subsequent disturbance upon a future burial.

Mr. Aston's cases are not applicable to the present case : because in them there was a collateral remedy : but here we have none. Therefore the plaintiff ought to be in the present case nonsuited ; and we are intitled to the postea.

Mr. Aston was going to reply : but

The Court prevented him : being extremely clear for the plaintiff : and Lord Mansfield said—that the distinction is between the case of the owner of the soil, and the case of a stranger, disturbing the person who has a right of this sort.

Where a person claims a servitude upon another's property, he must lay and prove the whole, against the owner of such property. There is a great difference too [444] between granting a servitude, absolutely ; and granting it, sub modo : the latter is a condition precedent. And there are many reasons why in case of a condition precedent, where the grantee brings his action against the owner, the whole ought to be set out : (which reasons he specified).

But in an action against a stranger and wrong-doer, it is not necessary to set out the whole. Here, (which is agreed to be in the case of a wrong-doer,) the plaintiff has stated enough, and has proved it. He claims a right to bury in the chancel ; and is disturbed by a stranger and a wrong-doer. What is the defence ? "That if he had buried the corpse in the chancel ; (which the defendants hindered him from doing,) the churchwardens would have had a right to 2s. for a burial-fee." But he was dis-

\* Note. He does not here state the present prescription truly, according to the case stated. V. ante, 441.

turbed, by the defendants, from burying the corpse there : and then the churchwardens had no right to the 2s. for their right arose upon the corpse being buried there.

For this purpose, the payment of the 2s. is no material and essential part of the prescription ; but collateral to it. It is not an entire prescription, as in the case of *Lovelace v. Reynolds* ; whereof the payment of the penny was parcel.

Mr. Just. Denison concurred entirely. And he distinguished this case (as Ld. Mansfield had also done) from that of *Lovelace and Reynolds* ; which was “ paying for it, every year a penny.”

But whatever may be the right that the churchwardens might in the present case have, the plaintiff had no need to set out this right, in an action against a wrong-doer, a stranger. I do not know that in this case, he needed even to have set out any prescription, in this action against a stranger and wrong-doer. And this matter seems settled in the case of *Kendrick v. Taylor*.

Mr. Just. Foster concurred for the same general reasons. And he thought the payment of the 2s. to be rather a customary payment than a prescription : being “ for every person buried in the isle, or chancel.” To which, Ld. Mansfield agreed.

Mr. Just. Wilmot was also clear in the general position laid down by the rest, as before. And he observed also, “ that the duty could never arise till after the sepulture.” And therefore he thought that if the action had even been brought against the churchwardens, it had yet been within the distinction of *Gray's case*, and to be come at by a collateral remedy ; and not parcel of the prescription, or a qualification of it. But against a wrong-doer, [445] possession alone is certainly sufficient. Therefore he was clear, upon both points.

Per Cur. unanimously,

Let the postea be delivered to the plaintiff.

REX versus LOXDALE AND FOUR OTHERS. 1758. Appointment of more than four overseers bad. [See 4 Durn. 272. 2 East, 171. 4 New Abr. 646.]

[Principle applied, *Howard v. Bodington*, 1877, 2 P. D. 213 ; *Stoomvaart Maatschappij Nederland v. P. & O. S. N. Company*, 1882, 7 App. Cas. 816 ; *Goldsmiths' Company v. Wyatt*, [1907] 1 K. B. 105.]

Mr. Morton had some time ago, (viz. on Monday 17th November 1755,) moved to quash an order of two justices appointing five overseers for the parish of St. Chad, in Shrewsbury.

His objection was that the justices have no power to exceed the number of four. Which objection was founded upon the words of 43 Eliz. c. 2, § 1, “ That the churchwardens of every parish ; and four, three, or two substantial householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly in Easter week or within one month after Easter, under the hand and seal of two or more justices of the peace in the same county, (whereof one to be of the quorum) dwelling in or near the same parish or division where the same parish doth lie, shall be called overseers of the poor of the same parish : and they, or the greater part of them, &c.” And he mentioned a former case of *Rex v. Harman*, upon the very same point, which depended in this Court from P. 12 G. 2, to M. 15 G. 2, and at last was never determined ; and also *Rex v. Besland*, Hil. 19 G. 2, B. R. which was the reverse of an excess of their jurisdiction, where the order, (being to appoint one overseer) was confirmed.

A rule was thereupon made, “ to shew cause.” And after the point had been several times argued in Ld. Ch. J. Ryder's time, it came on to be argued once more, on the 27th of January 1757, before Lord Mansfield, he having never heard the former arguments. When the same things which had been so often said were again repeated.

On the side of the extension of the number of overseers, usage was alledged and greatly relied upon.

Note—The Court misled by assertions “ that there had been a usage to appoint more overseers than four ;” for fear of inconvenience, had avoided determining the question in the case of *The King v. Harman*, after it had depended six years, in hopes that the Legislature would make some provision for what was past, as well as for the

future.<sup>(a)</sup><sup>1</sup> And upon the same [446] apprehension, the Court had hitherto postponed the determination of this.

Lord Mansfield said he had seen full notes of the former arguments of the present case; and also of the case of *Rex v. Harman*. He observed particularly what was said as to the usage in large parishes. And he therefore had directed inquiry to be made in many large parishes, as to the fact, "whether there had been such usage, or not." And he ordered the return which had been made to him upon such inquiry, by the agents on both sides, to be read. From which, it appeared thus—In St. James's Clerkenwell, 4. In St. Bridgett's, 3. In St. Dunstan's, 2. In St. Clement's Danes, 4. In St. Paul's Covent-Garden, 2. In St. George's, Hanover-Square, 4. In St. James's, Westminster, 4. In St. Margaret's, Westminster, 2. In St. Andrew, Holborn, 8: (but that parish contains three separate divisions). In St. Giles's in the Fields, 8: (though now only four are appointed by the justices, and act as assistants, unless eight voluntarily serve: but there were never less than eight before the case of *Rex v. Harman*). In St. Martin's in the Fields, five (since the Act of Parliament lately made, which impowers them to appoint nine, if in the discretion of the justices it should be thought proper). In Shrewsbury, (which contains five parishes;) in St. Alsemond's, 3. In Holy-Cross and St. Giles's, 4. In St. Mary's, 4. St. Julian's, 4. St. Chad's, 5, for one year only; and never exceeding 4, but once, viz. this present year.

After reading the report, Lord Mansfield proceeded, —The usage is, as it were, out of the case; or rather, it supposes "that they can not legally exceed 4."

Therefore, consequently, but little inconvenience can arise from determining the construction of the statute, according to its natural import.

As to legal constructions—the case of *Rex v. Harman* was never determined as to the \* order for the appointment of overseers.

In the case of *Rex v. Besland*, where only one overseer was appointed, no opinion was given judicially, upon the point of law; nor was the appointment † quashed: <sup>(a)</sup><sup>2</sup> so that the present case is a new original case: and it must be determined upon the 43 Eliz. c. 2; which is the foundation of the system of law concerning the poor.

[447] There is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory. The precise time, in many cases, is not of the essence.

In the case of *Rex v. Sparrow*, 2 Strange, 1123, the justices had been guilty of a neglect, in not appointing overseers within due time; and this Court issued a mandamus, to compel them to do it afterwards, for the sake of the poor. The poor could not have a specific remedy, in that case; unless the justices might do it after the precise time, in obedience to the mandamus.

So, as to the justices "in or near the parish or division"—it is only directory.

Justices of peace have no other power to appoint overseers but under the special authority given them by Act of Parliament. Therefore this special authority must be strictly pursued, and can not be exceeded by them. The question here is upon the meaning and intention of the Legislature, in this power given the justices to appoint overseers.

Where there are different statutes in *pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.<sup>(a)</sup><sup>3</sup> So, in the laws con-

<sup>(a)</sup><sup>1</sup> The resolution in this case occasioned the Act of Parliament 26 Geo. 3, c. 23, for the appointment of an additional overseer of the poor of the parish of Westbury in the county of Wilts.

\* There was another order adjudging Harman "to have neglected the execution of his office;" which was quashed in Mich. 13 G. 2.

† It was confirmed, as not necessarily appearing to be a bad order: for it might be "that others were appointed by other orders." [See 1 Wils. 128. Bott, 5, 133. 1 Burr. Set. Cas. 37. Salk. 501, 527, pl. 9. 2 East, 171.]

<sup>(a)</sup><sup>2</sup> Qu. this reason; for in a MS. note I have seen of that case, it was stated that there was but one house in the parish; and the same appears, or at least is necessarily to be inferred from the quotation of the case in 3 Burr. 273.

<sup>(a)</sup><sup>3</sup> Vid. several cases in support of this general rule, that all statutes on the same subject must be taken into consideration on the construction of any one of them, 4 New Abr. 646.



cerning church-leases ; and those concerning bankrupts. And so also I consider all the statutes providing for the poor, as one system relative to that subject. Now 39 Eliz. c. 3, is the first of these, and when first mentioned by my brother Foster, struck me strongly, with regard to the determination of the present question. That Act says, "that the churchwardens and four substantial householders, &c." (without any latitude whatsoever, for a greater number). And more than four could not have been appointed under it : for the number the Legislature had named, could not be altered.

That Act of Parliament of the 39 Eliz. was continued by the very Act of 43 Eliz. c. 2, § 18, till the following Easter, when that of 43 Eliz. c. 2, was to take place : so that the Legislature had it before them, and even under particular consideration, And that Act of 39 Eliz. is expressly fixed to four. Parishes were not then, so populous as they are now. And this Act of 43 Eliz. c. 2, gives power to lessen the number to three or two according to the size of the parish : but they had no notion of extending it to a greater number. And there is some weight in the circumstance of the numbers descending from four downwards, and not ascending upwards.

[448] As to the argument which was drawn from 13, 14 C. 2, c. 12, § 21, I think that statute ought to be taken into consideration in construing this of 43 Eliz. c. 2 : but I do not see that this will help the case. For it is begging the question, to suppose "that the justices may appoint more than four overseers of the poor, in townships and villages in those large parishes." It is expressly directed by that statute of 13, 14 C. 2, c. 12, § 21, that such choice and appointment shall be, (and the construction of it must be guided according to its own reference,) according to the rules and directions mentioned in the Statute of 43 Eliz." And neither any judicial determination, nor usage, support this conceit "that they can appoint more than four in these townships and villages in the large parishes."

The Act of 13, 14 C. 2, was indeed rightly and reasonably extended to Wales.(a) But no argument can be drawn from that latitude of construction : as both the words of it, (which name Wales,) and also the general intention of it, (viz. the care of the poor,) well justified such an extension.

Then the Act of Parliament in 1740, relating to St. Martin's, and the overseers of that parish, and which extends their number, shews the construction put by the Legislature themselves upon the 43 Eliz. on this head ; and excepts this very large parish of St. Martin out of it. And yet even this very Act restrains the number to nine ; which shews that the justices had no power under the 43 Eliz. to appoint what number they pleased. For it would be a strange thing, to limit the number, in a very large parish ; and leave it at large, in smaller ones.

There are two other Acts of Parliament, which have not been mentioned ; and both of them passed after the case of *Rex v. Harman*, and after the case of *St. Clement Danes* : viz. 17 G. 2, c. 3, and 17 G. 2, c. 38, both relating to overseers : and yet no extension of number, nor any variation therein.

The precise number is not an immaterial thing ; either to the officers of the parish, or to the persons for whom they are trustees. Upon themselves, it is a burden : which, by this practice, would come round the sooner. And in respect to the parish for whom they are trustees, a great number may not do business better than a smaller ; and it would be attended with more expence.

Also with regard to the churchwardens who are joined in authority with them— they are only two, or (by custom) four churchwardens in each parish. Therefore a greater [449] number of overseers being appointed, necessarily alters the balance of the majority amongst them, and makes an essential difference in the proportion between the one and the other. And there is no number to stop at, if the justices exceed four : they may go on, without any boundary, unless the specified number of four be the limit.

Therefore I think this appointment of more than four, is not warranted by the 43 Eliz. upon the true construction of that statute.

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(a) Qu. Whether the appointment of five overseers was good ? The Ch. J. said the 13, 14 Car. 2, allows the appointment of two or more in towns and villages : that has been construed to extend to all England ; and therefore by that statute more than four may be applied : to which Chapple, J. and Wright, J. seemed to agree, and were clear that it was void by 43 El. 2 Sess. Cases, 208.

Mr. Just. Denison concurred in opinion, "that this appointment ought to be quashed:" and he did not think that this Court ever had had any doubt about the legal determination of this question.

He then stated and expatiated upon the case of *Rex v. Harman*: and said the reason why the Court did not quash that appointment was merely for the sake of the poor; and not from any doubt of the law.

*Besland's case* was quite a different case from that of appointing a greater number than four. The point of the validity of an order appointing more than four, is a new case; but not a difficult one, at all.

This Act of 43 Eliz. is, as one may call it, the magna charta of the poor. And it can never be called directory as to the number of the overseers appointed by it.

By 1 Inst. 13 b. it appears that there were only two escheators, in England, in ancient time: though more were made indeed by Act of Parliament, (14 E. 3, c. 8). So there can be but one Chief Justice, or Chief Prothonotary, Jenkins 142, case 93. So, in the consolation of the Court of Wards; where 32 H. 8, c. 46, enacts "that there shall be two auditors of the Court of Wards," the King can not make four. So is 11 Co. 4 a. *Auditor Curle's case*.

Certainly, the Legislature had the number which stood fixed by 39 Eliz. in their view, and under their consideration, when they made the 43 Eliz. And can it be imagined that the justices have a jurisdiction to appoint more? clearly they have not.

In the case of *Rex v. Sparrow*, (mentioned in 2 Strange, 1123,) the Court took great care in their determination. And 13, 14 C. 2, was there considered by Ld. Ch. Just. Lee, as tied up to the rules and directions of 43 Eliz. and [450] that mandamus was issued for the sake of the poor: and the Court equitably and rightly held, "that when the justices had elapsed the time for appointing overseers, the Court might oblige them to do it afterwards, as to the time; that being discretionary."

But no body ever thought it discretionary as to the number: and there is no reason in the earth, for us to break the boundary, which is fixed. Therefore he was clear, to quash the present order for the appointment of five.

Mr. Just. Foster declared the very same thing; and that he never had any doubt in point of law: his only doubt was in point of discretion; as he then supposed the usage to be otherwise than as it now appeared to be.

When the Statute of 43 Eliz. was made, there were very few large parishes in towns and cities: therefore at that time, the Parliament thought four overseers sufficient. Under 39 Eliz. I take it, the justices could not have gone below four. For, it being a special power given by statute, must be strictly pursued. And therefore, in the 43 Eliz. the Legislature, though they took the Act of the 39th for their plan, and followed it in almost every instance; yet, seeing the inconvenience in small parishes, departed from it with regard to the number of overseers: which they reduced, at the discretion of the justices; but did not increase, in any event; probably because they thought four overseers, with the churchwardens, sufficient for the largest parish (as they certainly are,) though too many for the small ones.

If it be now become inconvenient, the application must be to Parliament. However, he declared that he did not think that business is best done by a multitude of hands: and in fact, where the number that are to do it is large, they always delegate the actual transaction of it to a few.

It is not true, (what some people imagine) "that the common law of England made no provision for the poor:" the Mirror shews the contrary. How, indeed, it was done, does not appear.

As to the case of *Rex v. Sparrow*,—43 Eliz. fixes a time to appoint overseers, with a penalty: but did not mean that the poor should lose the equity and benefit of the Act, if the justices did not appoint within that time.

No parish ever applied for a mandamus commanding the justices to appoint more than four. The general sense of mankind was against it. This is an authority founded upon a positive law; and therefore must be pursued.

[451] Mr. Just. Wilnot declared (as his brethren Mr. Just. Denison, and Mr. Just. Foster had done) that he never had had the least doubt, but upon the apprehension of an usage of the large parishes, for many years back, to appoint more than four. But this apprehension is now vanished: and therefore the usage (as it now comes out) confirms the true construction of the Act.

The instances of greater numbers appear to be only three: and one of them



(St. Andrew's Holborn,) is considered as three vills, under 13, 14 C. 2. And St. Martin's (another of them) is under a new Act of Parliament made on purpose. I think this order cannot be supported.

There were provisions for the poor, as my brother Foster has observed, at common law: though it does not fully appear what they were. The first regular provision, however, is by 39 Eliz. By this statute, and by 43 Eliz. the Legislature add four overseers to the former parochial administration. And no one can doubt that the number is essential; and cannot, by the rule of law be exceeded. For powers given by a positive law, or even by deed, to certain numbers of persons can never be exceeded, in the article of number. On the other hand, if it had rested singly upon 39 Eliz. the number four could not have been lessened. But then indeed the 43 Eliz. relaxes this precise number of four, as to small parishes; but still continues it, as to all greater. And where the makers of the Act intend an indefinite number, they expressly say so. For the 19th section relating to the island of Foulness converts the whole district into one parish, for this purpose; and directs an indefinite number of overseers for that place. Which clause alone would satisfy me, as to the sense of the Legislature. And they might as easily have said "so many as should seem necessary," as precisely fix it to four; if they had meant it so.

And it is (as has been observed) an office which is burdensome upon the persons appointed: and business is not better done by great numbers of men, than by a few. And the parish have as great security from four, as from more. Upon the whole, he entirely concurred, "that the order could not be supported."

Mr. Norton moved that the order might not be immediately quashed; because the overseers had laid out 500l. or 600l. under it: and therefore he proposed that the other side should consent to have one of the overseers left out of the order.

[452] The Court thought it might be reasonable; and for this reason only, did not directly and immediately pronounce the rule "to quash the order."

But now at a day so long subsequent, on Mr. Morton's motion for the judgment of the Court; and Mr. Norton, not urging any thing further against it, (and acknowledging that he had spoken to his client).

Lord Mansfield said there must be an end of it, some time or other: therefore let the rule be made absolute, to

Quash the appointment.

Order quashed.

(1792) 1 K.B. 321

MILLER *versus* RACE. Tuesday, 31st Jan. 1758. Bank notes, though stolen, the property of the person to whom they are paid, without knowledge of the larceny. [See 1 Bos. 649. 4 Durn. 30, 325. 1 Hen. Bl. 318. 3 Durn. 554, and S. C. cited and S. P. adjudged on a bill of exchange, payable to A. or bearer. 3 Burr. 1519.]

[S. C. 1 Sm. L. C. (11th ed.) 463. Adopted, *Lichfield Union v. Greene*, 1857, 1 H. & N. 889. Referred to, *Crouch v. Crédit Foncier*, 1873, L. R. 8 Q. B. 381; *Goodwin v. Roberts*, 1875-76, L. R. 10 Ex. 350; 1 App. Cas. 476; *London & County Banking Company v. London & River Plate Bank*, 1887-88, 20 Q. B. D. 238; 21 Q. B. D. 543.]

It was an action of trover against the defendant, upon a bank note, for the payment of twenty-one pounds ten shillings to one William Finney or bearer, on demand.

The cause came on to be tried before Lord Mansfield at the sittings in Trinity term last at Guildhall, London: and upon the trial it appeared that William Finney, being possessed of this bank note on the 11th of December 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton in Oxfordshire; that on the same night the mail was robbed, and the bank note in question (amongst other notes) taken and carried away by the robber; that this bank note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank note being taken out of the mail.

It was admitted and agreed, that, in the common and known course of trade, bank notes are paid by and received of the holder or possessor of them, as cash; and that in the usual way of negotiating bank notes, they pass from one person to another as cash, by delivery only and without any further inquiry or evidence of title, than



what arises from the possession. It appeared that Mr. Finney, having notice of this robbery, on the 13th December, applied to the Bank of England, "to stop the payment of this note:" which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

[453] Some little time after this, the plaintiff applied to the bank for the payment of this note; and for that purpose delivered the note to the defendant, who is a clerk in the bank: but the defendant refused either to pay the note, or to re-deliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21l. 10s. damages, subject nevertheless to the opinion of this Court upon this question—"Whether under the circumstances of this case, the plaintiff had a sufficient property in this bank note, to entitle him to recover in the present action?"

Mr. Williams was beginning on behalf of the plaintiff.—

But Lord Mansfield said, "that as the objection came from the side of the defendant, it was rather more proper for the defendant's counsel to state and urge their objection."

Sir Richard Lloyd, for the defendant.

The present action is brought, not for the money due upon the note; but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question: the note is only an evidence of the money's being due to him as bearer.

The note must either come to the plaintiff by assignment; or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer: though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can, or cannot stop payment; that is another question. But the note is only an instrument of recovery.

Now this note, or these goods (as I may call it,) was the property of Mr. Finney, who paid in the money: he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected, that this note is to be considered as cash "in the usual course of trade." But still, the [454] course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note, from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank for the money. In which action of trover, property can not be proved in the plaintiff: for a special proprietor can have no right against the true owner.

The cases that may affect the present are, 1 Salk. 126, M. 10 W. 3, *Anonymous*, coram Holt, Ch.J. at Nisi Prius at Guildhall. There Ld. Ch. J. Holt held, that the right "owner of a bank bill, who lost it, might have trover against a stranger who found it: but not against the person to whom the finder transferred it for a valuable consideration, by reason of the course of trade which creates a property in the assignee or bearer." 1 Ld. Raym. 738,\* S. C. In which case the note was paid away in the course of trade: but this remains in the man's hands, and is not† come into the course of trade. H. 12 W. 3, B. R. 1 Salk. 283, 284, *Ford v. Hopkins*, per Holt, Ch.J. at Nisi Prius at Guildhall. "If bank notes, Exchequer notes, or million lottery tickets, or the like are stolen or lost, the owner has such an interest or property in them, as to bring an action, into whatsoever hands they are come. Money or cash is not to be distinguished but these notes or bills are distinguishable, and can not be reckoned as cash; and they have distinct marks and numbers on them." Therefore the true owner may seize these notes wherever he finds them, if not passed away in the course of trade.

1 Strange, 505, H. 8 G. 1, in Middlesex, coram Pratt, Ch.J. *Armory v. Delamirie*,

\* N.B. In this case, the transferee went to the bank; and got a new bill in his own name. However, the case turned upon his having the note for a valuable consideration.

† The fact seems to be quite otherwise.

a chimney sweeper's boy found a jewel. It was ruled "that the finder has such a property as will enable him to keep it against all but the rightful owner, and, consequently, may maintain trover."

This note is just like any other piece of property until passed away in the course of trade. And here the defendant acted as agent to the true owner.

Mr. Williams contra for the plaintiff.

The holder of this bank note, upon a valuable consideration has a right to it, even against the true owner.

1st, the circulation of these notes vests a property in the holder, who comes to the possession of it, upon a valuable consideration.

[455] 2dly, this is of vast consequence to trade and commerce; and they would be greatly incommoded if it were otherwise.

3dly, this falls within the reason of a sale in market-overt; and ought to be determined upon the same principle.

First—He put several cases, where the usage, course, and convenience of trade, made the law: and sometimes, even against an Act of Parliament. 3 Keb. 444, *Stanley v. Ayles*, per Hale Ch.J. at Guildhall. 2 Strange, 1000, *Lumley v. Palmer*: where a parol acceptance of a bill of exchange was holden sufficient against the acceptor. 1 Salk. 23.

Secondly—This paper credit has been always, and with great reason, favoured and encouraged. 2 Strange, 946, *Jenys v. Fowler et Al*.

The usage of these notes is, "that they pass by delivery only; and are considered as current cash; and the possession always carries with it the property." 1 Salk. 126, pl. 5, is in point.

A particular mischief is rather to be permitted, than a general inconvenience incurred. And Mr. Finney, who was robbed of this note, was guilty of some laches in not preventing it.

Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it, for want of title against a true owner; even if there was a chasm in the transfer of it through one only out of five hundred hands.

Thirdly—This is to be considered upon the same foot as a sale in market overt.

2 Inst. 713. "A sale in market overt binds those that had right."

But it is objected by Sir Richard, "that there is a substantial difference between a right to the note, and a right to the money." But I say the right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. I do not contend that the robber, or even the finder of a note, has a right to the note: but after circulation, the holder upon a valuable consideration has a right.

We have a property in this note: and have recovered the value against the withholder of it. It is not material, what action we could have brought against the bank.

[456] Then he answered Sir Richard Lloyd's cases; and agreed that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration, or not in the course of trade: which is all that Ld. Ch. J. Holt said in 1 Salk. 284.

As to 1 Strange, 505, he agreed that the finder has the property against all but the rightful owner: not against him.

Sir Richard Lloyd in reply—

I agree that the holder of the note has a special property: but it does not follow that he can maintain trover for it, against the true owner.

This is not only without, but against the consent of the owner.

Supposing this note to be a sort of mercantile cash; yet it has an ear-mark by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford v. Hopkins*.

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper; it may be as well stopped, as any other sort of mercantile cash, (as, for instance, a policy which has been stolen). And this has not been passed away in trade; but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away: for this was not passed away. Here the true owner, or his

servant (which is the same thing) detains it. And, surely, robbery does not divest the property.

This is not like goods sold in market overt; nor does it pass in the way of a market overt; nor is it within the reason of a market overt. Suppose it was a watch stolen: the owner may seize it, (though he finds it in a market overt,) before it sold there. But there is no market overt for bank notes.

I deny the holder's (merely as holder) having a right to the note, against the true owner; and I deny that the possession gives a right to the note.

Upon this argument on Friday last, Ld. Mansfield then said that Sir Richard Lloyd had argued it so ingeniously, [457] that (though he had no doubt about the matter,) it might be proper to look into the cases he had cited, in order to give a proper answer to them; and therefore the Court deferred giving their opinion, to this day. But at the same time, Ld. Mansfield said, he would not wish to have it understood in the city, that the Court had any doubt about the point.

Lord Mansfield now delivered the resolution of the Court.

After stating the case at large, he declared that at the trial, he had no sort of doubt, but this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd for the defendant. But the whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts.

Now they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money, as guineas themselves are; or any other current coin, that is used in common payments, as money or cash.

They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon Ld. Ailesbury's<sup>\*1</sup> will, 900l. in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money; not as for securities or notes.

So on bankruptcies, they cannot be followed as identical and distinguishable from money: but are always considered as money or cash.

It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the Bar or Bench; and mistake their meaning. It has been quaintly said, "that the reason why money can not be followed is, because it has no ear-mark:" but this is not true. The true reason is, upon account of the currency of it: it can not be recovered after it has passed in currency. So, in case of money stolen, the true owner can not recover it, after it has been paid away fairly and honestly upon a valuable and bona fide consideration: but before money has [458] passed in currency, an action may be brought for the money itself. There was a case in 1 G. 1, at the sittings, *Thomas v. Whip*, before Ld. Macclesfield: which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and, being alone, conveyed away the money. And Ld. Macclesfield held that the action lay. Now this must be esteemed a finding at least.

Apply this to the case of a bank-note. An action may lie against the finder, it is true; (and it is not at all denied:) but not after it has been paid away in currency. And this point has been determined, even in the infancy of bank-notes; for 1 Salk. 126, M. 10 W. 3, at *Nisi Prius*, is in<sup>\*2</sup> point. And Ld. Ch. J. Holt there says that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee.)

Here, an inn-keeper took it, bona fide, in his business from a person who made an appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is

<sup>\*1</sup> *Popham et Al. v. Bathurst et Al.* in Chancery, 5th November, 1748.

<sup>\*2</sup> *V. ante*, 454.



so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed if there had been any collusion, or any circumstances of unfair dealing; the case had been much otherwise. If it had been a note for 1000l. it might have been suspicious: but this was a small note for 21l. 10s. only: and money given in exchange for it.

Another case cited was a loose note † in 1 Ld. Raym. 738, ruled by Ld. Ch. J. Holt at Guildhall, in 1698; which proves nothing for the defendant's side of the question: but it is exactly agreeable to what is laid down by my Ld. Ch. J. Holt, in the case I have just mentioned. The action did not lie against the assignee of the bank-bill; because he had it for valuable consideration.

In that case, he had it from the person who found it: but the action did not lie against him, because he took it in the course of currency; and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who *bonâ fide* took it in the course of currency, and in the way of his business.

The case of *Ford v. Hopkins*, was also \*<sup>1</sup> cited: which was in Hil. 12 W. 3, coram Holt Ch. J. at Nisi Prius, at Guildhall; and was an action of trover for million-lottery tickets. But this must be a very incorrect report of that [459] case: it is impossible that it can be a true representation of what Ld. Ch. J. Holt said. It represents him as speaking of bank-notes, Exchequer-notes, and million lottery tickets, as like to each other. Now no two things can be more unlike to each other, than a lottery-ticket, and a bank-note. Lottery tickets are identical and specific: specific actions lie for them. They may prove extremely unequal in value: one may be a prize; another, a blank. Land is not more specific, than lottery-tickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property; so far, the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note, into what hands soever it shall come."

Now the whole of that case turns upon the throwing in bank-notes, as being like to lottery tickets.

But Ld. Ch. J. Holt could never say "that an action would lie against the person who, for a valuable consideration, had received a bank note which had been stolen or lost, and *bonâ fide* paid to him:" even though the action was brought by the true owner: because he had determined otherwise, but two years before; and because bank notes are not like lottery-tickets, but money.

The person who took down this case, certainly misunderstood Lord Ch. J. Holt, or mistook his reasons. For this reasoning would prove, (if it was true, as the reporter represents it,) that if a man paid to a goldsmith 500l. in bank notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery, \*<sup>2</sup> on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable; upon her giving bond, with two responsible sureties, (as is the custom in such cases,) to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill: which was dismissed because she either could not or would not give the security required. No dispute ought to be made with the bearer of a cash-note; in regard to commerce, and for the sake of the credit of these notes; [460] though it may be both reasonable and customary, to stay the payment, till inquiry can be made, whether the bearer of the note came by it fairly, or not.

Lord Mansfield declared that the Court were all of the same opinion, for the plaintiff; and that Mr. Just. Wilmot concurred.

Rule—That the *postea* be delivered to the plaintiff.

† Ex relatione of another person.

\*<sup>1</sup> V. ante, 454.

\*<sup>2</sup> *Walmesley against Child*, 11th December, 1749. [1 Vez. 341. 3 Burr. 1524. 3 Durn. 454.]

REX *versus* DR. SHEBBEARE. Wednesday, 1st February 1758. Habeas corpus issued in vacation, returnable immediate before a Judge, does not expire by the commencement of the term.

The doctor was brought up to be bailed : but had not bail ready.

Note—He was now brought up by virtue of a habeas corpus issued by the Ld. Ch. Justice in the vacation, returnable immediate, before himself at his chambers.

Upon Dr. Shebbeare's mentioning that he had been informed that, "as the term was begun, it was necessary to take out a new writ of habeas corpus, to bring him into Court ;" and the officers on the Crown-side having said that their notion of the practice was, "that, the term being begun, the old writ was expired, and it was necessary to take out a new one."

Lord Mansfield declared the Court to be unanimously of opinion that such notion was ill founded ; that a person might be brought into Court upon a habeas corpus issued in the vacation : and that to require a new writ would be attended with delay and expence, without the least reason or utility.

Lord Mansfield—If you have not bail, we cannot commit you to the same custody you come hither in, (which was that of Mr. Carrington, one of the King's messengers ;) but must commit you to our marshal : and you will not then be obliged to sue out your habeas corpus again ; but may be brought up from the prison of this Court, by a rule of Court, whenever you shall be prepared to give bail.

Accordingly, the doctor, being charged with two warrants under the hand and seal of the Secretary of State, which appeared upon the return to the habeas corpus, was

Committed to the custody of the marshal of this Court.

[461] REX *versus* INHABITANTS OF FLECKNOW. Saturday, 4th Feb. 1758. One who inclosed an allotment of lands adjoining to an open road across common fields is not bound to repair.

H. 30 G. 2, No. 6.

This was a cause in the Crown paper, upon a special case from the assizes in Warwickshire ; upon an indictment against the inhabitants of the hamlet of Flecknow, for not repairing a highway, which the indictment lays, "that they ought to repair."

The inhabitants pleaded "that one George Watson ought to repair it, by reason of his tenure : (a) so long as the same should remain inclosed, &c." And traverse that the defendants, the inhabitants, ought to repair it.

The replication sets out an Act of Parliament of 15 G. 2, c. (a private Act) "for inclosing and dividing the common fields called Flecknow, in the county of Warwick, into just allotments and proportions ;" and also the several proceedings under it ; and then traverses "that the said George Watson, by reason of his inclosing the said highway, ought to repair and amend it, as often as there should be occasion, whilst it should remain so inclosed by him," *modo et forma prout* is alledged by the plea : *et hoc paratus est verificare*.

The rejoinder admits the Act, and the proceedings under it, and George Watson's acceptance, &c. under them ; and alledges that George Watson, by reason of his inclosing, ought to repair, &c. And of this they put themselves upon their country.—Issue is taken thereon ; and a verdict *pro Rege*, subject to the opinion of this Court.

The case stated, by consent of counsel was (in substance) thus—the inhabitants of the hamlet of Flecknow, before the making the inclosure by virtue of the Act of Parliament in the record mentioned, were bound to repair the highway in question.

The road in the pleadings mentioned, was, before the making the said Act of Parliament, an ancient open road, lying inclosed, without hedge, ditch, or fence ; and continued to lie so uninclosed at the time of making the said Act of Parliament, and until the inclosure thereof as hereafter mentioned.(b)

(a) This is wrong in point of form ; for as in 2 Saund. 160, it was resolved that if a defendant be chargeable by reason of incroachment, he ought not to be charged *ratione* tenure, but by reason of the incroachment only : so in the case of an inclosure of land contiguous, the same reasoning will hold as in the case of incroachment.

(b) If the inhabitants of a township bound by prescription to repair the roads

The commissioners appointed by the said Act of Parliament did, in pursuance of the said Act, by their award in writing, duly award, ascertain, set out, direct and appoint [462] "that there should be at all times, for ever, after the new inclosure by the said Act directed to be made, a public way or road, leading from the hamlet of Flecknow aforesaid, to Southam in the said county of Warwick, and also from Southam aforesaid to Flecknow aforesaid (being the road in question,) for persons to pass, either on foot, horseback, or with cattle and carriages, into, over and through the allotment of the said George Watson; and that the same should be and remain at all times for ever thereafter, full forty feet broad, as the same was then admeasured and set out." And the case states that within one year after making the said award, (that is to say, in January 1745,) the said George Watson inclosed his allotment, pursuant to the said Act of Parliament: and the highway in question lay open and uninclosed on each side thereof as aforesaid over the lands, part of the allotment of the said George Watson, for the space of three years next after the inclosure of his said allotment so by him made as aforesaid.

The said George Watson, at the end of the said three years, inclosed with hedges, ditches, and fences, the said highway, on both sides thereof, leaving the same full forty feet broad between the ditches: and the said road or highway remained so inclosed by the said George Watson, during the whole time mentioned in the indictment.

The said George Watson made no inclosure of the said highway in question, other than as aforesaid.

A verdict by consent was found by the jury; whereby the defendants were found guilty: but such verdict was to be subject to the opinion of this Court, upon the whole case, as it appears on the pleadings and on what appeared to be and was the case as is before mentioned. And the

Question submitted is whether the inhabitants of the said hamlet of Flecknow continued bound to repair the highway in the said indictment mentioned, notwithstanding the said inclosure by the said George Watson in manner before stated: or whether, by reason of such inclosure, they were discharged therefrom, during the time in the indictment specified.

Serj. Hewitt pro Rege, argued that the inhabitants remained still bound.

It is admitted that this hamlet of Flecknow was bound to repair before the Act of Parliament. And it does not appear [463] that George Watson is bound by having inclosed, under this Act of Parliament: for this is no incroachment, no injury to the public, no act done without consent.

And the cases turn upon want of lawful authority. 1 Ro. Abr. 390, letter A. pl. 1. *Sir Edward Duncombe's case*: outlets are parcel of the highway, in an open field. Ibid. Letter B. pl. 1. "The subject may go out of the beaten track, when the way is foundlerous in an open field." (a) Sheppard's Epitome of the Law, 1116. "If a man inclose the highway, and put it within his own ground, the parish is not to repair it, but he must repair it himself." 2 Saund. 160, *Rex v. Sir Nicholas Stoughton*: an encroacher upon the highway, is obliged to repair, so long as the encroachment continues. Style, 364. "Whoever incloses, &c. takes upon him to repair."

But this inclosure and allotment is under an Act of Parliament; to which every body consents. And this Act directs public and private highways to be laid out:

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within the township be expressly exempted by the provisions of a Road-Act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. *The King v. Inhabitants of Sheffield*, 2 Durnf. 106.

(a) So the subject might before the inclosure have done, if this road had been foundlerous: for there was nothing to distinguish this road from others; for when highways are appointed by commissioners authorized by Parliament to appoint the same, they become highways for all purposes; and the rights and privileges of the subjects relating to highways in general attach upon and are incident to the highways so appointed; and there can be no distinction between the right of the public to such new appointed highways and the old highways in lieu of which such new highways are generally appointed; and there is at least as little reason for any such distinction, where the commissioner appointed the old highway instead of stopping it up, and appointing another in its stead.



and it provides "that no-body shall go upon any other highway." Therefore the old right to the old way is at an end, is annihilated: and so is the way itself, being exchanged for the new one. And this, of course, warrants the inclosure.

But the Act lays no charge upon the owner: therefore George Watson cannot be said to have inclosed any part of the highway: for this land is allotted to him, as his private property; and he is warranted in making this inclosure.

This is just like the case of a writ of *ad quod damnum*; it is indeed a Parliamentary *ad quod damnum*. It may be even worth the inheritance of the land, to repair the adjoining highway. So that this is not within the principles which oblige persons inclosing, to repair. And if George Watson be not obliged to repair this highway, the inhabitants of Flecknow are obliged.

Mr. Caldecott contra for the defendants. This is an indictment against the inhabitants for not repairing: and "it only charges that they are bound."

The plea sets out by way of inducement "that one George Watson, by reason of his inclosure, ought to repair;" and then tenders a traverse "that the inhabitants ought not to repair."

[464] The replication (instead of taking issue upon this traverse,) sets out the Act of Parliament, and then sets out all the proceedings under it, and the allotment to George Watson and his acceptance thereof, and his inclosing his allotment, first, and the road afterwards; and then takes quite another traverse, viz. "that he the said George Watson, is not, by his inclosing the road, bound to repair it."

Cur'—We cannot meddle with the pleadings, now: we are upon the special case. If you have any objection to the pleadings, you must move in arrest of judgment.

Mr. Caldecott then proceeded on the case. This was a road, which was always an open and uninclosed road, and went over George Watson's own lands.

1st. This is no inclosure, within this Act.

2d. If it was, yet the Act does not take away the legal consequence of inclosure.

First—This was an old open uninclosed road, over this George Watson's own lands. And the Act does not give any authority to inclose it; nor could intend any such thing. And it is much better for the public, that it should be open and uninclosed, than that it should be inclosed. If he will inclose it, he ought to repair it.

It is here stated that he did inclose his allotment within two years (the time limited for so doing:) but that he did not inclose this road, till three years after the commissioner's award. Therefore it is not an inclosure under this Act: consequently, he is liable to repair.

I agree that if a man incloses on both sides of a road, he shall repair the whole: and if, &c. (See Hawkins as below.) There is a great deal on this subject in 1 Hawk. P. C. 202, lib. 1, c. 76, § 6, 7. And I agree that a man is bound to repair, no longer than whilst he continues his inclosure; so that if he opens his inclosure, he will be discharged.

As to an *ad quod damnum*—It makes the old road to become private property: and there ought to be a grant from the Crown.

But this Act of Parliament has not directed an inclosure of the road in question: neither does the award of the commissioners direct it. Therefore George Watson is in this obliged to repair; and the inhabitants are not obliged.

Lord Mansfield stopped Mr. Serj. Hewitt from replying: for this case was too plain, he said, to need a reply.

[465] An owner of land over which there is an open road, may inclose it, by his own authority; or alter it, under a proper authority, and by a legal course. 1st. He may inclose it, by his own authority: but then it must be upon two conditions—One, "that he is obliged to repair it, till he throws up the inclosure;" the other "that he leave sufficient space and room for the road." 2dly. The other act, viz. altering or changing the road by a legal course, is by a writ of *ad quod damnum*: where the application is to be made by the owner of the lands; and a licence given by the King, upon a finding by a jury. But in this latter case, the owner of the land, is not obliged to repair the new road; unless the jury impose such a condition upon him: for if they do not, the repair of the road stands just as it did before; even though it was at first open, and should be directed by the jury to be inclosed. (a)

(a) The very name and nature of the proceedings prove that no person ought to

And this case is like a writ of *ad quod damnum*; and not only so, but even more than a writ of *ad quod damnum*. For here, the Act vests a power in the commissioners, to set out new roads, by their award. Therefore there is an end of the old road, as an old road. And the commissioners here made their award: in which they describe the future road, and direct it to be forty feet broad, as it was then admeasured.

And these common fields were not designed to continue open fields, as they were before: but the intent of the Act of Parliament was that they might be inclosed. And the Act says nothing about the expence of repairing the road. Therefore the repair clearly stands as it did before; and was certainly meant so to do.

And every man had a right to inclose, whose lands adjoin to the road. But if the person to whom the allotment was made near the highway, was to be obliged to repair, (a) it might have made a vast difference in the value of the lands respectively allotted to each person: for one person's allotment might perhaps run alone very far, by the side of the highway; and another person's allotment not lie at all near it. And yet there is no provision for any such case.

Therefore this George Watson is not, upon the facts here stated to us, obliged to repair, by reason of his having inclosed an open road: nor indeed is it an open road, under the circumstance of this case. (b)

The parish were bound to repair, before the Act: and this road happens to be the same identical road, that was [466] the road before the Act. And the Act of Parliament never designed to alter the charge and obligation of repairing the roads over these fields which were intended to be inclosed by virtue of it: nor is this inclosure thus made under this Act, such an inclosure as comes within the meaning of the law, which obliges the person inclosing a road voluntarily and of his own head, to repair the road which he has so voluntarily inclosed.

Mr. Just. Denison concurred: and he thought this case was very properly compared to the case of an *ad quod damnum*; and that it might be very properly called a Parliamentary *ad quod damnum*.

And he was very clear that the hamlet were bound to repair, just as they were before: and that this inclosure was not such an inclosure as the cases cited intend.

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be damaged by them; but if the jury had such a power as asserted by Lord Mansfield, all the inhabitants of the parish would be damaged, if the old road was open and uninclosed; and the jury had a power of directing the new road to be inclosed, without throwing the burthen of the repairs of the new road upon the prosecutor of the writ *ad quod damnum*; for then the inhabitants would be obliged to repair the new road though inclosed, instead of the old road which was uninclosed, and could not have been inclosed by the prosecutor, the owner of it, without making himself liable to the repairs: the consequence is, either that the jury have no power to direct the new road to be inclosed, or if they have, the law must throw the repairs of it not upon the parish, but upon the prosecutor, as the person making or causing the inclosure.

This if law, (as to which query,) is the best, if not the only good reason for the judgment; for there seems to be little or no weight in the other reasons, that the road was inclosed, not voluntarily, but by authority of the Act. In respect of repairs, the parish stood before liable to repair the road only so long as it remained uninclosed; and it appears, ante 461, that before the Act, the road was an ancient open road, and so continued at the time of passing the Act; and that it lay open, as appears, ante, 462, for three years, after the inclosure made by Watson of his allotment: so that the inclosure was not made by authority of the Act, but was a subdivision.

(a) He need not have inclosed the road, and then he would not have been liable to repairs; and no doubt the commissioners allowed for this inconvenience, as well as others.

(b) It appears in page 462, to have been stated by the case, that the road in question was over and through the allotment of George Watson.

Query, whether it be an objection to this determination, that in consequence thereof, such proprietors of estates in the parish or town, as are not benefited by the inclosure, will be injured by the increase of the expence of repairing highways, which will be much heavier after they are made into lanes, than when they were uninclosed?

Mr. Just. Foster likewise concurred. And he thought the Act intended to give the person, to whom an allotment adjoining to the road should be made, power to inclose : or otherwise he might be a very great sufferer by such allotment. And he was extremely clear that the hamlet remained bound to repair the road, just as much as they were bound to repair before the Act.

Mr Just. Wilmot concurred too, clearly : and the rather, for that, if it was not so, the allotment might prove what the civil law terms a *damnosa hereditas*. And the allotments to the different persons might be of extreme different values, according as they lay near to, or far from the road.

Upon all the circumstances of the case, he was clear that the hamlet remained liable, in the same manner as they were before the Act.

Per Cur. unanimously

Rule for the *postea* to be delivered to the prosecutor.

TURNER *versus* TURNER. 1758. Volunteer soldier not privileged from arrests.

The Court (Mr. Just. Foster being gone) were unanimous, that a person voluntarily inlisting himself, was not privileged from arrests, within the Act of last sessions (30 G. 2, c. 8), "for the Speedy and Effectual Recruiting of His Majesty's Land-Forces, and Marines:" for that the Act was only meant to privilege such persons from arrests, as were, under that Act,<sup>\*1</sup> compelled against their wills, to serve as soldiers.

[467] SIR EDWARD WORSELEY ET AL. Assignees of Richard Slader, a Bankrupt, *versus* DEMATTOS AND SLADER. Tuesday, 7th February, 1758. Conveyance by a trader of his whole substance to a particular creditor an act of bankruptcy.

[Referred to, *Lomax v. Buxton*, 1871, L. R. 6 C. P. 112.]

The present question came before this Court, after a trial at law before Lord Mansfield, upon a feigned issue out of the Court of Chancery, to try, whether one Richard Slader, a trader, was a bankrupt; and (2dly.) if he was a bankrupt, then upon what particular day he became so : and that particular day on which he should be found to have become a bankrupt was to be indorsed upon the *postea*.

It was soon agreed, as to the first point, "that he certainly did become a bankrupt," by an undoubted clear act of bankruptcy committed on the 13th of November, 1756.

But, upon the second point, as to the time when he first became a bankrupt, it was insisted, on behalf of the plaintiffs, that he became a bankrupt anterior to that 13th of November, viz. upon the 23d of October; namely, by the very executing the deed in question, which bore the latter date. For they alledged this deed to be fraudulent : and the executing it, to be ipso facto an act of bankruptcy, within the statute of 1 Jac. 1, c. 15 ;<sup>\*2</sup> which statute expressly makes any fraudulent grant or conveyance of the trader's lands or goods, whereby his creditors may be defeated or delayed of their just debts, a specific act of bankruptcy.

If the deed was fraudulent, within the true intent and meaning of the statute, he certainly committed an act of bankruptcy on the 23d of October : if it was not, he did not commit any act of bankruptcy till the 13th of November.

The jury found him a bankrupt.

And, by consent, the following order was made at Nisi Prius, viz. that either party be at liberty to move the Court. And if the Court shall, upon such motion, be of opinion "that the deed of the 23d of October 1756, is, under all the circumstances fraudulent, and the execution of it by Richard Slader, an act of bankruptcy,"—then the *postea* shall be marked on the back thereof, "that the said R. S. became a bankrupt on the said 23d of October 1756:" but if the said Court shall be of opinion "that the execution of the said deed, under all the circumstances by the said R. S. be not an act of bankruptcy," then the said *postea* shall be marked on the back, "that the said R. S. became a bankrupt on the 13th day of November."

[468] The form of the rule, under which it came before the Court, was thus—"It is ordered that the plaintiffs shew cause why the *postea* in this cause should not be indorsed, that Richard Slader became a bankrupt on the 13th day of November 1756."

<sup>\*1</sup> V. section 20th, pa. 117, 218.

<sup>\*2</sup> V. § 2 of that Act.



Lord Mansfield first repeated the whole evidence very particularly and minutely : which, after the counsel had done, was resolved, by the opinion of the whole Court, into the following case ; viz.

James Davis, an agent of Isaac de Mattos, knowing Slader to be indebted, and that he could not carry on his trade, unless somebody in London, in the nature of a banker, would pay his draughts, negotiated (in the month of July 1756,) an agreement between the said Isaac de Mattos and Richard Slader, "that De Mattos should pay Slader's draughts, upon having security."

The nature of the security, and the terms of the agreement, appear only by the deed of the 23d of October ; prepared, and procured to be executed, by James Davis and James Whitehead, both of them agents of Isaac de Mattos.

The deed in question bears date the 23d of October 1756 ; and recites Slader's title to the mill and premises ; and also his being concerned in and carrying on divers branches of merchandize and other business ; and his having frequent occasion to draw and remit sums of money from and to London : and his having requested Isaac de Mattos to be his agent or banker there ; and that, in order to indemnify him for so doing, Slader had agreed to transfer and assign all his estate and interest in the premises afore-mentioned in the said indentures, and also all his stock used and employed in the trades of brewing and making malt, and in the business of a corn-factor and miller, to the said Isaac de Mattos, his executors, administrators and assigns, for that purpose : and then the deed imports that for the purposes aforesaid, and in part performance of the said agreement, and in consideration of 5s. he the said Slader grants, assigns, &c. his said messuage, corn, water mill, and divers other things (subject to a mortgage then subsisting, on part thereof). And further, in full performance of the said agreement, and for the considerations aforesaid, he grants, &c. all his stock, utensils, and other things, used in his trades of brewing and malting, and of a corn-factor and miller ; consisting of coppers, tuns, backs, coolers, pumps, cisterns, screens, and other implements ; and also all his changeable stock, consisting of debts, horses, carts, casks, hops, beer, ale, wheat, barley, malt, coals, wood, [469] and all other goods and commodities belonging, employed, or made use of, in the said several trades, or any of them ; and all his estate, right, title, interest, property, claim, and demand whatsoever thereto, and to every or any part thereof ; to the said Isaac de Mattos, his executors, &c. defeazanced however, on his the said Slader's paying and making good to the said Isaac de Mattos all the sums of money which he should advance and pay on any note, draught, bill, or writing of the said Slader ; and on his indemnifying De Mattos against the same and all matters any ways touching or concerning the said agency.

This deed further contains the common covenants : and there is a receipt indorsed for the 5s. consideration-money.

In it is also a covenant that in case of breach of or failure in the conditions, &c. or any part thereof, then and from thenceforth, it should be lawful for the said Isaac de Mattos, his executors, &c. to enter, possess and enjoy the said land and premises, &c. and also to take to his and their own use and uses, absolutely, all and singular the premises last before-mentioned, viz. the stock, &c.

Upon the 8th of October, Richard Slader drew a bill upon Isaac de Mattos, by authority from him for 200l. but, to give it credit, it was made payable to the said James Davis, and indorsed by him.

Upon the 23d of October, Richard Slader drew another bill upon Isaac de Mattos, by authority from him : but, to give it credit, it was made payable to the said James Whitehead, and indorsed by him.

Isaac de Mattos himself personally knew that the affairs of Richard Slader were in confusion : and hired Samuel Sills, whom he sent down in the month of October, to be book-keeper to this Richard Slader. Sills accordingly went, and had examined all Slader's accounts and affairs, by the 20th of October.

The deed, (which had been a considerable time preparing,) was executed on the 23d of October ; and is witnessed by the said James Whitehead, James Davis, and Samuel Sills.

The bankrupt continued in possession of every thing conveyed by the said deed. And James Davis took occasion to tell the creditors of Richard Slader, "that the said Slader would do very well ;" "that he had recommended him to two good men ;" and "that Slader had given a mortgage of the mill, and other leasehold premises :"

but James Davis concealed and did not mention Slader's having assigned his general effects.

[470] Upon the 11th of November, Slader told Davis and Sills, both together, "that he could not stand;" and consulted them what to do: the result of which consultation was,—that Sills, by order of Slader, the same day, gave possession to Davis, as agent of De Mattos, who immediately set out for London. The next day, (the 12th of November,) Slader ordered Sills to deny him: on the 13th Sills did deny him accordingly; and told the reason, "that it was to commit an act of bankruptcy."

Slader had nothing of value, but what was comprized in the deed of the 23d of October: and he traded as a brewer, maltster, corn-factor, and miller; but carried on no other trade.

After the 13th of November, Isaac de Mattos paid the said two draughts indorsed by Davis and Whitehead.

After Ld. Mansfield had reported the evidence, the counsel for the plaintiffs proceeded to shew cause: and they urged the deed to be merely colourable, and so fraudulent as to constitute, in itself, an act of bankruptcy; being to the intent to defeat and delay his creditors, or whereby they might be defeated or delayed.

They cited 3 Co. 80, *Twine's case*, and the rules and resolutions contained in it, and urged that the present case was fully within it.

They also cited 13 Eliz. c. 7, and 1 Jac. 1, c. 15, § 2, which goes further than 13 Eliz. Likewise 2 Inst. 110, on the Statute of Marlebridge. 6 Rep. 76, *Curson's case*, S. P. Moore 193, *Ld. Paget's case*, upon the statutes of fugitives beyond seas made anno 13 Eliz. In which, they observed that 13 Eliz. c. 3, is in Rastal, and not elsewhere. Style, 288, *Tucker v. Cosh*. 2 Peere Wms. 427, *Small v. Oudley et Al*. Where a goldsmith assigned two-thirds of his stock in the wine trade; and it was holden good: but contra, if it had been of all his goods, &c.

Also Lucas's Rep. 489, *Dr. Goodfellow's case*: and *Ryal v. Rowls* in Canc. 27th January 1749.

And they observed that here was no possession altered; no estimate or account taken of the stock, &c. nor any consideration paid.

The counsel for the defendant insisted, that even if it was granted that this deed was fraudulent, as against creditors or purchasers, yet it would not be an act of bankruptcy: for the \* Act has a proviso to except deeds made bonâ fide and upon good consideration.

[471] This deed was made bonâ fide, and upon good consideration. It was made by Mr. Slader, a trader in the country, to secure Mr. de Mattos, who agreed to become his banker or agent in London; and to permit Slader from the country, to draw upon him in town; and the only intent of it was to indemnify De Mattos against Slader's over-drawing *Unwin v. Oliver*, in Canc. Tr. 12 G. 2, was a like case, determined by the Lord Chancellor. And this transaction tended to enable the country trader the better to carry on his trade; and was far from being intended to deceive his creditors.

It must be agreed, that this deed of assignment includes goods and utensils, as well as the house and mill, &c. And that there was no previous appraisement. But that was quite unnecessary: because it could not be then known how much money was to be secured.

As to the owner's continuing in possession.—The case of *Meggot v. Mills*, 1 Ld. Raym. 286, B. R. 1697, was so; and yet not fraudulent. Precedents in Chancery, 285, *Bucknall et Al v. Roiston* was the like. And in the nature of the thing, possession could not be delivered in the present case; because the debt to be secured was future and uncertain. So that this continuing in possession was no mala fides, no badge or evidence of fraud: because it did not give the owner a false and fallacious credit. Neither was it secret; but notorious: and it was not with intent to defeat and delay his creditors; but to their benefit, and calculated to support Slader's credit, and to enable him to pay his creditors.

The generality of a deed is not always and necessarily an evidence of fraud: for unless there be a trust, either expressed or implied, there is no fraud: and here is no trust, either expressed or implied: nor could De Mattos recover more than was fairly owing to him.

The case of *Ryal v. Rowls* was rightly determined, "that a security may be lost,



by suffering a continuance in possession." But it does not follow that our continuance in possession constituted an act of bankruptcy. Here was neither imposition nor collusion : it is only a mortgage of his personal property, and for a fair consideration.

To prove it not to be an act of bankruptcy, they cited several cases. In the case of *De Gols v. Ward*, in 1739, the quo animo was indeed clear and plain. The next case [472] where a deed was considered as an act of bankruptcy, was *Ashley's case* : but that was also quite clear : so again, in *Mackrell's case*, lately : where it was indeed given up. But there is nothing intentionally ill in the present case.

If this mere giving security to indemnify his banker was an act of bankruptcy, it could never afterwards be purged : which would be a great inconvenience to trade ; because it is a common case. And this man gave it to his former banker, as well as to De Mattos.

It is no act of bankruptcy, unless the deed be fraudulent, as well as intended to give unjust preference to one creditor before another. And there is no pretence, in the present case, that any bad use has been made of this deed.

The 5th clause in 1 Jac. 1, c. 15, would be nugatory, if the second was to be understood to make the executing such a deed as this, an ipso facto act of bankruptcy. It was only a contingent and collateral security, depending upon future events and circumstances : and therefore there could not, in the nature of the thing, be either delivery of immediate possession, or any particular consideration-money, expressed. And De Mattos's being liable to be damned was, of itself alone, a good consideration.

The case of *Unwin v. Oliver*, P. 12 G. 2, in Canc. was this : Unwin, being appointed receiver by that Court, and thereupon obliged to give security, assigns his debts, as a security (amongst other things) to the persons who were bound for him in a recognizance upon that occasion : and afterwards he became bankrupt. This assignment of his debts was holden good.

Bankruptcy is considered by the Acts of Parliament, as a crime. The description of an act of bankruptcy, or of a person's becoming bankrupt, must be therefore taken strictly : and the acts that constitute bankruptcy must be done with intent to defraud or delay creditors.

Put the case of an officer in the Revenue appointing a trader his deputy ; and, for his indemnity, taking from such deputy, such a deed as this is : would the executing it make the trader a bankrupt ?

The Act of 21 Jac. 1, c. 19, § 10, 11, takes care of an inconvenience to the creditors, arising from the trader's continuing in possession. But such assignments have never been considered as constituting an act of bankruptcy, *Small v. Oudley*, 2 Peere Wms. 427. *Jacob v. Shepherd*, [473] there cited. *Ryal v. Rowis*, in Canc. 27 January 1749 : which was an assignment by Harvest the bankrupt, of all his goods, utensils, &c. and was made liable to future monies to be advanced.

The counsel for the plaintiffs in reply, urged the inconvenience that must arise to trade, from such general assignments of all a trader's effects in trade, un-valued and un-appraised ; in order to secure eventual debts, not existing at the time of executing the deed : and insisted that 1 Jac. 1, c. 15, § 2, expressly makes such conveyances acts of bankruptcy.

Here is no consideration of any money paid, or any debt really contracted. Nor was any money afterwards advanced upon this deed. And for what was then owing to Mr. de Mattos, he had at that time a warrant of attorney, to confess and enter up a judgment : though it was afterwards destroyed, when he actually took possession under the deed now in question.

And indeed, if there had been a real debt subsisting, yet this had been an undue preference, within the Act. But as it was not so, nor any thing done in consequence of this deed, it is merely fraudulent.

None of the cases, on either side, are in point.

In *Unwin's case*, there was a consideration ; for an indemnity is a good consideration. And the case goes no further than to prove "that it is so."

But of moveable chattels, possession ought to be instantly and actually given : and of immoveable or remote chattels, possession of every title to it, and every thing that can, in the nature of the thing, be done towards it.

Whereas here is no attempt to take possession ; till the man was determinately going to become bankrupt, by a plain indisputable act, on the 11th of November.

Therefore this general provision for one particular creditor, implied a secret trust



or conciliating favour: which is a badge of fraud and collusion. And no argument can be drawn for mortgages of land, (where it is the usual method for the mortgagor to remain in possession,) to the keeping possession of goods assigned over. And if this had been an honest transaction, there would have been an appraisement and a schedule; and it would not have been left thus at large.

As to its not being to be afterwards purged;—that [474] does not alter the case at all; for no act of bankruptcy can be purged, but by obtaining a certificate.

As to 21 Jac. 1, c. 19, § 11, continuing in possession was always looked upon as an evidence of fraud: that law is only declarative of what was the law before.

The cases cited of *Ward*, *Ashley*, and *Macrell*, prove nothing against us, at all.

Lord Mansfield said the Court would consider it, both upon the particular circumstances, and upon the general principles: and it would be proper to consider the subject, with regard to traders in general, under 13 Eliz. c. 7, as well as to traders becoming bankrupts. And they would give notice when they were ready to declare their opinion.

Lord Mansfield now delivered the opinion of the Court.

The question is, whether, upon all the above circumstances, Slader became a bankrupt on the 23d of October, or on the 13th of November.—And the *postea* is to be indorsed, as to the time of Slader's becoming bankrupt, according to the opinion of the Court.

All the Acts concerning bankrupts are to be taken together, as making one system of law; they are all to be construed favourably for creditors, and to suppress fraud.

"Whether a transaction be fair or fraudulent," is often a question of <sup>\*1</sup> law; it is the judgment of law, upon facts and intents.

The indemnity, which is the consideration of the deed in question, I allow to be a good, valuable, and true consideration; and I allow this deed to be a valid transaction, as between the parties.

But valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy to injure a third person: for instance—A. buys an estate from B. and forgets to register his purchase deeds: if C. with express or implied notice of this, buys the estate for a full price, and gets his deeds registered; this is fraudulent, because he assists B. to injure A. Or, if a man knowing that a creditor has obtained a judgment against [475] his debtor, buys the debtor's goods, for a full price, to enable him to defeat the creditor's execution: it is fraudulent. Again, if a man knowing "that an executor is wasting and turning the testator's estate into money, the more easily to run away with it," buys from the executor, with that view, though for a full price; it is fraudulent.

Marriage-brochage bonds, secret agreements, different from the open treaty of marriage, and many other cases that might be put, though for a true and valuable consideration, as between the parties, are fraudulent, by reason of deceit or injury consequentially brought upon third persons.

<sup>\*2</sup> *Twyne's case*, even in the criminal prosecution, was of this sort: the consideration of the sale was more than sufficient, and undoubtedly true.

Whether this deed be of that sort, will depend upon the whole purpose of it.

As to all, except the leasehold, it could not have the effect of a conveyance, if De Mattos permitted Slader to continue in possession.

By the express tenor of the deed, Slader was to have the absolute order and disposition as before. In fact he was permitted to continue in possession, and act as owner. They who dealt with him, trusted to his visible trade and stock. They trusted to the bankrupt-law that he could neither have sold or mortgaged; and in case of a misfortune, that his effects must be equally distributed. They were imposed upon by false appearances.

To deceive the more, under a fictitious shew of credit, the bills drawn upon De Mattos were made payable to and indorsed by his own agents. Davis, one of his agents, expressly told the creditors, "that Slader would be very well; that two good men, upon security of the leasehold, would pay his draughts;" but concealed that he had mortgaged any thing else.

A false shew, by collusion, to deceive third persons, is generally connected with

<sup>\*1</sup> Vide ante, 397, accord. [Qu. If not contra? See 2 Burr. 936, 937.]

<sup>\*2</sup> 3 Co. 80 b. 81 a.

a secret confidence. So here, the trust put in Slader manifestly was, that when he could stand no longer, he should give notice to De Mattos or his agents, deliver possession, and then commit a positive act of bankruptcy.

From the nature of the fund, possession never could be meant to be taken, but as the immediate fore-runner of a commission of bankruptcy. He could not stand a mo-[476]-ment, after his whole trade, fixed and fluctuating stock, and credits were taken from him.

To watch Slader, De Mattos put Sills about him, as his book-keeper. Agreeable to the confidence put in him, when Slader saw he could stand no longer, he acquainted Sills and Davis the agents of De Mattos, with it: and by their advice, first gave an order to deliver possession, and then to be denied. This shews, to a demonstration, that they were all aware that possession was necessary; and intended from the first, by a formal delivery of possession, when he was determined to break, to evade the \*1 clause in 21 Jac. 1, c. 19. For the measure was instantly taken, without any new advice.

I will consider this transaction more particularly, in two great views:

1st. In respect of the end;

2dly. In respect of the means.

As to the first—The end proposed by the secret trust was, that in case Slader should become bankrupt, his whole estate should first be vested in De Mattos, for payment of what was justly due to him. The preference aimed at was fraudulent and unlawful.

Suppose, after the consultation on the 11th of November, this deed had been prepared and executed accompanied with such formal delivery of possession: we are of opinion, that it would have been fraudulent, and an act of bankruptcy.

Such preference is a fraud upon the whole bankrupt law, and would defeat the two main objects it has in view; to wit, the management of the bankrupt's estate; and an equal distribution among his creditors.

The law gives the management, to persons chosen by the creditors, under the direction of commissioners, and the control of the Great Seal.

But, if a bankrupt may convey all to a favourite and friendly creditor, just before he orders himself to be denied: the whole power of selling his effects, calling in his debts, and settling his accounts, must be in such single and particular creditor: he must have a right even to the custody of the books and papers.

[477] An equal distribution among creditors who equally gave a general personal credit to the bankrupt, is anxiously provided for, ever since the Act of 21 Jac. 1, c. 19.

It was thought mischievous, to suffer priorities to be gained by secret liens; as \*2 by judgments, statute, recognizance, bond, specialties, attachments by custom in London or elsewhere, assignment of debt to the †1 King's debtor. Unless they took out execution, these all equally gave a personal credit to the bankrupt, and trusted him to manage his effects.

Conveyances of personal chattels by way of security, where possession was left ‡ with the bankrupt, fell within the same reason.

Land is held, without perception of the profits, by the title: but there is no hold of goods, which the mortgagor is allowed to possess and dispose of. Therefore by a clause|| in the same Act, any priority by such secret lien is also taken away; and as such mortgagee equally gives a general credit, he is levelled with the other creditors.

But, if a bankrupt may, just before he orders himself to be denied, convey all, to pay the debts of favourites; the worst and the most dangerous priority would prevail, depending merely upon the unjust or corrupt partiality of the bankrupt.

A\*3 case lately happened where a conveyance, calculated to postpone one creditor to the rest, was held an act of bankruptcy. It came on before Ld. Hardwicke. the late Lord Chancellor, at Lincoln's Inn Hall,†2 one Gayner, a trader, had made an assignment on the 7th of June, 1755, of all his effects, goods, stock in trade, and book-debts, (except household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash then by him,) to trustees, in trust to pay themselves and all

\*1 § 11.

\*2 § 9.

†1 § 10.

‡ § 11.

|| § 11.

\*3 *Gayner, Bankrupt, ex parte Foord and Others.*

†2 31st July 1755. [4 Burr. 2240.]



the rest of his creditors, except Foord the petitioner. But the trustees declining to act under this assignment: he executed another, on the 9th of June, 1755: wherein the trustees were to pay themselves, and all the creditors mentioned in a schedule: (in which schedule, the petitioner was not included;) and in this second assignment a large parcel of ginger, as well as the things above mentioned were excepted.

The petitioner insisted that he alone could choose assignees; since the other creditors claimed under the assignment.

Ld. Hardwicke was clear, "that the executing the deed of the 9th of June was an act of bankruptcy." And [478] all that heard his determination, were of the same opinion: and every body concerned acquiesced in it. Whereupon the creditors mentioned in the schedule, consented to wave all benefit or advantage under that assignment, and all proved their debts, in order to receive an equal dividend with the petitioner: and the creditors proceeded to a choice of new assignees.

The framers of this deed executed by Gayner took for granted, "that if it had been a conveyance of all his effects, it must be bad: and therefore they colourably excepted parts. But the contrivance did not prevail, even so far as to bear an argument; or to be thought, by any body worthy of a trial.

There is a great difference between the conveyance of all, and of a part. A conveyance of a part may be public, fair and honest: as a trader may sell; so he may openly transfer many kinds of property, by way of security; but a conveyance of all, must either be fraudulently kept secret: or produce an immediate absolute bankruptcy.

It has been argued, "that after a resolution taken by a trader, "to commit an act of bankruptcy, the trader, so resolving to become bankrupt, might lawfully prefer a just creditor by conveying part of his effects, to satisfy that creditor's debt."

It is not necessary to determine that question, in this cause; for here the conveyance is of all; and therefore I will only say, that no such proposition is yet established: much less, in the extent whereto it has been urged.

The cases mentioned were,\*<sup>1</sup> *Cock v. Goodfellow*;† *Jacob v. Shepherd*;‡ *Small v. Oudley*; and *Unwin v. Oliver*.

In the case of *Cock v. Goodfellow*, the fact did not give rise to any question. An immediate prospect of a certain bankruptcy was not the motive to what Mrs. Cock did. She was solvent at the time; and, that very day, lent 40,000*l*. Besides her children, to whom she was guardian and trustee, were not upon the foot of common creditors: the Court of Chancery would have decreed her to place their fortunes out upon Government or real securities.

As to the case of *Jacob v. Sheppard*, I have looked into the register's book, upon this occasion; and I have a note of it, as stated by Ld. Hardwicke, in the cause of *Bourne v. Dodson*. And it was this—

Mr. Thomas Leigh, (the bankrupt,) who was a Turkey-merchant, by deed dated the 18th of June 1709, sold [479] and conveyed particular goods in the hands of his factors, to Mr. William Snelling; upon trust to apply the money arising thereby, in satisfaction, in the first place, of a debt of 1500*l*. due to Snelling himself; and then of a debt of 1551*l*. and interest, due to George Morley; and out of the residue to pay such of the bankrupt's creditors, as he, with Morley's consent, should direct: and if there should be any surplus after the said Snelling's and Morley's debts were paid, and such sums for which they were bail or security for the said bankrupt, the same was to be paid to the said bankrupt, his executors, administrators and assigns.

Afterwards, by deed dated 16th December 1709, and by deed dated 20th January 1709, other debts were appointed to be paid, agreeable to the power reserved by the former deed.

On the 11th of February 1709, Thomas Leigh failed, and committed an acknowledged act of bankruptcy: and a commission was taken out, and his estate and effects assigned.

The trusts of the deed of the 8th of June 1709, were immediately and openly carried into execution: so that no question ever did or could arise upon the\*<sup>2</sup> clause of 21 Jac. 1 c. 19. But the assignees brought a bill against the parties claiming under the deed of the 8th of June 1709, and the subsequent deeds; "to have them set aside; and to have an account of the money which they had received;" upon two

\*<sup>1</sup> V. Lucas 489.

† 2 Peere Williams, 427.

† Cited in 2 Peere Williams, 430, 431.

\*<sup>2</sup> § 11.



grounds; 1st. That the deeds were obtained by fraud and imposition on Leigh the bankrupt: 2dly. That they were an imposition upon the other creditors.

The cause came on to be heard at the Rolls, upon the 16th of June 1725. Sir J. Jekyll took time to consider of it; and ordered all the pleadings and proofs to be left with him: and upon the 17th of December, Sir Joseph gave judgment. He thought these deeds could not be looked upon, or set aside, (upon the former ground, viz.) as a fraud upon the bankrupt; but he declared the said deeds to be fraudulent, and an imposition upon the creditors of the bankrupt; and decreed them to be set aside, with costs.

In making this decree, he went upon right principles; but did not attend to its being a bankruptcy, if it was really fraudulent; and that a Court of Equity could not decree it to be fraudulent, unless it was fraudulent at law; in which case it would constitute an act of bankruptcy, of itself.

On the 6th of August 1726, Ld. King, upon an appeal, directed an issue at law, to try, "whether by the exe[480]cution of the deed of the 8th of June 1709, Thomas Leigh became a bankrupt; or at any other, and what time." The jury found he became bankrupt on 11th February 1709.

Upon the equity reserved, Ld. King established the deeds: held the plaintiffs to be only intitled to the surplus, after the trusts in the deeds were performed; and decreed the proper accounts against the defendants, of the money they had received, in order to find out that surplus.

Many very obvious observations occur upon this case.

Sir Joseph Jekyll was so struck with the objections of fraud from preference, that he set aside the deeds, with costs.

Ld. King reversed his decree: because no deed made by a trader can be fraudulent in Chancery, which is not fraudulent in a Court of Law, and an act of bankruptcy. Therefore he directed an issue.

There might be many reasons, why it was not found fraudulent, upon the trial. The deed was executed the 8th of June, of specific goods: and was immediately carried into execution. The act of bankruptcy was not till the 11th of February following: and I see no suggestion that in June, Leigh thought of committing an act of bankruptcy. Besides, one ground upon which the assignee brought his bill, was "fraud and imposition upon the bankrupt himself, in obtaining the deeds:" therefore, most probably, he was frightened into giving this security, by threats of legal diligence against him.

The case of *Small v. Oudley*, was determined very soon after; viz. upon the 4th of December 1727. The best report of it, is in 2d P. Wms. 427: but it is no where fully stated. I have a copy of the decree from the register's book: as follows—

On the 21st September, 1720, Small, (to accommodate Daniel and Joseph Nercott, brothers, goldsmiths, and partners, upon a pressing occasion,) transferred to them 500l. S. S. stock; upon their engaging "to transfer to him the like sum in the S. S. stock in a week or ten days at farthest," and giving a note for that purpose.

They sold the S. S. stock for 1800l.

On the 29th September 1720, they made the assignment of their share in a wine partnership, which Oudley carried [481] on solely in his name, (in which, they had two thirds, and Oudley one third:) as a security for transferring 500l. S. S. stock; and reciting the truth of the case.

They, at the same time, assigned two leasehold estates to Small for the same purpose.

Their interest in the wine trade was but 300l. And Oudley had a right to carry on the trade till Christmas 1723. The bill, (which was against Oudley, and against the assignee under a commission issued against the Nercotts,) was not brought by Small, till after that time; but an issue had been directed in another cause, to try, "whether the said Nercotts were bankrupt at the time they executed an assignment to Small of a lease of certain houses, on the said 29th of September 1720."

The above facts are admitted by the answers; no fraud is suggested: and they do not mention any desire to have the time of the bankruptcy tried over again.

Sir Joseph Jekyll, in 2 Peere Wms.\* gives strong reasons against the decree he

\* Pa. 429, to 331.

thought himself bound to make, because Ld. King had just established, "that a deed by a bankrupt could not be set aside, as fraudulent in Chancery."

This case too, was very particular. The fraud was upon Small: and not upon the creditors: his stock was to be replaced, in a week, or ten days at farthest, by the original agreement. 1800l. of Small's money went to the creditors: and this security amounted but to about 300l. so that the whole transaction was beneficial to the bankrupt's creditors. The S. S. stock was got from Small, with a view to save the Nercotts from breaking. The security was given at the very time they were obliged to replace the 500l. S. S. stock; and there was no pretence that Small afterwards permitted them to continue one moment in possession.

The case of *Unwin v. Oliver*,\*<sup>1</sup> T. 12 G. 2, is not entered in the register's book: but I have seen a fuller note of it, than was cited at the Bar.

It was an assignment of several debts mentioned in a schedule; to indemnify his sureties in a recognizance. Martin Unwin had been appointed receiver of a lunatic's estate: and the plaintiffs became his securities, by recognizance, "that he should account for what he should receive under the orders of the Court." Two years after, Martin Unwin, by deed reciting "that 604l. were due from him to the lunatic's estate," assigned to the plaintiffs several debts mentioned in a schedule annexed [482] to the assignment; to discharge 604l. and to indemnify them against this security which they had entered into for him. A month after this assignment, Martin Unwin became a bankrupt.

The act of bankruptcy was admitted to be a month after the assignment. No question was made upon the clause in the 21 Jac. 1, c. 19. And there was no suggestion "that the immediate prospect of a certain bankruptcy was the cause of the assignment."

Lord Hardwicke held that it could not be set aside as fraudulent in Chancery; unless it was fraudulent in a Court of Law, and an act of bankruptcy. And he held "that indemnity was a good consideration:" of which, there can be no doubt.

But 2dly, (to consider this transaction, in respect of the means). Suppose a bankrupt could, after a resolution to commit an act of bankruptcy, prefer one of his creditors, by an assignment of all; (which we think he cannot;) yet in this case, the means to attain such preference were fraudulent. A false credit is industriously given the bankrupt, upon a secret trust "to deliver possession so as to avoid the clause in the 21 Ja. 1, c. 19."

The second argument of fraud in *Twyne's case*,\*<sup>2</sup> is—"the donor continued in possession, and used them as his own; and by means thereof, traded with others, and deceived and defrauded them."

But, three cases have been cited to shew, "that upon a mortgage of goods by a trader, the leaving possession does not infer fraud; though it may upon an absolute sale." These are the cases of *Meggott v. Mills et Al'*, 1 Ld. Raym. 286; *Bucknal et Al' v. Roiston*, in Precedents in Chancery, 285: and *Ryal v. Rowls*, in Chancery, 27th January 1749.

The first is a direct authority to the contrary. For Ld. Ch. J. Holt says, "If these goods of Wilson's had been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent, as to the other creditors." But he very justly distinguished that case; and seems to have considered the landlord (who lent his tenant money to buy the goods, to furnish his house,) as the original owner of the goods.

*Bucknal et Al' v. Roiston* was not a case of bankruptcy, but upon the course of administration of assets, (where [483] secret liens give priority:) and is expressly\*<sup>3</sup> distinguished, by my Lord Chancellor, from the case of a bankrupt. Besides, the possession was there a trust under an authority to negotiate and sell; and could not be meant to give any false credit.

In the case of *Ryal v. Rowls*, the act of bankruptcy upon which the commission proceeded, was long after the mortgages; the assignees did not wish to carry it farther

\*<sup>1</sup> *Stephen and Morley Unwin*, against *Oliver et Al' Assignees of Martin Unwin*, a Bankrupt, Easter term 1739. [See 1 Durn. 621.]

\*<sup>2</sup> 3 Co. 81 a.

\*<sup>3</sup> V. Precedents in Chancery, p. 287. Where Lord Chancellor admits "that in case of a bankrupt, such keeping possession would make the sale void, against his creditors."



back ; and therefore never objected "that the bankrupt's keeping possession made the mortgages fraudulent:" but if they had, in that case the presumption of fraud would have been disproved. The same fund was mortgaged six times over: they all trusted to their conveyances, (like mortgages of land,) as a title, without possession; though a bankruptcy should happen. They mistook the law; but did not evade it.

Whereas here, the parties manifestly were aware "that possession was necessary:" the solemn determination in the case of *Ryal v. Rowls* had made that point notorious. Possession was here left, upon a secret trust "to deliver it so as to avoid the clause in 21 Jac. 1, c. 19." Which, in fact, was accordingly done.

Two general objections, from inconvenience, have been urged: which deserve an answer.

1st. That it will hurt credit, if traders may not raise money by mortgaging their goods without quitting possession.

The policy of the bankrupt law introduced by 21 Jac. 1, c. 19, and followed ever since, is to level all creditors, who have not actually recovered satisfaction, or got hold of a pledge which the bankrupt could not defeat.

A trader is trusted upon his character, and visible commerce: that credit enables him to acquire wealth. If by secret liens, a few might swallow up all, it would greatly damp that credit.

If he mortgages and parts with the possession of goods, the world has notice; but, to give priority from mortgaging goods, of which the trader is allowed to act and appear as the owner, would be enabling him to impose upon mankind; and draw them in by false appearances.

No injustice is done to such mortgagee; because he really trusts only to the general credit of the trader: the [484] conveyance is not a fraud against him, but against his other creditors.

Mortgages of land are checked by the title: but where possession is not delivered, goods may be mortgaged a hundred times over, and open a plentiful source of deceit.

The other general objection from inconvenience was, "that a fraudulent deed is an act of bankruptcy, upon the face of it; and can never be purged."

I am sorry the phrase has crept into use; because it confounds the idea which ought to be annexed to it.

Every equivocal fact may be explained by circumstances. If a trader orders himself to be denied, circumstances may shew, that he did not do it to avoid payment; but on account of sickness, or particular business. So if he leaves his house, circumstances may shew, it was not to abscond.

Of all the equivocal facts which can amount to acts of bankruptcy, deeds are the most open to be explained by a variety of circumstances. Hardly any deed is fraudulent upon the mere face of it. It is a good sale, if the consideration be true: fraudulent, if false; good, if possession immediately follows: bad, if it do not: nay, the not taking possession, being only evidence of fraud, may be explained.

The use to which a deed is applied, shews quo animo that it was made. Leaving possession till after the act of bankruptcy, in the case of *Ryal v. Rowls*, shewed there was no fraud; and that they trusted to the conveyance.

In this case, the consultation and delivery of possession upon the 11th of November proves the secret trust, in confidence of which, the false credit was given the bankrupt before: it shews that evading the clause in 21 Jac. 1, c. 19, was in the view and contemplation of the parties. There was no other reason for delivering possession on the 11th of November: because no default had happened, which gave De Mattos more pretence to enter then, than before.

Under all the circumstances, we are of opinion that this conveyance of the bankrupt's whole substance to De Mattos, though by way of security, and for valuable consideration, is fraudulent and an act of bankruptcy.

The determination here, is upon the assignment of all.

Per Cur. The postea must be indorsed, "that Richard Slader became bankrupt on the 23d of October."



[485] REX *versus* WAKEFIELD ET AL'. Wednesday, 8th February 1758. Order of justices on Quakers for payment of tithes confirmed at sessions, good. [S. C. 4 Burr. J. P. tit. Tithes.]

Mr. Harrison had obtained a rule, in Michaelmas term 1755, to shew cause why an order of two justices, made upon several Quakers, (for payment of tithes under the value of ten pounds to the curate of a chapel) and confirmed at the sessions, upon an appeal from it, should not be quashed, together with the order of sessions confirming it. See 7, 8 W. 3, c. 34, and 1 G. 1, st. 2, c. 6, § 2.

Mr. Norton, in Michaelmas term last (viz. on 26th November 1757,) shewed cause. He gave up the order of sessions, as not maintainable; but defended the original order.

To this original order, Mr. Harrison had taken four exceptions: which were now supported by him and Mr. Clayton. These exceptions were as follow.

1st. It is a joint order made on different persons, for distinct non-payments of different tithes: whereas there ought to have been a distinct order on each. In 1 Str. 471, between *The Parishes of Chewton and Compton-Martin*, the removal of different families of paupers by one order, was holden bad; though the parishes were the same.

2d. The title is in question: therefore the justices have no jurisdiction. The exception in the Act of 1 G. 1, stat. 2, c. 6, § 2, is "unless the titles of such dues, tithes or payments shall be in question." And these words "unless, &c." extend to this whole clause; and are not confined to the granting a certiorari only. And this fact, of the title being in question appeared, as Mr. Harrison alledged, upon the granting the certiorari, in the present case.

3d. Non constat that the two justices who made this original order, are "neither patrons nor interested in the tithes." But 1 G. 1, c. 6, § 2, requires that they shall be neither one nor the other. Now they ought expressly to aver and shew (negatively) "that they are not:" or else they have no jurisdiction, by the very words of the Act; the jurisdiction being given to "any two or more justices, &c. Other than such as, &c."

[486] 4th. It does not sufficiently ascertain and state what is due and payable by the defendants; or at least,\*<sup>1</sup> for what, the respective sums are due. † One sum is "1s. 6d. being due to the curate:" not saying for what. Another is, "being the value of their ancient customary payments." Another is—"4s. being ancient customary payments."

This order was made on the Act of 1 G. 1, stat. 2, c. 6, § 2, which extends the 7, 8 W. 3, c. 34, § 4, to all payments to ministers or curates officiating in churches or chapels. (V. that statute of 7, 8 W. 3, c. 34, § 4: which extends only to tithes and church-rents.)

Mr. Norton contra answered these objections. The substance of his defence against them was fully sufficient, if true: for he denied the first, to be material; and denied the three last, to be well founded.

The matter was adjourned to Monday, 28th November.

Then, this motion being mentioned again,—

The Court inquired "whether the return of the certiorari was filed."

And Lord Mansfield said he had called for, and read the affidavits made for obtaining the certiorari, and upon the shewing cause.

Mr. Just. Denison mentioned a case of *Rex v. Furnes*, B. R. H. 6 Geo. 1, upon a certiorari to remove an order made upon the Act of 7, 8 W. 3, c. 6, for Payment of Small Tithes; where Ld. Ch. J. Pratt thought that where the right was in question, such cases were never intended to be the subject of that Act of Parliament. He said, this was only spoken from a note, which he had seen: but it should seem to be right\*<sup>2</sup> and true; and the rather, from a case of *Rex v. Furness* being mentioned in 1 Strange

\*<sup>1</sup> V. 7, 8 W. 3, c. 34, § 4. N.B. The Act does not require the latter.

† This objection is not supported by the Act.

\*<sup>2</sup> It is right and true; at least I have a MS. note of the same case to the same effect, or stronger; (for mine says "per Cur. the design of the statute was only to give a speedy remedy for small tithes where the right is agreed.")

264, where an order for non-payment of small tithes made on 7, 8 W. 3, c. 6, was quashed.

Adjourned to the present term.

Lord Mansfield now delivered the opinion of the Court.

He begun with stating the two Acts of 7, 8 W. 3, c. 34, (§ 4,) and 1 G. 1, stat. 2, c. 6, (§ 2,) the former relates only to great and small tithes and church-rates; and is temporary. The latter makes it perpetual and extends [487] it to "any tithes or rates, or any customary or other rights, dues or payments belonging to any church or chapel, which, of right, by law and custom ought to be paid, for the stipend or maintenance of any minister or curate officiating in any church or chapel." And both Acts direct "that the proceedings shall not be removed into any other Court, unless the title shall be in question."

It is upon the last Act, that the present order was made.

A certiorari has issued, to remove the order into this Court; and it came on, upon exceptions to the order. Both sides made very material objections,—one side, to the order; for that the justices had no jurisdiction, because the title was in question: the other, to the certiorari; for that no certiorari could issue, by the express provision of the Act, to remove the proceedings from before the justices into any other Court, because the title was not in question.

The Act was made in favour to, and for the ease and benefit of Quakers; and to save them from troublesome and expensive prosecutions: but it never meant, that a mere scruple of theirs, or an obstinate with-holding of the tithes should be any hindrance to the matter's being determined by the justices of peace. This would have frustrated the very intention of the Act; which meant to give this jurisdiction to the justices in that very case; where the real right and title to them should not be in dispute between the parties.

Then his Lordship directed the affidavits on which the certiorari was granted to be read.

It was therein sworn on the part of the defendants, "that the defendants controverted the title to the tithes, before the justices;" and also, "that the title to the tithes was then and at the time of making the said affidavit, really in question."

The justices had notice to shew cause against the certiorari.

On shewing such cause, five old inhabitants of the chapelry, swear by their affidavit "that such customary stipends or payments have always been paid to the curate by the land-holders, without any sort of scruple or objection except lately by the Quakers;" and no other persons dispute it. And these five persons also swear "that they believe them to be due; and that the former owners of these very lands (which had been purchased about four years ago, by those Quakers,) did [488] pay for them, as other persons did, in the said chapelry;" and these Quakers purchased the lands as subject to such payments.

— These are the affidavits upon which the certiorari was granted.

Now if this general allegation "of the Quakers controverting the title," and the consequential assertion "that the title was in question," (without any further particulars, or shewing at all upon what foot they controverted the payment) should be esteemed a sufficient ground for removing the orders, it would put a total end to these Acts of Parliament, and evade the very design and intention of making them.

For the Quakers might pretend that they are obliged in conscience to refuse or controvert the payment of these demands; and consequently, to question and deny the right to receive them. Now that is the very thing the Acts mean to provide a summary remedy for. The intention was, that in such case, the justices should make an order to compel them to pay.

Their affidavits are general, "that they controverted the title: and that it was really in question."

Whereas by the affidavits made by the five old inhabitants, it is very plain that the former owners of these very lands have always paid: and that these Quakers, who are the subject of this order, have no pretence to dispute it, upon any other foot than their own general scruple to pay any demands of this nature: which these Acts are, for their own ease and advantage, calculated to compel them to do, in a method the most gentle and convenient for themselves (who scruple to pay without compulsion).

We are all of opinion, as to the merits of the case, that the title is not so contro-

verted, or so in question, as that the justices can be precluded from jurisdiction, or their order be regularly and properly removed into any other Court.

And we are all of opinion that the rule for the certiorari having been made absolute, and the return thereto having been filed, ought not now to stand in the way and prevent our coming at the real justice and merits of the case. For if the certiorari issued improvide, we can order it to be superseded; and the return to be taken off the file.

[489] There have been \* several instances of this—(a) one was where an order of two justices was appealed from; and before the time when the appeal should in course have come on at the sessions, a certiorari was brought to remove the order: and, because the certiorari was brought before the time of hearing the appeal was come, the certiorari was quashed, and the return taken off the file.

The (b) other was a certiorari to remove an indictment from the Old Bailey: and it appearing to this Court, that they could not give judgment, but that the Sessions of Oyer and Terminer at the Old Bailey ought to do it; the like method was taken, and it was sent back to the Court below, for them to pronounce the judgment.

Therefore, upon this case, we are all of opinion that the writ of certiorari be superseded (quia improvide emanavit;) the return taken off the file; and the order remanded.

His Lordship added this hint, to be observed in future cases of this sort: viz. that upon all orders of this kind, the great and material point must be “whether the title to the tithes was really in question, or not:” and ought to be determined, before the certiorari issues.

GODIN ET AL’ *versus* LONDON ASSURANCE COMPANY. Thursday 9th February, 1758. Insurance made by a factor who has a lien, does not pass by a consignment of the goods insured to a third person by the principal. [1 Bl. 103, S. C.] [See also 3 Burr. 1397. 1 Durn. 748. 3 Durn. 120.]

[Considered, *Ebsworth v. Alliance Marine Insurance Company*, 1873, L. R. 8 C. P. 624. Approved, *North British and Mercantile Insurance Company v. London, Liverpool and Globe Insurance Company*, 1877, 5 Ch. D. 587.]

This was a point reserved at Nisi Prius, before Lord Mansfield at Guildhall.

The question, strongly litigated there, was “whether the plaintiff ought to recover his whole loss, or only half:” it being objected “that there was a double insurance.”

A verdict was found for the whole, subject to the opinion of the Court: and if the Court should think, upon His Lordship’s report, “that the plaintiff, by law, ought to recover for half his loss only,” then the verdict to be entered up as for half.

[490] It was argued, yesterday, by several counsel on each side: and this day, Lord Mansfield delivered the opinion of the Court.

He begun with stating the facts, as they appeared to him at the trial; which were these—

Mr. Meybohm, of St. Petersburg, had dealings with Mr. Amyand and Company, of London; who often sent ships from London, to Mr. Meybohm at St. Petersburg.

Meybohm, as appeared by the evidence, was indebted, on the balance of their accounts, to Amyand and Company.

Amyand and Company sent a ship, called the “Galloway,” Stephen Baker master, to Mr. Meybohm at St. Petersburg, to fetch certain goods.

Meybohm sent the goods; and promised to send the bill of lading by the next post, but never did.

Afterwards, viz. in August 1756, Amyand and Company got a policy of insurance from private insurers, for 1100l. on the ship, tackle and goods, at and from London to St. Petersburg, and at and from thence back again to London; which policy was signed by several private underwriters, quite different persons from the present defendants; and of this sum of 1100l. thus underwritten, 500l. were declared to be on eleven sixtieth parts of the ship: and the remaining 600l. to be on goods.

Between the 26th August and 28th September 1756, (both included,) Mr. Amyand

\* I suppose he meant the cases of (a) *Rex v. Eliz. Nichols*, Pas. 18 G. 2, B. R. And (b) *Rex v. Govers*, Pas. 28 G. 2, B. R.



insured 800*l.* more, with other private insurers: and this latter insurance was upon goods only: and was only at and from St. Petersburg to London.

On 28th, 29th and 30th of October 1756, Mr. Amyand insured 900*l.* more, with other private insurers: which last insurance was on goods only, at and from the Sound to London.

So that the whole sum thus insured by Amyand and Company, was 2800*l.* Of which 2800*l.* the sum of 2300*l.* was on goods, the remaining 500*l.* was on the ship.

Several letters being given in evidence, it appeared that Meybohm wrote from Petersburg, on 7th September 1756, (the date of his first letter on this subject,) to Amyand and Company; and mentioned what goods he should send to them, referring to the [491] invoice for the particulars: and directed them to get insurance thereon, and to place the goods and the insurance to a particular account, which he named in his letter; in which, he also specified some iron, which was for Mr. Amyand's own account.

This letter Mr. Amyand afterwards received, (probably, about the 27th of October:) and, in consequence of it, made the insurance accordingly, upon the 28th, 29th and 30th of the same October, as before mentioned.

Meybohm, having shipped the goods, indorsed the bills of lading to one Mr. John Tamesz in Moscow, (the plaintiff, in effect, in the present action:) who on the 7th October 1756, wrote to his correspondent Mr. Uthtoff, here in London, "to insure these goods." In this letter, he desires Mr. Uthtoff to insure the whole, "that he (Tamesz) might "be safe in all events; for he suspected that these goods were intended to be consigned by Meybohm to some body else, and perhaps might be insured by some other persons:" and he says, they were transferred to him, in consideration of his being in advance to Meybohm more than their amount. This letter from Mr. Tamesz, with these directions "to insure," was received by Mr. Uthtoff, on the 15th of November 1756.

Mr. Uthtoff accordingly applied to the defendants, the London Assurance Company; and disclosed to them, at the same time, all these particulars: and they, upon the 10th of November 1756, after being thus apprised "that there might be another insurance," made the insurance now in question, for 2316*l.* on the goods, at and from the Sound to London. The goods were lost, in the voyage.

Mr. Uthtoff's insurance was made by the plaintiffs Godin, Guion and Company who are insurance brokers: and they declare that this insurance (which is expressed to be made by them, "as well in their own names, as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all,") was made by order of Henry Uthtoff, Esq. This declaration is indorsed upon the policy; and is dated 18th November 1756.

There is no doubt, as to the value of the goods, or as to the loss of them. And it is admitted by the defendants, "that the plaintiff ought to recover half the loss, from them:" but they say, they ought to pay only half, not the whole of the loss. So that the only question is,

"Whether the plaintiff is entitled, upon the circumstances of this case, and upon the facts I have been stating, to recover the [492] whole loss from the present defendants; or only the half of his loss from them, and the remainder from the underwriters of Mr. Amyand's policy."

The verdict is found for the plaintiff, for the whole: but it is agreed to be subject to the opinion of this Court, upon the question I have just mentioned.

First—to consider it, as between the insurer and insured.

As between them, and upon the foot of commutative justice merely, there is no colour why the insurers should not pay the insured the whole: for they have received a premium for the whole risque.

Before the introduction of wagering policies, it was, upon principles of convenience, very wisely established, that a man should not recover more than he had lost. Insurance was considered as an indemnity only, in case of a loss: and therefore the satisfaction ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses.

If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute pro rata, to satisfy that loss against which they have all insured.

No particular cases are to be found, upon this head : or, at least, none have been cited by the counsel on either side.

Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover, against several insurers in distinct policies, a double satisfaction, "the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it." And if the same man really and for his own proper account, insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing : for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole.

The Act of 19 G. 2, c. 37, (made to regulate insurances, and for prevention of wagering policies,) expressly prohibits the reassuring, (after having already insured the same thing;) unless the former assurer shall be insolvent, or become a bankrupt, or die : and it provides <sup>\*1</sup> that even [493] in those cases, it shall be expressed in the policy "to be a re-assurance." So that, here, if Mr. Tamesz had himself made a second assurance upon the same goods, and was to have had the benefit of both assurances himself, it had been within this Act.

But if Tamesz was not to have the benefit of both policies in all events, then it can never be considered as a double policy.

It has been said "that the indorsement of the bills of lading transferred Meybohm's interest in all policies by which the cargo assigned was insured ; and therefore Tamesz has a right to Mr. Amyand's policy ;" and "that Tamesz, being the assignee of Meybohm, is the cestuy qui trust of it, and may recover the money insured ;" and even "that he may bring trover, or detinue, for the very policy itself : " and it is urged from hence, "that he either will or may have a double satisfaction for the same loss."

But, allowing "that by the indorsement of the bills of lading and assigning the cargo to Tamesz, he stands in the place of Meybohm in respect of his insurances ;" yet Mr. Amyand has an interest of his own, and had actually insured the ship and goods, and the sum of 1900l. (upon both together,) prior to any directions or intimation received from Mr. Meybohm, "to insure for him." Various people may insure various interests, on the same bottom : (as one person, for goods ; another, for bottomree, &c.). And here, Mr. Amyand had an interest of his own, distinct from the interest of Meybohm : he had a lien upon these very goods, as a factor to whom a balance was due. And he had the sole interest in the ship : which was a part of the things insured by him. It is far from appearing, "that even his last insurance (in October) was made on the account of Meybohm, or as agent for him." So far from it Mr. Amyand insists upon it for his own benefit, (as he expressly declared at the trial,) and absolutely refuses to give it up or to suffer his name to be used by the plaintiff ; though he was a witness for the defendants, and was produced by them, and inclined to serve them. So that the foundation of this argument, urged by the defendant's counsel, fails them ; and there is, in reality, nothing to support it.

But even supposing "that Mr. Amyand had made his insurance, not upon his own account, but as agent or factor for Mr. Meybohm, and upon the account of Meybohm : " yet, even then Tamesz can never come against Amyand's underwriters, or come at Amyand's policy, to his own use. For Mr. Amyand, the factor for Meybohm, has possession of the policy, and appears to have been a creditor of Meybohm's upon the balance of accounts between them at the time when he made the insurance : [494] and I take it to be now a settled point, "that a factor, to whom a balance is due, has a lien upon all goods of his principal, so long as they remain in his possession." *Kruzer et Al. v. Wilcox et Al.* was a case in Chancery upon this head. It came on first, <sup>\*2</sup> before Sir John Strange then Master of the Rolls : who decreed an account ; and directed allowances to be made for what the factor had expended on account of the ship or cargo ; and reserved all further directions, till after the Master's report. It came on again, afterwards for further directions, after the Master's report, before the Lord Chancellor : who was attended by four eminent merchants, who were

<sup>\*1</sup> Vide § 4.

<sup>\*2</sup> 12th March 1754. [See also 4 Burr. 2219. 5 New Abr. 270. S. C. Amb. 252.]

interrogated by him publicly. After which, he took time to consider of it; and on 1st February 1755, decreed "that the factor has a lien on goods consigned to him; not only for incident charges, but as an item of mutual account for the general balance due to him, so long as he retains the possession. But if he parts with the possession of the goods, he parts with his lien; because it can not then be retained as an item for the general account." And there was another case, in the same Court, of *Gardiner v. Coleman*, a few † months after; in which, the former case, determined as I have mentioned, was considered as a point settled: and this latter case, of *Gardiner v. Coleman*, was decreed agreeably to it. So that Mr. Amyand, even considered as factor or agent to Meybohm, and as making the insurance upon Meybohm's account is yet entitled to retain the policy: Meybohm being indebted to him upon the balance of the account between them: and he has a lien upon the policy, whilst it continues in his possession. Therefore, even in this view of the case, Mr. Tamesz must first have paid to Mr. Amyand the balance of his (Amyand's) account, before he could have gotten that policy out of Mr. Amyand's hands: and consequently, Mr. Tamesz was very far from being entitled to the benefit of it, as a *cestuy qui trust*, absolutely and entirely.

But if the question "whether Tamesz could take benefit of Mr. Amyand's policy," were doubtful; yet, here, Tamesz insured the goods with the defendants, expressly under the declaration of his suspicion "that there might have been a former consignment, and some former insurance made upon the goods by some other person;" but he desired to insure the whole, for his own security; and to this, the defendants agreed; and took the whole premium. Mr. Amyand insisted upon his right to the whole benefit of his own policy, when he was examined as a witness; and is now litigating it in Chancery. It would neither be just nor reasonable, that Tamesz should only recover half of his loss from the defendants, and be turned round, for the other half, to the uncertain event of a long and expensive litigation. I do not believe there [495] ever will or can be any recovery by Tamesz or those who shall stand in his place, against Amyand's underwriters. However, if those underwriters are liable to contribute at all, the contribution ought to be amongst the several insurers themselves: but Tamesz, the insured, has a right to recover his whole loss from the defendants, upon the policy now in question, by which they are bound to pay the whole. For though here be two insurances, yet it is not a double insurance: to call it so, is only confounding terms. If Tamesz could recover against both sets of insurers, yet he certainly could not recover against the underwriters of Amyand's policy, without some expence; nor without also first paying and reimbursing to Mr. Amyand the premium he paid, and also his charges. This is by no means within the idea of a double insurance. Two persons may insure two different interests: each, to the whole value: as the master, for wages; the owner, for freight, &c. But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same goods or the same ship. Mr. Tamesz is intitled to receive the whole from the defendants upon their policy; whatever shall become of Mr. Amyand's policy; and they will have a right, in case he can claim any thing under Mr. Amyand's policy, to stand in his place, for a contribution to be paid by the other underwriters to them. But still they are certainly obliged to pay the whole to him.

Therefore, upon these grounds and principles, in every light in which the case can be put, we are all of us clearly of opinion, "that the verdict is right, as it now stands, for the whole; and that the

"Postea be delivered to the plaintiff."

Rule accord.

#### REX versus INHABITANTS OF BISHOP'S HATFIELD. 1758.

See this case at large, in the quarto-edition of my *Settlement-Cases*, No. 141, pa. 439.

† 2d June 1755.



[497] ROSSEL, QUI TAM, &C. *versus* KITCHEN. Saturday, 11th Feb. 1758.

Qui tam action on the stat. 1 Jac. 1, c. 22, relating to leather cutters.

On Thursday 26th January last, Mr. Whitaker moved in arrest of judgment, after a verdict for the plaintiff in a qui tam action upon the statute of 1 Jac. 1, c. 22, "the duty of tanners, curriers, shoemakers, and of others cutting of leather." A rule was then made "to bring in the postea." And the postea being now brought in Mr. Whitaker and Mr. Nares objected—

1st. That the defendant is not an object of this Act.

It is not alledged in the declaration "that the defendant was a tanner, currier, shoemaker, or other person occupied in the cutting of leather:" which the preamble shews that he ought to be. Cro. Car. 587, *Lodge v. Hollowell*, is an action brought upon another clause of this Act: and there it is alledged, "that the defendant was a currier, &c."\*1 Brown's Entries, on the Act against buying and selling live cattle—the defendant is here alledged to be a butcher.†

They relied upon the preamble of the Act, rather than the enacting part; and argued that both must be taken together.

2d objection.—This action is brought upon a supposition, and under an allegation, "that a third part of the penalty belongs to the Dean and Chapter of Westminster, as lords of the liberty where the offence was committed." Whereas by the Act of Parliament this third part of the penalty must belong to the City of London, when the offence was committed within three miles of the [498] city: although the place where the offence was committed, be not, in any other respect, situated within the said city or its liberties.

For the 50th section of this Act gives to the Mayor of London, a jurisdiction extending to all places\*2 within three miles of that city: and at the same time, excludes all others in general, and all the other jurisdictions thereby established in particular, from having any jurisdiction at all, within three miles of the said city. So that if the City of London, have not jurisdiction in all places within three miles of the city, they have none at all given them under this Act of Parliament.

Now Drury-Lane appears and was proved to be the place where the present offence was committed; which is clearly within three miles of the City of London; and therefore is within the jurisdiction given to the city by this clause, although it is indeed actually situated within the liberty of the church of Westminster. And consequently, the penalty belongs to the City of London; and not to the church of Westminster.

(Vide § 46, which gives the penalty, viz. one-third to the King; one-third to the prosecutor; and one-third to the city, borough, town, or lord or lords of liberties where the offence shall be committed or done.) They cited 1 Lutw. 138, under this second objection.

3d. objection. It follows, "that the venue is wrong;" it being laid in Middlesex.

Mr Norton contra for the plaintiff, was going to answer the objections, but was prevented by

Lord Mansfield.

1st. The Act is not confined to particular sorts of leather, nor to particular persons: it extends to all red leather; and to every person. The preamble is general, and does not mean or intend to specify and enumerate every particular case. But what the Legislature had in view, in the making of this Act, was "to secure the staple of leather, by this search, &c."

[499] And all the other clauses of this Act are general; and are not confined to "persons occupied in the trade or business of cutting leather." This would not have remedied the evil; or answered the end of the Act; for the evil is just the same, if any other persons commit this offence.

2dly. The extension of the jurisdiction of the City of London, undoubtedly, cannot alter the locality of the place where the offence is committed. All that the Act does, is enlarging the jurisdiction of the City of London. Besides, the Act gives particular penalties for particular offences; and this penalty, in the 46th section,

\*1 The words there are—"that the defendant, being a currier, &c."

† But N.B. here the words of § 38 are "that every person."

\*2 V. ante, pa. 398, 390, *Rex v. Goddard Williams*.

is given "one-third to the King, one-third to him or them that shall first sue, &c., and one-third to the city, borough, town, or lord or lords of liberties, where the offence shall be committed or done."

He concluded with saying that it was an excessively plain case.

In which opinion

The three Judges concurring, a rule was made, "that the *postea* be delivered to the plaintiff."

REX *versus* INHABITANTS OF AUSTREY. Monday, 13th Feb. 1758.

See this case at large, in the quarto-edition of my *Settlement-Cases*, No. 142, p. 441.

REX *versus* INHABITANTS OF COLD ASHTON. 1758.

See this case at large, in the quarto-edition of my *Settlement-Cases*, No. 143, p. 444.

[510] REX *versus* MARTHA GRAY. 1758. Trial put off upon account of a libel published to influence the jury.

The defendant stood indicted of a nuisance in stopping up a foot way leading through Richmond-Park.

The present question was only, whether the trial (for which a notice had been regularly given by the prose-[511]-cutors, "to try it at the next Surrey-Assizes,") should be put off, or not.

The cause alledged for putting it off, by the counsel for the defendant, (who professed themselves to be counsel, in this particular case, for the Crown,) was that there had been a libel published relative to the question in issue, with intention to influence the public and the jury who should try the cause.

The fact was, that when the cause came on to be tried at the last Summer Assizes, before Lord Mansfield, this libel (just then published and distributed,) was produced in Court, and complained of in Court, as calculated to instruct the witnesses and influence the jury.

Two of the principal prosecutors, then in Court, were by affidavit charged with having procured the said libel to be written, published and distributed. It purported, in the title-page, to be printed for and published by Shephard, the brother of a principal prosecutor: and an affidavit was read, proving him the publisher, and that the copy produced was bought from him in his shop, and that he said, "great numbers had been sent to the Surry-Assizes."

The next day one of the said prosecutors only made an affidavit to deny the charge; but in such a manner that it rather fixed it, as much as the silence of the other did.

The counsel for the prosecution, as it did not appear to what witnesses or jurors the pamphlet had been conveyed, apprehending that such practices were not only a contempt of the Court and high misdemeanor, but might invalidate any verdict obtained before a proper inquiry could be made into the matter, desired that the trial might be postponed.

Which was consented to, by the counsel for the defendant: and an order was accordingly made, upon the motion of one side, consented to by the order.

Informations were afterwards moved for, and granted, against some of the persons concerned in printing and publishing the said pamphlet; and were ready for trial at the sittings after this term, in Middlesex and London.

[512] Mr. Attorney-General and the other counsel for the Crown, moved, a few days ago, to put off the intended trial of the indictment against the defendant Gray, till after the trial of this information which had been filed against the publishers of this libel; or at least to the next following assizes to these now approaching Lent-Assizes; to the end that the publishers of this libel might be tried in the interim, and receive judgment, (if convicted;) which, they said, would take off the improper influence which the publication of it had occasioned.

Which motion being strongly opposed by the counsel for the prosecution: the Court took time, till this day, to advise.

And now Lord Mansfield delivered his own and Mr. Just. Denison's and Mr. Just.

Wilmot's opinions, (for he said he did not know Mr. Just. Foster's, who had just sent him a letter to inform him "that he could not be here to-day;") which opinion was, in short, (though he gave it very much at large,) that the trial of these informations for publishing the libel, was not so connected with the merits of the question to be tried upon the indictment, (which was a mere question of civil right, though in the form of a criminal prosecution,) as that the trial of the civil right ought to be stayed till the determination of the information against these publishers of the libel.

At the assizes, the counsel for the prosecution desired the trial might be put off; which was consented to, on the part of the defendant. If they had not, I should have adjourned it myself. But there is not the same reason now. For at that time, it appeared that one, if not two of the principal prosecutors attending the assizes, had been industrious in dispersing and sending it about, to the witnesses and jury, for very unjustifiable purposes. But now one\* of the principal prosecutors chiefly concerned in it, is dead, and was so even before the motion for the information; the other† is not now under the charge of being concerned, (whatever suspicion may remain upon him:) and the only persons fixed upon by the affidavits, now actually under the charge, are mere pamphlet-sellers and publishers, of whom they were bought. And he could not, he said, upon the best consideration that he could give it, at all discover or conceive how the conviction or acquittal of them of the mere fact of publication of this libel, could any way affect the merits of the question concerning the civil right: or how the trial of the point upon the civil right could be at all altered, by being brought on before, or after the event of the criminal trial for publishing the libel.

[513] Indeed, if that had been the case, as suppose there had been an information against the principal prosecutors of this indictment for the nuisance, for instructing and suborning witnesses, or for undue endeavours to influence jurors, that might have been a reason for postponing the cause till these charges relative to the conduct of the parties were tried. But that is not this case: and whether the defendants to the informations were or were not guilty of publishing this libel, can no [514] way effect the merits of the cause, or can any how be given in evidence.

Therefore the rule must be discharged.

#### REX *versus* INHABITANTS OF MAYFIELD. 1758.

See this case at large in the quarto edition of my Settlement-Cases, No. 144, pa. 513.

FAIRLEY *versus* M'CONNELL. 1758. Procedendo denied to a Borough Court that had tried a cause without the presence of a barrister of three years standing.

Mr. Aston shewed cause "why a procedendo should not go, to the Borough-Court of Portsmouth:" who insisted on a right to proceed there, after a habeas corpus cum causa.

He, on the contrary, insisted that by the proviso in § 6 of the 21 Jac. 1, c. 23, ("to prevent suits commenced in Inferior Courts, from being removed into superior, unless, &c."). There ought to have been an utter-barrister of three years standing present at the trial of the cause; whereas no such person was present at this trial. For want of which, the trial, he said, was void; and the habeas corpus to remove the cause, was well brought. In proof of this he cited Cro. Car. 79, *Clapham's case*—2d resolution) in point—"That it is essential that an utter-barrister of three years standing, be present, either as Judge, or Deputy Judge." 3 Mod. 85, *Anonymous*. A like resolution proving the necessity of an utter-barrister's being present; or else, that this Act, by virtue of this proviso, does not extend to the case.

Mr. Yates *contra* for the procedendo. This qualification, of being utter barrister of three years standing, &c. only extends to the case of the Judge or the steward himself; [515] not to his assistant. And Mr. Serj. Stanniford who is such a barrister as is described in the proviso, is the Judge of the Court. So that the proviso does not extend to the present case.

Mr. Aston in reply—But he was not present; the cause was tried by Mr. White,

\* Shephard.

† Lewis.



an attorney ; who is his deputy, and is not a barrister at all. And the defendant relied upon the habeas corpus to remove the cause out of this Inferior Court ; and therefore did not attempt to try the merits, or make any defence there.

N.B. The proviso is, that this Act (of 21 Jac. 1, c. 23,) shall extend only to such Courts of Record "in cities, liberties, towns corporate, and elsewhere, and for so long time only, as there is or shall be an utter barrister of three years standing at the Bar, of one of the four inns of Court, that is or shall be steward, under steward or deputy steward, town clerk, or Judge or recorder of the same Inferior Court ; or that is, or shall be from time to time assistant to such Judge or Judges of such Inferior Courts as shall not be utter barristers of such standing, as is aforesaid ; and there present ; in which, such actions, bill, complaints, suits, or causes, is or shall be brought, commenced, or depending ; and not of counsel in any action, suit or cause then depending in the same Inferior Court."

Lord Mansfield—The Judge, though he be such a barrister, can be of no use to the Court, unless he himself be there. The meaning of the Act is, that such an utter-barrister ought, in all events, to be present at the trial.

Mr. Just. Denison and Mr. Just. Wilmot—Certainly that was the meaning of the Act beyond doubt. And for want of this, the trial now in question is void.

The rule (to shew cause "why there should not issue a writ of procedendo, to be directed to the Mayor, Aldermen, and Burgesses of the Borough of Portsmouth ;" and "why the defendant should not pay to the plaintiff the costs of this application ;") was

Discharged.

[516] REX *versus* ELIZABETH SARMON. 1758. Indictment for setting a person on the footway to distribute hand bills quashed.

The Court made no sort of difficulty to quash an indictment, (though attempted, by two or three counsel, to be supported) "for that the defendant for the space of four hours and more together, on every of the several days specified, (which were the first day of January 29 G. 2, and divers other days and times between that day and the day of taking the inquisition,) with force and arms, &c. at London, at the parish of St. Martin within Ludgate, in the ward of Farringdon Without, in London aforesaid, unlawfully, injuriously and wilfully did set, place and keep a certain person (whose name was yet unknown to the jurors,) in and upon the common and ancient foot-way on the north side of the public street there situate, called Ludgate-Hill ; to deliver out certain printed bills of her occupation, to persons passing that way ; which said person so set, placed and kept there, by her the said Elizabeth, did, on the said days and times, remain in and upon the said common foot-way during the several spaces of time aforesaid, delivering and distributing printed bills, as aforesaid ; whereby the same foot-way, at those several days and times, was greatly impeded and obstructed ; so that the liege subjects of our said lord the King, there passing and residing, could not so freely go, pass and repass in, by or through the same way, as they ought and were used to do : to the great damage and common nuisance of all the said subjects, and against the peace of our said lord the King his Crown and dignity."

The Court held this to be a matter not indictable ; and quashed the indictment.

The end of Hilary term 1758, 31 Geo. 2.

[517] EASTER TERM, 31 GEO. II. B. R. 1758.

REX *versus* RICHARDSON. Wednesday, 12th April 1758. A bye-law to give power of amotion for just cause is a good bye-law.

[Followed, *O'Grady v. Mercer's Hospital*, 1887, 19 L. R. Ir. 350.]

This was a general demurrer, by the King's coroner and attorney, to the defendant's plea to an information in nature of a quo warranto exhibited against Thomas Richardson, to shew by what authority he claimed to be one of the portmen of the town or borough of Ipswich.

The plea (in substance) is, that Ipswich is an ancient borough by prescription, prior to the charter : that at the time of granting it, there were, and long before had

been twelve burgesses called portmen. Then it sets forth the letters patent of incorporation, dated 11th Feb. 17 Car. 2, which, after reciting that this town or borough had been, for many ages, a corporation, &c. first confirms the said incorporation and all their liberties, free customs, franchises, &c. Then the said letters patent name, constitute and confirm the several officers, and (amongst the rest) twelve portmen. Then they go on to grant, and confirm, "that all elections of the portmen and of every of them, by the death or removal of any of them or otherwise in whatsoever manner happening, should from thenceforth for ever be made and ought to be made by the others or residue of the portmen for the time being, or the greater part of them."

Then the plea sets forth the acceptance of the letters patent by the corporation, and their conforming thereto, to the time of the plea.

The plea goes on, and alledges a custom then and still subsisting, "that the bailiffs, burgesses, and commonalty for the same being, or so many of them as would be present, have met and assembled, and of right ought to [518] meet and assemble together in the Moot-Hall yearly and every year, at divers times in the year, viz. once, on the 8th of September in every year, for the election of bailiffs, and for the consulting about and transacting of other lawful and necessary affairs concerning the borough and the good rule and government thereof: and again at Michaelmas in every year, for the transacting of divers lawful and necessary businesses, &c. and also at such other time and times in the year, as to the bailiffs of the said town or borough for the time being, hath seemed meet and necessary, upon due notice being previously given thereof, for the better ordering, regulation and government of the said town or borough: at which said assembly, from time to time had and held as aforesaid, the bailiffs of the said town or borough for the time being, during all the time aforesaid, have of right presided, and have used and been accustomed and ought to preside; and which said assembly, during all the time last aforesaid, hath been and hath been called the great Court of the said town or borough."

Then the plea further sets forth another then and still subsisting custom and method of electing, swearing and admitting the portmen, whenever any vacancy or vacancies hath or have happened by the death, resignation, discharge or removal of any portman or portmen of the same town, or in any wise whatsoever; viz. "that the residue of the portmen, or the greater part of them, have within a reasonable and convenient time after the happening of such vacancy or vacancies, assembled in the council-chamber, for the election of another portman or other portmen: and, in the said room there, have elected and named, and of right ought to elect and name, out of the then burgesses of the said town or borough, then resident and inhabiting within it, such other person or persons as the said then residue of the portmen aforesaid, or the greatest part of them, have thought fit and proper to be a portman or portmen of the said town, to fill up such vacancy or vacancies: and such person or persons so elected and named to be a portman or portmen of the said town or borough, and being resident and inhabiting in the same town, hath and have, for all the time aforesaid, been sworn and admitted, and during all that time ought of right to be sworn and admitted into the same office or offices; and every person so elected, sworn and admitted, &c. and being resident and inhabiting, &c. during all the time aforesaid, hath of right enjoyed, had, used and exercised, and during all that time ought of right to have, use, and exercise and still of right ought to enjoy, use, have, and exercise, the said office of a portman of the said town or borough, and all the liberties, privileges, rights and franchises to that office belonging and appertaining, from the time of his admission thereto, until the death, resignation, discharge or removal of such portman."

[519] The plea further shews, that every portman of the said town or borough, during the time of his being in that office, ought, according to the custom of the said town or borough, to be resident and inhabiting within the same town or borough, or the liberties thereof; and according to the custom of the said town or borough, and by the duty of his office of portman, ought to attend and be present at every great Court of the said town or borough held or to be held in the Moot-Hall aforesaid, within the said town or borough, to advise and assist the bailiffs of the said town or borough for the time being, in the good rule and government of the same town or borough.

It then alledges that on the 8th of September 1755, and for six months and more



next preceding that day, he the said Thomas Richardson and one John Gravenor were bailiffs of the said town or borough.

That on the same day and year, and for the space of one whole year then last past, and upwards, Sir Richard Lloyd, Knight, John Sparrowe, Samuel Kent, Humphrey Rant, Ellis Brand, Michael Thirkle the Younger, Goodechild Clarke, William Hammond, George Foster Tuffnell, and James Wilder were the then portmen of the said town or borough.

That within the said space of that year during which the said Sir Richard Lloyd, &c. were portmen as aforesaid, divers great Courts of the same town or borough, were holden, &c. that is to say, one great Court of the said town or borough, was duly holden at the said Moot-Hall of the said town, in and for the said borough, on the 13th of January, 1755; one other great Court of the said town or borough was duly holden at the said Moot-Hall, &c. on the 15th of April, 1755: one other, on the 9th of June, 1755; and one other, on the 19th of June, 1755; before the holding of which said several Courts respectively, due notice had been given of the holding thereof respectively.

That on the said 8th of September 1755, they the said Thomas Richardson and John Gravenor, being then bailiffs, and the above-named James Wilder, then one of the portmen of the said town or borough as aforesaid, and a great number of the then burgesses and commonalty of the said town or borough, in due manner, according to the custom of the said borough, met and assembled together in the Moot-Hall aforesaid within the said town or borough; and then and there held a great Court of the same town or borough, (due notice of the holding thereof having there been previously given), for the election of [520] bailiffs of the said town or borough, and for the transaction of divers other lawful and necessary matters and businesses concerning the good rule and government of the same town or borough.

That the said Sir Richard Lloyd, John Sparrow, Samuel Kent, Humphrey Rant, Ellis Brand, Michael Thirkle, Goodechild Clarke, William Hammond, and George Foster Tuffnell, did not, nor did any of them attend or appear at the same great Court of the said town or borough, but wilfully absented themselves therefrom; and that they and every and each of them wilfully had absented themselves from the said other great Courts of the said town or borough, which had been so duly holden in the same town or borough, within the said space of one year then last past as aforesaid, and from every of those great Courts; and had voluntarily neglected, and every and each of them had voluntarily neglected to attend at the said great Courts, so holden as aforesaid, or at any of them: and thereby, each of them the said Sir Richard Lloyd, &c. and G. F. Tuffnell neglected and omitted the duty and execution of his said office of one of the portmen of the said town or borough, and thereby deprived the then bailiffs, burgesses and commonalty of the said town or borough, assembled at the said several great Courts, of that counsel, aid, assistance and advice which by the duty of his office of portman of the said town or borough, and according to the obligation of the oath of office by him taken in that behalf, he ought to have given; to the great hindrance and delay of the public business of the said borough, to the great damage, disappointment, and prejudice of the bailiffs, burgesses, and commonalty of the said borough, and to the great hindrance, and in open subversion of the good rule, government, and constitution of the said borough.

That thereupon at the same great Court of the said town or borough holden on the said 8th day of September 1755, for the purposes aforesaid, (the said great Court having notice of the premises,) it was in due manner ordered, by the said then bailiffs, burgesses, and commonalty of the said town or borough then met and assembled at that great Court as aforesaid, "that the said Sir Richard Lloyd, John Sparrowe, Samuel Kent, Humphrey Rant, Ellis Brand, Michael Thirkle, Goodechild Clarke, William Hammond, and George Foster Tuffnell, and each of them respectively, should severally and respectively have notice of the neglect of duty charged upon each of them, and be summoned to appear at the then next great Court of the said town or borough, that is to say, in the Moot-Hall aforesaid, on Monday the 29th day of the same September; severally and respectively to shew cause, (if they or any of them could,) why each of them respectively should not be discharged from his said office of portman, for his respective neglects aforesaid."

[521] That afterwards, and before the holding of the said then next great Court of the same town or borough, to wit, on the 17th day of the same September 1755,



each of them the said Sir Richard Lloyd, J. S. S. K. H. R. E. B. M. T. G. C. W. H. and G. F. T. had notice of the said order so made by the same great Court, and of the charge alledged against each of them respectively, of his aforesaid neglects; and were then and there severally and respectively summoned, and every and each of them was then and there in due manner summoned to attend and appear at the said then next great Court of the said town or borough to be holden in the Moot-Hall aforesaid in the said town or borough, on Monday the 29th day of the same September by the bailiffs, burgesses and commonalty of the said town or borough, and to shew cause (if any of them could) why each of them the said portmen respectively should not be discharged from his said office of portman, for his respective neglects aforesaid.

That afterwards, that is to say, on the same Monday, the 29th day of September in the said year of our Lord 1755, they the said Thomas Richardson and John Gravenor, being then and there bailiffs of the said town or borough, and the said James Wilder, being then one of the portmen of the said town or borough, and a great number of the then burgesses and commonalty of the same town or borough, (due notice having there been previously given in that behalf,) did, in due manner according to the custom of the said borough, meet and assemble in the Moot-Hall aforesaid, within the said town or borough, and then and there held a great Court of the same town or borough, in and for the said town or borough; and the said Sir Richard Lloyd, J. S. S. K. H. R. E. B. M. T. G. C. W. H. and G. F. T. although they were then and there solemnly and severally called for that purpose, did not nor did any of them appear or attend at that Court, or shew any cause why they and each of them should not be discharged from the said office of portman of the said town or borough: but they and each of them did then and there wholly make default therein.

That at the same great Court, &c. so holden as aforesaid on the said Monday the 29th of September 1755, a further day was given by the same great Court, to the said Sir Richard Lloyd, &c. respectively, until the then next great Court of the said town or borough, to be holden in and for the said town or borough, at the Moot-Hall of the said town or borough, on Tuesday the 14th day of October then next ensuing, to shew cause as aforesaid: and it was then and there in due manner ordered by the same great Court, "That the said Sir Richard Lloyd, &c. and every of them should have notice and be severally and respectively summoned to appear at the said then next great Court, &c. to be holden, &c. on the said Tuesday, the [522] 14th day of October then next ensuing; severally and respectively to shew cause, (if any of them could,) why they and each of them respectively should not, for the cause aforesaid alledged against each of them respectively, be discharged from his office of portman of the said town or borough, for his neglects aforesaid."

That afterwards, and before the holding of the said then next great Court of the same town or borough, to wit, on the 10th day of the same October, in the said year of our Lord 1756, they the said Sir Richard Lloyd, &c. and each of them respectively, had due notice of that order, and of the charge alledged against each of them respectively, of his aforesaid neglects; and were then and there severally and respectively summoned, and every and each of them was then and there in due manner summoned to appear and attend at the said then next great Court of the said town or borough, to be holden in and for the said town or borough, on Tuesday, the 14th day of October then next ensuing, to shew cause, if any of them could, why they and each of them respectively should not, for the cause aforesaid alledged against each of them respectively, be discharged from his office of a portman of the said town or borough, for his neglects aforesaid.

That on the said Tuesday, the 14th of October aforesaid, in the said year of our Lord 1755, Lark Tarver and Thomas Bowell were bailiffs of the said town or borough; and that the aforesaid Sir Richard Lloyd, &c. and James Wilder, were the then only portmen of the said town or borough.

That on the said Tuesday, the 14th day of October aforesaid, they the said Lark Tarver and Thomas Bowell, then being bailiffs of the said town or borough, and the said James Wilder then one of the portmen of the same town or borough, and a great number of the then burgesses and commonalty of the said town or borough, (due notice in that behalf having there been previously given,) did, in due manner according to the custom of the said borough, meet and assemble in the Moot-Hall aforesaid, in the said town or borough, and then and there held a great Court of the same town

or borough, for the transaction of divers lawful affairs concerning the good rule and government of the said town or borough.

That at the same great Court, &c. so holden as aforesaid on Tuesday the 14th of October 1755, the aforesaid Sir Richard Lloyd, &c. were severally and solemnly called, and every and each of them was severally and solemnly called to appear and shew cause at that Court, (if any of them [523] could,) why each of them respectively should not, for his neglect of duty aforesaid charged and alledged against each of them respectively, be discharged and removed from his said office of portman of the said town or borough. That they the said Sir Richard Lloyd, &c. being so respectively and solemnly called as last aforesaid, did not nor did any of them attend or appear or shew any cause whatsoever, at that Court, why they or any of them should not be discharged and removed from his said office of portman of the said town or borough: but they every and each of them did then and there wholly make default therein; and neither they nor any of them, nor any person on the behalf of them or any of them, did then require any future day or time to be allowed to them or any of them, to shew cause as aforesaid. Whereupon, the said Lark Tarver and Thomas Bowell, then being bailiffs of the said town or borough, and the rest of the said burgesses and commonalty of the said town or borough then so met and assembled and holding the said great Court of the said town or borough as aforesaid on the said 14th day of October in the year last mentioned, having taken the premises into their consideration, and having fully and deliberately weighed the same, the said Court did then and there order "that each of them the said Sir Richard Lloyd, J. S. S. K. H. R. E. B. M. T. G. C. W. H. and G. F. T. should be dismissed, discharged and removed from his office of a portman of the said town or borough: and each of them respectively was then and there, by the said Court, for his said neglect of duty, duly discharged and removed from his place and office of portman of the said town or borough; and each of them hath ever since remained and been, and yet is discharged and removed therefrom."

That the aforesaid Sir R. L. J. S. S. K. H. R. E. B. M. T. G. C. W. H. and G. F. T. being so respectively discharged and removed from their said respective offices as aforesaid, he the said James Wilder, afterwards on the same day and year, and from the time of their said respective discharges and removal until and at the time of the election of other portmen of the said town or borough herein after mentioned, remained and was a portman of the said town or borough; and then, and during all that time, was the only portman of the same town or borough.

That afterwards, on the said Tuesday the 14th day of October aforesaid in the year last mentioned, the said James Wilder, being then the only portman of the said town or borough, retired and went into the room called the council-chamber, in the Moot-Hall aforesaid in the said town or borough, in order to elect other burgesses of the same town or borough, resident and inhabiting within the said town or borough, to be portmen of the said town or borough in the places of portmen of the said town or borough vacant as aforesaid; and did then, in the said room [524] there, in due manner elect him the said Thomas Richardson (being then and there a Burgess of the same town or borough, inhabiting and resident within the same town or borough, and a fit and proper person to be a portman thereof,) to be one of the portmen of the said town or borough in the place of one of the portmen of the said town or borough then vacant as aforesaid.

That he the said Thomas Richardson, being so elected to be a portman of the said town or borough, afterwards and before he was admitted to or took upon him the execution of that office, that is to say, at the same great Court of the said town or borough, in the Moot-Hall aforesaid, on the same Tuesday the 14th day of October in the year last aforesaid, at the same great Court of the said town or borough, in the town-hall aforesaid, did then and there, before the said Lark Tarver and Thomas Bowell then bailiffs of the said town or borough, in due manner and according to the usage and custom of the said borough, take his corporal oath for the faithful and due execution of the said office of a portman of the said town or borough in all things concerning the same, and all other oaths then required by law in that behalf: and thereupon, he the said Thomas Richardson was then and there, at the same great Court, in due manner admitted into the said office of a portman of the said town or borough. And thereupon, and by virtue thereof, he the said Thomas Richardson, afterwards, that is to say, on the said 14th day of October 1755, and continually from



thence until and at the time of exhibiting the information, was and still is a portman of the said town or borough.

And by that warrant, &c. &c.

The King's coroner and attorney demurs generally: and the defendant joins in demurrer.

This case was three times argued.

The general question was, "whether the defendant has shewn a sufficient title to the office." Which general question was divided into two subordinate ones; viz.

1st. Whether the nine portmen had been well and duly removed: and (admitting that they were so,)

2dly. Whether the defendant was well chosen.

First.—The counsel for the Crown urged, that the persons amoving had no power to amove. For, a corporation have no such power inherently or incidentally: [525] and none is, in the present case, either given to this corporation by charter, or claimed by prescription.

They cited *Magna Charta*, c. 29, "Nullus liber homo disseisietur de libero tenemento suo, nisi per legale iudicium parium suorum, vel per legem terræ." *James Bagg's case*, 11 Co. 93 to 99. 1 Ro. Rep. 224, 225, S. C. and S. P. The Crown may, by writ, discharge some officers, after conviction. See Sir Robert Sawyer's Argument on the Quo Warranto against London, fo. 22. *State Trials*, vol. 4, fo. 810, S. C. where Sir Robert mentions the case of a coroner. F. N. B. new edit. 381, old edit. 163, writ de coronatore eligendo vel exonerando. Register 177, 178, writ de coronatore eligendo; & de viridario eligendo. F. N. B. new edit. 383, old edit. 164, writ de electione viridarium forestæ. Dyer, 333, Pasch. 16 Eliz. pl. 28, which was a restoration by writ, of a citizen of London, who had been disfranchised.

These authorities they cited, to illustrate and reduce the position "that, in consequence of a conviction, writs shall issue out of the King's Courts, where the conviction is;" and to shew "that the power is originally in the Crown."

In *Yate's case*, Style, 477, 480, it is said "there must be a custom or a statute to warrant a disfranchisement." 1 Ld. Raym. 391, *Rex v. Mayor of Coventry*, M. 10 W. 3, (2d point,) the Court held that the corporation ought to shew a power, either by custom or under their letters patent. 2 Ld. Raym. 1564, 1565, 1566, M. 3 G. 2, *Rex v. Mayor, &c. of Doncaster*, recognizes the authorities of *Bagg's case*, and *Yates's case*, "that a freeman shall not be removed, but by charter or prescription." That return was quashed; and a peremptory mandamus issued. And M. 29 G. 2, B. R. *Rex v. Ponsonby* was agreeable to this.

The only dictum to the contrary of this doctrine, is in 2 Strange, 819, 820, *Lord Bruce's case*: where it is said "that the modern opinion has been, that a power of amotion is incident to the corporation." But this report ought to carry but little weight: for other accounts of that case differ from it; and no such modern opinion as there hinted at, does any where appear.

Second objection (under the first point).

Here was no sufficient cause of removal of these nine portmen.

Their non-attendance was no breach of their duty so as to occasion a forfeiture. 1 Hawk. P. C. 168, says that the notion of forfeiture by bare non-user is not well warranted by the authority cited in maintenance of it.

[526] This duty, "of attending to advise and assist the bailiff at the great Courts," is not constant and continual; but occasional only, and when they receive notice to do so: they are not obliged to attend the ordinary and common business of these great Courts. And it is not here alledged, "that any counsel, aid, assistance, or advice was wanting." Indeed, the plea "concludes that this was to the damage and prejudice of the corporation, and their hindrance, &c." But there is no special damage laid: and the stating a general damage to the corporation is not enough; without shewing particular prejudice to them. 1 Inst. 233 b. is expressly so.\*

A burgess's non-attendance at sessions, is no cause sufficient for a removal of him. *Regina v. Mayor and Burgesses of Pomfret*, M. 11 Ann. in Lucas's Report 107, is expressly so resolved.

But even admitting they had this power of removal; yet, it ought to be for such

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\* As to private offices; not as to public, which concern the administration of justice or the commonwealth.



an offence as was against their oath of office: and consequently, this oath of office ought to be set forth. Style 477, 478. 2 Ld. Raym. 1233, in Serjeant Whitaker's case—*Regina v. Ballivos, Burgenses, &c. de Gippo*: there the oath is set forth: here, it is not.

Third objection (under the first point)—This is not a removal by the whole body, at a corporate assembly: but by a particular Court. In Carthew 172, *Sir Peter Rich v. Pilkington*, the Court of Mayor and Aldermen was holden not to be a corporate assembly; but a Court. So here, this great Court was only a mixed assembly: and not the mayor, burgesses and commonalty.

Fourth objection (under the first point). The removal is not under their common seal. 1 Salk. 192, *The Mayor of Thetford's case*, is in point, "that a corporation can not do an act in pais, without their common seal." 13 H. 8, 12. Plowd. 91 b. 92 a. 2 Saund. 305. \*1 3 Lev. 107, *Manby v. Long et Al.* † 1 Vent. 47, *Horn v. Ivy*. 1 Mod. 18, S. C. ‡ In 1 Vent. 355, *Haddock's case*, the words are, if "the power to remove be at their will and pleasure, this will must be expressed under their common seal: but in a return to a mandamus, debito modo amotus may suffice." There is a note, at the bottom of *The Colchester case* in 1 Peere Wms. 596, "that the method of disfranchising a corporator, (in order to examine him as a witness,) is by an information in the nature of a quo warranto against the member; who confesses the information: on which, there is a judgment to disfranchise him." The present case is not like to a return to a mandamus; where the [527] mere return of his being "debito modo amotus," is sufficient: here, it ought to be so pleaded; this being a plea to an information: which plea ought to be taken against the pleader.

Fifth objection (under the first point) was to the want of personal notice being given to the nine removed portmen, "to attend the five great Courts first mentioned in the plea;" (for the non-attending whereof, they were afterwards removed).

This objection was first started by Lord Mansfield: who observed that for the meetings assembled for doing corporate acts, a summons (of some sort or other) is necessary; and that here, the offence itself turns upon absences from several Courts, not holden (except one of them) upon stated days, during the period of about a year; yet no personal notice to these portmen is alledged by the plea; but only, in general, "that due notice was given of the holding thereof respectively:" so that it does not appear that they had any reason to think of any particular or special business. And if so, the particular notice afterwards given them, "to shew cause why they should not be disfranchised," will not affect them: for that is quite a subsequent distinct transaction.

Therefore he offered to hear a further argument on this single head if the parties desired it. Which they did: and this objection was argued by itself.

The counsel for the Crown also objected to the notice given to these portmen, of the Courts at which they were to have attended to shew cause why they should not be disfranchised.

1st. They argued that it was not their duty to have attended at all great Courts, upon general notice of them, without particular and personal summons. For without such personal notice, they could not be guilty of such a lachesse as would be a ground for a forfeiture of their office.

2dly. They insisted also that particular and personal notice ought to have been given them, of the charge, and of the intention to disfranchise. 1 Salk. 214, *Nurse v. Framton*. 8 Rep. 93, *Fraunces's case*, (3d resolution). And although it is alledged, "that each of them respectively had notice;"\*2 yet this was not enough: but a particular and specific summons ought to be set forth. And they cited Style, 446, 452, *The Protector and the Town of Colchester*; *Bernardiston the Recorder's case*, 4 Mod. 37. *Glide's case*, Cases temp. W. 3, fo. 29, S. C. *Bagg's case*, 11 Rep. 99 a. And it is likewise so in actions. *Fletcher v. Ingram*, last cited book, fo. 87, 88, (v. Cases temp. W. 3,) was a replevin: and "notitiam habuit" was holden too general, [528] 1 Ld. Raym. 225, 226, *Rex v. Chalke* upon a mandamus to restore an alderman, per Holt, "a summons is necessary, that the person charged may be prepared to make his defence." And this ought to be personal, and it must be given by the proper

\*1 (On the 1st exception to the plea.)

† (2d exception to the avowry.)

‡ All these last cases do not authoritatively prove the position; not being the point resolved.

\*2 V. post, 540.

person. 6 Rep. 29 a. b. *Green's case* : where no lapse incurred for want of its being given in certainty and explicit particularity, and by the proper person too.

Now the words in the present allegation "that each of them had notice," may be true though they had no proper, regular and personal notice.

Second point (viz. second subordinate question).

The defendant has not been duly elected, and sworn.

1st. For the election ought to be by the residue : and "residue" is a plural term, and imports "the others :" whereas here was only one single portman left, and he alone elected the defendant into this office.

The custom requires "the portmen to assemble :" which expression necessarily imports some number of them, at least more than one ; for one alone can never be said to assemble. And all charters ought to be taken according to the custom subsisting at the time of granting them. 2 Inst. 282. And here they have been reduced to one, not by the act of Providence, but by the voluntary act of the corporation themselves.

2dly. The custom also requires a reasonable and convenient time, "between the happening of the vacancy, and the election of a new portman." Whereas this election, admission and swearing of the defendant to be one of the portmen in the place of one of those removed, were all immediate.

3dly. Besides he ought to have been elected into the place of some particular portman ; not in general, "into the place of one of them then vacant."

4thly. The plea does not sufficiently particularize the oath of office, (vide *Style*, 478 ;) nor alledge that the persons who administered the oaths to the defendant, (viz. the bailiffs,) "had such power to administer them." It is only averred "that he took them before them in due manner and according to the custom." 1 *Strange*, 539, *Rex v. Decan. et Capitul. Dublin*. Per Eyre Justice, "in the case of corporations, where the charter doth not empower any body to give the oath, they are forced to get a dedimus out of Chancery." M. 8 G. 2, B. R. *Rex v. [529] Gibbon, a Freeman of New Romney* ; on a motion for a new trial : per *Ld. Hardwicke*, "the defendant, when he comes to make a title against the Crown, upon an information in nature of a quo warranto, must make a complete title to the office ; and must shew a right of swearing : " and his Lordship expressly added, "shewing that he was sworn in due manner and form, alone is not sufficient." Now here, he has not shewn "that the bailiffs had a right to administer the oath."

The counsel for the defendant first observed that a plea is to be taken to a common intent : it is not like a mandamus to restore ; which must be taken more strictly.

It appears, they said, upon this plea, that there was in fact a removal of former portmen ; a vacancy occasioned thereby ; and an election of the defendant into the office, upon that vacancy. The power to remove, is to be tried in another method ; at least, more properly than by this method : however, the defendant is content to have the merits determined in this or any method.

Having premised thus much in general.—

1st. They urged that this power of removal is implied and inherent and incidental to the constitution of a corporation.

The law gives whatever is necessary to the enjoyment of a grant. Upon this principle is founded the power of making bye-laws by corporations : much more, must they have power inherent in them to exercise acts essential to their existence and preservation.

The power of amotion is one of these ; and is not limited to cases where the party has been previously convicted. Their power of amotion is the same, after conviction, as before ; neither greater, nor less : the conviction working no change, either upon the charter or prescription.

Conviction is not a true criterion of guilt. For atrocious crimes are not purged, with respect to the corporation, by a pardon before conviction ; (which the Crown may grant, if they please :) or the offender may run away ; and thereby avoid being convicted at all.

Such amotion can not be contrary to *Magna Charta*. For a man may certainly be removed from his freehold : if he can be so by the law of the land. So that there is no argument to be drawn from *Magna Charta* as to this question.

If a corporation have no inherent power to disfranchise, how can they do it even upon request of the corporator himself? Yet that was *Tidderley's* <sup>\*1</sup> case.

[530] But this is not a disfranchisement of a freeman: but only a displacing an officer from an office, leaving him still a freeman. And surely, this mere displacing from an office can never demand a previous conviction.

Suppose an officer becomes, by the visitation of Providence, insane, blind, or otherwise incapable to execute his office; may not he be removed from such office? Ours is not an arbitrary removal ad libitum; but a removal for good cause.

The case of *The Corporation of Doncaster*, in 2 Ld. Raym. 1564 (on a mandamus to restore Scott to be a capital burgess,) makes the distinction between <sup>\*2</sup> turning out from an office, and disfranchising.

*Lord Bruce's case* in 2 Strange 819, is an authority for us: for it says expressly, "that the modern opinion has been that a power of amotion is incident to a corporation; though *Bagg's case* seems contrary." So in the case of *Rex v. Plimpton*, temp. Ld. Hardwicke.†<sup>1</sup> And from the nature of the thing, it must be inherent in the corporation.

Besides, here is an implied power to remove, by the custom. For it is "to go to election, &c. whenever any vacancy happens by removal, &c. of any portman or portmen:" which implies that the corporation must have a power to amove.

In the case of *Mr. Fetherston-haugh*, *Rex v. Mayor of Newcastle upon Tyne*, Mich. 1747, 21 G. 2, B. R. the Court would not grant a peremptory mandamus to restore him; though the common council, who removed him, had no power in them to remove, but that power must have been in the body at large, if it existed at all. However, here the removal is by the body at large.

In the case of *Rex v. Tidderley*, 1 Siderf. 14. It appears that the Ld. Ch. Baron Hale thought that corporations had this power, "to remove for good cause;" as corporations, and incidentally.

It has been said, "that, after conviction, the corporation may have a writ from the Crown to remove the offender." But this is a dangerous doctrine, "that corporators may be removed by writ from the Crown."

As to the cases cited—some of them relate to coroners, verderors, &c. which are not applicable to corporators.

*Bagg's case* was upon a mandamus to restore: and there was no sufficient cause of removing him from his [531] franchise. All the rest of the case is extrajudicial: and the latter part of it does not appear in Ld. Roll's report of it. So that, probably, it was only the reporter's own opinion; and not said by the Court.

And if a corporation has inherent power to remove, the citation from *Magna Charta* does not oppugn it: because, in such case it is "per legem terræ."

Style, 478, was the case of a freeman disfranchised; not an officer only removed from his particular office.

As to 1 Ld. Raym. 391, *Rex v. Mayor of Coventry*, it was a mandamus to restore: and the cause returned was holden <sup>\*3</sup> insufficient.

As to 2 Ld. Raym. 1564, the distinction above mentioned is expressly taken: and the cause returned was holden†<sup>2</sup> insufficient.

As to the 2d objection (under the first point,) concerning the cause of amotion of the nine portmen.

It appears to be a cause fully sufficient: for they had neglected the duty of their office, even after notice. 1 Inst. 233 a. proves this to be a forfeiture of office: for Lord Coke there expressly says, "that non-user of public offices is, of it <sup>\*4</sup> self a cause of forfeiture." And in the nature of the thing, it was so in the present case. The

<sup>\*1</sup> V. 1 Siderf. 14.

<sup>\*2</sup> At pa. 1566 indeed the Court observe "that the charge did not affect him as a capital burgess; but only as chamberlain."

†<sup>1</sup> Qu. What case, or when? § V. post, 533 or 534.

<sup>\*3</sup> Yet still it seems to be an authority: for the Court held "that they ought to have shewn either custom or grant to remove."

†<sup>2</sup> Yet it is an authority in point, in express terms, "that a freeman shall not be removed by a corporation, unless by virtue of a charter or prescription."

<sup>\*4</sup> V. ante, pa. 525.



corporation have a right to their attendance: and the right and the obligation ought to be reciprocal.

And how is it possible to assign a special damage, where several officers are equally obliged and equally negligent? However it is charged to be "to the damage and prejudice of the corporation."

It is a tacit condition, that neglect of duty is a sufficient cause of disfranchisement. *Bagg's case*, 98 a. in 2 Ld. Raym. 1275, *Regina v. Truebody*, who left the borough and lived out of it several years, and neglected attendance at the public assemblies, &c. This was holden a good cause of disfranchisement. In 4 Mod. 33, *Glide's case*, the whole Court agreed in this opinion, "that an alderman's deserting his office was a good cause of disfranchisement." And Holt said "so was absenting himself from the council, in the very nature of the thing." In Carthew, 227, *Vaughan v. Lewis*, Ld. Ch. J. Holt was of opinion, "that the not inhabiting infra the borough, &c. was a good cause to remove a member."

[532] In the case of *Rex v. Ponsonby*, it did not appear "that there was any non-attendance:" it only appeared "that they lived out of the borough."

And this wilful absence and neglect of the nine removed portmen could not but be contrary to their oath of office too; though their oath of office is only mentioned consequentially, in setting forth their offence in the plea.

As to the 3d objection under the first point—it is objected, "that this was not a corporate meeting." But it clearly was so: the meeting consisted of all the integral parts of the corporation; and the portmen must be freemen. It was not necessary to specify the names of the corporators who were present. These portmen were removed at a corporate assembly, met to do corporate acts; and upon a contumacious refusal to attend and shew cause why they should not be removed.

4thly, it is objected, "that it was not under the common seal."

As to which, 1st, that was not necessary: and 2dly, it is done upon record; which is of as high a nature.

And members are, in every day's experience, removed without any judgment.

As to the want of personal notice, viz. "whether the absence of these portmen, whose presence was not particularly necessary, and who had no particular notice of any special business, or any reason to suspect any particular and special business to be done at these Courts, made a forfeiture, or was a sufficient ground of amotion."

They cited 9 Co. 50 a. in *The Earl of Salop's case*. Non-user or non-attendance is a forfeiture of such offices as ought to be attended without demand or request.

2 Ld. Raym. 1237, *Serj. Whitaker's case*, it was holden "that non-attendance was a cause of forfeiture: and he was bound to attend, at his peril, being a public office concerning the administration of justice."

It is their duty, as much as if they had actually covenanted to do it. And it appears by Palmer, 332, *Bishop of Rochester v. Young*, "that a covenantor shall take notice; and there is no need of personal notice." And this notice is equivalent to personal notice.

[533] For it is reasonable to presume that they were resident in the corporation. Carthew, 227, 229, *Vaughan v. Lewis*, (the last point) Ld. Ch. J. Holt held "that the not inhabiting within the borough, ought to have been returned as special matter." 5 Mod. 438, 442, *Vanacker's case*.—Per Holt Ch.J. "Every member of a corporation, though absent, is supposed in law to be there." 2 Ro. 136, title Notice—Commoners are obliged to take notice of ordinances made by the homage under a custom. Cro. Car. 497, *S. C. James v. Tutney*. There, it was, by the custom, the duty of all the commoners, to appear at the Court. So here, it is stated to be the duty of these portmen, to be resident. And non-residence alone is a cause of forfeiture.

And the frequency of corruption of the original institution is a good reason for reforming.

Their contumacious disobedience to the summons to shew cause why they should not be disfranchised, shews their former neglects to be wilful. They absented themselves five successive Courts; though only one other portman was left.

An officer refusing to come when demanded, forfeits his office. Bro. Forfeiture de Terre, pl. 61, 115.

And "due notice" is alledged; which is confessed by the demurrer.

Second point—the defendant was duly and legally elected, and sworn.

Indeed, if he was not, the corporation is gone: and therefore the Court will

endeavour to save it, rather than let it be destroyed. And so they did, in the late case of *The Corporation of Carmarthen*, P. 1755, 29 G. 2, B. R.

1st. The word "residue" only imports what is left; and does not necessarily imply plurality. Wilder was "the residue." Consequently, he could continue the corporation.

The Court will construe these words favourably, *Regina v. J. S. Burgess of the Derizes*, 7 Ann. in Hilary term, was such a construction. And so here, death or amotion might produce the number to two or even to one: in either of which cases, there might be a want of majority amongst them. So that the Court will make such a construction as to support the charter.

[534] 2dly. As to the time.—The sooner it was done, the better: and especially as there was only one portman left. If he had died, the corporation had been dissolved. They had a right to fill up the vacancy immediately.

3dly. The election into one of the vacancies is enough: it was not necessary to specify which.

4thly. As to the swearing in of Richardson—it is alledged "that he was sworn in before L. T. and T. B. then bailiffs of the borough, in due manner, and according to the usage and custom of the said borough;" and "that he had taken all the requisite oaths:" and they might have traversed this, and taken issue upon it. But they have demurred generally: and this is good on general demurrer. However, these slips may be amended, on motion.

The counsel for the Crown replied that powers do not always arise to corporations, upon every case of necessity.

A pardon will have the same effect in this case, as in all others.

Where the corporation is not possessed of the power, the amotion is not per legem terræ.

An acceptance of a corporator's surrender does not operate as a disfranchisement.

As to the implied power given by the charter—such a power is not alledged: and the Court will not presume such a power against the Crown.

As to the case of *The Corporation of Newcastle*—nothing was done in it: Mr. Fetherston had for very many years deserted the corporation; and therefore the Court suspended granting the peremptory mandamus.

As to *Lord Bruce's case* in 2 Strange, 819. It is only a loose and mistaken report of it.

As to the case of *Rex v. Plimpton*—it is not stated, nor can the counsel on the other side give any account of it.

We do not contend "that the Crown can disfranchise a corporator by writ:" but we say that the Crown may give notice of the determinations of the law; which its ministers are to execute.

[535] Lord Coke reports what we have cited out of *Bagg's case*, as the determination of the Court; not as his own extrajudicial opinion.

As to the Doncaster case—we have cited it from Lord Raymond: we do not know what the man was. (V. 2 Ld. Raym. 1564.)

As to the cause of removal, we do not say "that a portman was not obliged to attend the great Court;" but "that it was not necessary to the existence of that Court;" nor is it shewn to be contrary to the obligation of their oath of office. Non-attendance might indeed be a misdemeanor, but is not a cause of forfeiture; especially, without special damage shewn. And it is such a misdemeanor, that an indictment or information will lie against a corporator for it: so that there might have been a previous conviction, in the present case.

And though this is an information, not a mandamus; yet this man has here set out his own title; which appears upon his own plea to be a bad one: and therefore the Court must give judgment against him. And this seems a very adequate remedy. If a person be improperly elected, he is to be removed by a judgment of ouster. Afterwards, indeed, those who have right may be admitted, upon a mandamus.

It does not appear that this Court was a corporate assembly of the mayor, bailiffs and burgesses. And, as to a contumacious refusal to attend—there is no pretence to suppose it: they are only said "not to have attended upon due notice given of the great Courts." There was no particular summons to attend them; nor any particular call, for their advice and assistance.

A corporation can do no important act without their seal. And this great Court was no Court of Record.

As to the want of personal notice—this is not like the case of a bond: which obliges the obligor to take notice. Palm. 532, is similar to the case of a bond: there, Young covenanted to find provisions for the steward, &c.

*Vanacker's case* too is quite of another tendency and consideration: there, the notice was proper notice to the whole body; and was taken to include every member.

The “due notice given” is † not alledged to be given personally to them: and therefore is not confessed by the demurrer.

[536] As to *Lord Shrewsbury's case*—the clerk of the market is certainly an office that must of necessity be constantly attended: and the other offices there specified and hinted at, are such as are of necessity, for the administration of justice; and where the public must suffer by the officers not attending.

Non-inhabitaney is no part of the charge against these port-men: it is non-attendance at five successive Courts. But there was no reason for them to think of any special occasion for their attendance; nor any particular notice to any such purport.

2d point—the Court will not support an usurpation against law.

The words are “residue of them;” “major part of them:” and they are to “assemble, &c.” All which expressions import a number of persons; at least, more than one individual.

The case of *The Burgess of the Dezives* was considered as the act of the nineteen: and that corporation was a fluctuating body; and any majority of their number for the time being, might do the corporate acts.

Two may elect, in the present case; provided they agree: and two are certainly the major part of two. And these words are not merely directory. No power of election is given to one only.

And this cannot be presumed. They ought to have alledged and shewn such a power.

The bailiffs had no power to administer the oaths. So that the defendant did not take them duly and effectually.

It was impossible for us to traverse what they never alledged.

Lord Mansfield now delivered the resolution of the Court.

The general question upon the plea is, “whether the defendant has set out a good title to the office of a portman of the town or borough of Ipswich.”

The title he sets out is, that upon a vacancy made by removal, he was duly elected, sworn, and admitted into the said office, to fill up such vacancy.

His right therefore must depend upon two general points:

[537] 1st. Whether the vacancy was duly made;

2dly. If it was, whether the defendant was duly elected, admitted and sworn.

Upon the first point, the principal and material objections are two.

1st. That the Corporation of Ipswich has no power to amove:

2dly. Suppose they have power, the cause of amotion is not sufficient.

Upon the second point; one objection is chiefly relied upon; viz. That, after the amotion, James Wilder being the only remaining portman, the election under which the defendant claims, was singly by him; but one can not elect.

Then his Lordship stated the record: which see before pa. 517, &c.

Upon the first point.

1st objection—that they had no power to amove.

This objection depends upon the authority of the second resolution in *Bagg's case*, 11 Co. 99: where it was resolved, “that no freeman of any corporation can be disfranchised by the corporation; unless they have authority to do it either by the express words of the charter, or by prescription: but if they have not authority either by charter or prescription, then he ought to be convicted by course of law, before he can be removed. And this appears by *Magna Charta*, c. 29: nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, &c. nisi per legale iudicium parium suorum, vel per legem terræ. And if the corporation have power by charter or prescription to remove him for a reasonable cause, that will be per legem terræ: but if they have

† V. ante pa. 519. “Due notice had been given, of the holding, &c.”



no such power, he ought to be convicted *per judicium parium suorum*, &c. As if a citizen or freeman, be attainted of forgery, or perjury, or conspiracy, at the King's suit, &c. or of any other crime whereby he is become infamous, upon such attainder, they may remove him: so if he be convicted of any such offence which is against the duty and trust of his freedom, and to the public prejudice of the city or borough whereof he is free, and against his oath; (as if he burnt or defaced the charters or evidences of the city or borough, or erased or corrupted them and is thereof convicted [538] and attainted:) these and the like are good causes to remove him. And although they have lawful authority either by charter or prescription, to remove any one from the freedom, and that they have just cause to remove him; yet if it appears by the return, that they have proceeded against him, without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party; *quia quicumque, aliquid statuerit parte inaudita alterâ, æquum licet statuerit, haud æquus fuerit*; and such removal is against justice and right."

Previous conviction was not a circumstance at all necessary to the judgment in that case: for there was no sufficient cause of amoval at all. There too, the actual removal was by the select body, (the mayor and nine of the masters;) which cannot be, except by charter, bye-law, or prescription.

There are three sorts of offences for which an officer or corporator may be discharged.

1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.

2d. Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.

3d. The third sort of offence for which an officer or corporator may be displaced, is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.

The distinction here taken, by my Lord Coke's report of this second resolution, seems to go to the power of trial, and not the power of amotion: and he seems to lay down, "that where the corporation has power by charter or prescription, they may try, as well as remove; but where they have no such power, there must be a previous conviction upon an indictment." So that after an indictment and conviction at common law, this authority admits, "that the power of amotion is incident to every corporation."

But it is now established, "that though a corporation has express power of amotion, yet, for the first sort of offences, there must be a previous indictment and conviction." And there is no authority since *Bagg's case*, which says that the power of trial as well as amotion, for the second sort of offences, is not incident to every corporation.

In *Lord Bruce's case*, 2 Strange, 819, the Court says, [539] "the modern opinion has been, that a power of amotion is incident to the corporation."

We all think this modern opinion is right. \* It is necessary to the good order and government of corporate bodies, that there should be such a power, as much as the power to make bye-laws. Lord Coke says, † "there is a tacit condition annexed to the franchise, which if he breaks, he may be disfranchised."

But where the offence is merely against his duty as a corporator, he can only be tried for it by the corporation. Unless the power is incident, franchises or offices might be forfeited for offences; and yet there would be no means to carry the law into execution.

Suppose a bye-law made "to give power of amotion for just cause," such bye-law would be good. If so, a corporation, by virtue of an incident power, may raise to themselves authority to remove for just cause, though not expressly given by charter or prescription.

The law of corporations was not so well understood, and settled, at the time of *Bagg's case*, as it has been since. And whether a power of amotion was incident to "the corporation," could be no part of the question in judgment in that case, or necessary to the determination of it. The power of amotion was there exercised by

[\* Vide Bull. 205, 206. Doug. 144. 6 Vin. 295.]

† 11 Co. 98 a.

the select body; and the cause was insufficient; the offence not being any of the three kinds for which a corporator could be disfranchised. And the distinction<sup>\*1</sup> there taken, as to the mode of trial, is certainly not law. For though the corporation has a power of amotion by charter or prescription, yet, as to the first kind of misbehaviours, which have no immediate relation to the duty of an office, but only make the party infamous and unfit to execute any public franchise: these ought to be established by a previous conviction by a jury, according to the law of the land; (as in cases of general perjury, forgery, or libelling, &c.).

We therefore think the Court was well warranted in *Lord Bruce's case*, to controvert the authority of the proposition, collected from what is said in *Bagg's case*, "that there can be no power of amotion, unless given by charter or prescription;" and we think that from the reason of the thing, from the nature of corporations, and for the sake of order and government, this power is incident, as much as the power of making bye-laws.

The second objection upon this point was, that the cause is not sufficient.

[540] The plea sets forth two stated days in the year, viz. the 8th day of September and Michaelmas Day for holding great Courts at the Moot-Hall; and "that the bailiffs may call a great Court at any other time." Great Courts were called on the 13th of January, the 15th of April, the 9th of June, and the 19th of June 1755. Before the holding of the said several Courts respectively, due notice had been given of the holding thereof respectively. The plea states likewise another great Court on the 8th of September 1755; due notice of the holding thereof having there been previously given. And the portmen removed did not attend these Courts; but wilfully absented themselves.

It is not stated "that the removed portmen had personal notice." And the fact certainly is "that they had not:" for where personal notice was given to answer the charge, the plea alledges it precisely, and in a different manner. Besides, if truth would have warranted them, they might have<sup>\*2</sup> amended.

The notice then of holding these great Courts must have been by some customary signal, (as sounding a horn, or tolling a bell;) which the removed portmen, in fact, might know nothing of.

It is not alledged that the portmen's presence was necessary to the holding the great Court: on the contrary, the prescription is alledged to be, "that the bailiffs, burgesses and commonalty, or so many of them as would be present, have met, or assembled in the Moot-Hall."

It is not alledged particularly, that any particular business was obstructed or defeated by the portmen's absence. The plea alledges, "that they wilfully absented:" but that is a consequence of law. In pleading, they must alledge facts, from which the Court may judge "whether the absence was wilful:" upon which facts, issues may be taken, and tried by a jury.

It is clear from the plea, that the portmen had full notice of the charge against them, and full opportunity to have been heard: and therefore I lay all the objections upon that head, out of the case. But if the charge was insufficient, they had no occasion to defend themselves.

This brings the whole to the question, "whether an absence from four occasional great Courts, and one upon a stated day, so circumstanced, is a sufficient cause of amotion."

[541] There is no authority which says it is. Though the usual signal is given for holding a great Court, a member may not know of it; though he should know of it, he may be innocently absent, where he thinks his presence not at all necessary, and where he does not imagine that any business of consequence is to be proposed.

In the case of *Rez v. Mayor and Aldermen of Carlisle*,<sup>\*3</sup> the Court argued in this manner, that where an alderman receives a summons to appear at the common council, he might consider that his presence was of no consequence, and so stay away; and because he might innocently stay away from the common council, it was holden, that he should have had a particular summons to meet the mayor and alder-

<sup>\*1</sup> 11 Co. 99 a.

<sup>\*2</sup> The defendant's counsel had once proposed to move to amend: but gave it up on finding their facts sufficient to support it.

<sup>\*3</sup> Trin. 1720, 6 G. 1, B. R. V. 1 Strange, 385, 386.



men : and for want of such summons, an amotion by the mayor and aldermen at that common council, was holden to be void.

There is not an officer or freeman in the kingdom, (who is a member of an assembly,) that might not be removed or disfranchised, if this doctrine was given way to. At times, every alderman, every common council-man, not necessary to the constitution of the assembly, knowingly omits attending.

It is not necessary, and would be highly improper at present, to say what kind of absence, or under what circumstances, non-attendance may be a cause of forfeiture. It is sufficient that the absence, with all the circumstances alledged by this plea, is not a cause.

And we are all of opinion that it is not.

The second general point is, "whether the defendant was duly elected, by the one remaining portman." But that is now become unnecessary. If it had been material, we are inclined to support the election.

However, it is not now necessary to enter into that point ; because we are, upon the former point very clear "that the cause of amotion alledged and relied upon in the plea, is not a sufficient cause of amotion."

Judgment for the King.

REX *versus* MARY MEAD. 1758. Party may be brought up in term time upon an habeas corpus issued in vacation. [See 2 East, 288. 1 Hen. Bl. 338. 3 Bro. 619. 2 Bos. 107. Prec. in Ch. 496. 5 Durn. 90, 358. Str. 478.]

A habeas corpus having issued in the last vacation, at the instance of John Wilkes, Esq. to bring up the [542] body of Mary Wilkes, wife of the said John Wilkes, and daughter of the said Mary Mead before Mr. Just. Denison ; Mrs. Mead now brought her into Court.

The substance of the return was, that her husband, (having used her very ill,) in consideration of a great sum which she gave him out of her separate estate, consented to her living alone, executed articles of separation, and covenanted (under a large penalty) "never to disturb her or any person with whom she should live." That she lived with her mother, at her own earnest desire ; and that this writ of habeas corpus was taken out with a view of seizing her by force, or some other bad purpose.

The Court held this agreement to be a formal renunciation by the husband, of his marital right to seize her, or force her back to live with him.(a)

And they said that any attempt of the husband to seize her by force and violence, would be a breach of the peace. They also deciaered that any attempt made by the husband, to molest her in her present return from Westminster-Hall, would be a contempt of the Court. And they told the lady, she was at full liberty to go where, and to whom she pleased.(b)

V. *Rex v. Clarkson et Al.* 1 Strange, 444, 445, where the Court only took care that the young lady should be under no illegal restraint ; and ordered a tip-staff to see her safe home, to her guardian's, as had been formerly done in *Lady Harriot Berkley's case*.

*Rex v. Captain Lister, husband of Lady Rawlinson*, 1 Strange, 478.

*Lady Vane's case*, M. & H. 17 G. 2, B. R.

*Rex v. Johnson*, 1 Strange, 579, H. 19 G. 2. 2 Ld. Raym. 1334. S. C. a child was delivered to its proper guardian, by the Court.

*Rex v. Smith*, 2 Strange, 982, where indeed the boy was only set at liberty ; and *Johnson's case* was said to be carried too far.

*Rex v. Griffith*, H. 8 W. 3, B. R. And

*Lady Catherine Annesley's case*.

(a) Vide 3 Atk. 550. And qu. 1 Bl. Rep. 18, and 3 Atk. 550, if there had not been great ill usage? See also 3 Atk. 296, 550. 1 Vez. 19. 1 Ch. Cas. 250, that equity will not decree separation after an offer by husband to cohabit, where the separation was only occasioned by differences without cruelty.

(b) S. P. where there had been ill usage, though no separation. 4 Burr. 1991.



[543] REX *versus* WRIGHT, Clerk.(a) 1758. Where an Act of Parliament prescribes a particular remedy for an offence, an indictment will not lie.

[Followed, *R. v. Buchanan*, 1846, 8 Q. B. 888; 2 Cox C. C. 38. Referred to, *R. v. Hull* [1891], 1 Q. B. 763; *Mullis v. Hubbard* [1903], 2 Ch. 435; *Lowe v. Dorling* [1906], 2 K. B. 784.]

Mr. de Grey shewed cause against quashing the indictment.

Mr. Serjeant Hewitt had moved to quash this indictment charging the defendant, that he, being a spiritual person, did take to farm several lands, &c. against the statute of the 21 H. 8, c. 13, § 1. For that no indictment will lie, where a statute creates a new offence, and gives a particular remedy. On Monday, 12th February 1758, (upon Mr. de Grey's then coming to shew cause) the serjeant proposed three objections: viz.

1st. An indictment will not lie: it ought to be a proceeding by action, or by information; (which are the two particular methods of proceeding, specified and prescribed by the statute.)

2d. No offence is here charged. For occupation is the offence for which the Act gives the forfeiture: and here, no occupation is charged: it is only "that he did take to farm."

3d. It cannot be prosecuted at the sessions: for the words of the Act are "in any of the King's Courts."

First—An indictment will not lie: because the statute creates the offence, and has prescribed a particular method of proceeding: and has no general words. It enacts, "that no spiritual person shall take to farm, &c. upon pain to forfeit 10l. for every month that he &c. the one half of which forfeiture to be to the King: the other half to every such person that will sue for the same by original writ, bill, or plaint of debt, or by any information in any of the King's Courts." 2 Hawkins, P. C. c. 25, § 4, p. 211, is in point "that where a statute makes a new offence, and appoints a particular manner of proceeding, an indictment will not lie." Cro. Jac. 643, 644. *Castle's case* (1st exception) is also most express in point. 4 Mod. 144, *Rex & Regina v. Marriott*, S. P. *Rex v. Gluff*, Cases temp. Will. 3tij. B. R. 104, S. P.\*1

Lord Mansfield—Let us hear an answer to this objection first: for it seems a strong one; this being no offence at common-law.

Mr. de Grey, contra, proceeded to shew cause on behalf of the prosecutor.

As to the 1st objection—

2 Hale's Hist. P. C. fo. 171, is express, that if the Act [544] does also contain a prohibitory clause, the offender may be indicted upon the prohibitory clause, notwithstanding the penalty.

*Castle's case*, Cro. Jac. 643, M. 20 J. 1, is incorrectly reported: as appears by 2 Ro. Rep. 247, S. C. which says "that the indictment was quashed for some of the exceptions." Therefore *Castle's case* is not an authority in the present one: as it is only a partial report, upon memory; and has mistakes in it (as 40l. instead of 20l. for one instance). 1 Mod. 24, *Crofton's case* on 17 C. 2, c. 2, "to restrain Non-Conformist ministers from inhabiting in corporations," is most full and clear in point to the contrary. 1 Ventr. 63, S. C, this very objection was disallowed. 3 Keb. 75, *Rex v. Baker*, Raym. 219, S. C.\*2

As to the 2d objection. The occupation is only to ascertain the quantum of the penalty; viz. 10l. for every month that he shall occupy: but the taking to farm, is the offence prohibited.

As to the 3d objection. The indictment may be brought at the sessions, and prosecuted there.

In answer to the cases cited in support of the 1st objection of *Rex et Regina v. Marriott*, according to 4 Mod. 144, Ld. Ch. J. Holt held against the other two Judges, Dolben and Eyre; and thought an indictment the proper and reasonable method.

(a) Nothing at all in this case but what was fully settled long before in 2 Hawk. P. C. 211, c. 25, s. 4, cited in this page, and in 2 H. H. P. 171, cited in page 544.

\*1 But this was only quashed nisi, (or a rule to shew cause,) on a motion heard ex parte, only.

\*2 The two last are loose notes; and adjourned.

Carthew, 263, S. C. *Rex v. Marriott*, refers to 4 Mod. 144, and observes that it was against the opinion of Ld. Ch. J. Holt. 1 Shower 398 is S. C. *Dominus Rex v. Marriott*; and the reporter, (who himself took the objection,) says "that the rule was pronounced by Ld. Ch. J. Holt, consentientibus aliis, thus—'Let it stay.'"<sup>†1</sup>

Lord Mansfield—I always took it, that where new created offences are only prohibited by the general prohibitory clause of an Act of Parliament, an indictment will lie: but where there is a prohibitory particular clause specifying only particular remedies, there such particular remedy must be pursued. For, otherwise, the defendant would be liable to a double prosecution: one upon the general prohibition, and the other upon the particular specific remedy.

Therefore, if there be any doubt or difficulty about [545] this matter, it will be better to enlarge the rule, till next term.

Mr. Just. Denison laid down the distinction thus; viz. that where an offence is not so at common law, but made an offence by Act of Parliament; yet an indictment will lie, where there is a substantive prohibitory clause in such Act of Parliament; (though there be afterwards a particular provision, and a particular remedy given :) but it is \* otherwise, where the Act is not prohibitory; but only inflicts the forfeiture, and specifies the remedy.<sup>†2</sup>

Mr. Just. Wilmot also took it so; and that this point had been settled, later than any of the cases cited. (In Hil. 2 G. 2, B. R. *Rex v. Pensacks*, and also in *Rex v. Malard*, the same term, it was settled "that an indictment will not lie, where an Act of Parliament makes a new offence, and prescribes a particular method of proceeding.")

He said he had always understood it to be a settled distinction between a substantive independent clause, and a prohibition sub modo.

And, it would be hard to punish a man twice for the same new offence.

Mr. Just. Denison—This Act does not seem to me to give the King alone, a power to prosecute at all, for this new offence. However I shall give no opinion now, as the rule is enlarged.

On this day, Serjeant Hewitt informed the Court that Mr. de Grey gave up this matter.

Lord Mansfield—I do not at all wonder at it: I thought he would do so. I have looked into it; and there is nothing in it. That case of *Crofton* has been denied many times. Besides, Mr. Clayton has informed me of a case that was determined upon the 3d objection, "of its being at sessions."

Rule "to quash the indictment," made absolute.

REX versus INHABITANTS OF BANK-NEWTON. Thursday, 13th April, 1758.

See this case at large, in the quarto-edition of my Settlement-Cases, No. 145, pa. 455.

[548] REX versus PEACH ET AL'. Saturday, 15th April 1758. Information refused to one cheat against another.

Cause was now shewn against an information which had been moved for, at the application of some persons who now appeared to be a parcel of infamous cheats and gamblers, against several others of the same profession and character; for a conspiracy to cheat them out of about 900l. at a foot race, by a most shameful transaction of fraud, collusion, and bribery to induce the racers to run booty.

But it appearing most clearly to the Court, and it being too plain to be disputed by the counsel for the prosecutors themselves, that the parties complaining and those complained of, were (all of them alike) a parcel of infamous cheats;—

The Court unanimously refused to give the complainants the extraordinary assistance of this Court to enable them to attack their brethren in iniquity, (who had probably, as the Court not without reason suspected, quarrelled with them about

<sup>†1</sup> But Eyre added, "it cannot be maintained, I doubt." Note also, that Shower's Report of what passed in this case, is of Tr. 4 W. & M. (as likewise indeed is 4 Mod. 144;) but Carthew's is of Hil. 4 W. & M. which is two terms later.

\* V. 2 H. H. P. C. 171.

<sup>†2</sup> V. post, 803, 804, 805.

the division of their ill-gotten spoils :) they referred the complainants to the ordinary remedy of action or indictment; especially as the facts alledged seemed to be within the Acts of Parliament made to prevent excessive gaming. And, accordingly,

The rule to shew cause "why there should not be an information against them," was discharged.

[549] CARLETON EX DIMISS. GRIFFIN *versus* GRIFFIN.(a)<sup>1</sup> Tuesday, 18th April 1758. A will drawn up by an illiterate man if duly attested will be good. [See 8 Vin. 126.]

[Applied, *Doe d. Williams v. Evans*, 1832, 1 Cr. & M. 44.]

This was a special case in ejectment, brought upon the demise of John Griffin, the testator's heir at law. A verdict had been given for the plaintiff, subject to the opinion of this Court, on the following case. John Griffin (the testator) being seised, &c. and being, &c. on the 2d of May 1752, wrote upon a sheet of paper, with his own hand, as follows; viz. "Know all men, by these present, that I John Griffin, &c. make the aftermentioned, my last will and testament: and when it please God to call me, I pray God direct my relict. I make my present wife, my whole and sole executrix of what it hath pleased God to bless me with. I order my son John Griffin, my son by my first wife, 600l. I have 600l. in the Three per cent. Annuities: which I order not to be sold; but I order my wife to leave the interest thereof to help to bring up my daughter Lavinier. I likewise have two freehold houses in, &c. (which are the premises in question;) which are to be for the same use, to help to bring up my daughter Lavinier and her heirs for ever. My daughter to take possession of the annuities at her age of twenty-five. And if it please God my daughter die before her mother, and unmarried and without a lawful heir, then the said two houses to go to my son John and his heirs for ever."

It concludes—"I pray God to bless and direct my wife and daughter and son. And I die in peace with all mankind: and I hope the Lord Jesus Christ will receive my soul. And this is my last will; and not any other. 2d day of May, 1752."

And he subscribed it, at the same time when he wrote it: but there was no seal, nor witness to it.

And it was further stated, that on the 5th of January 1754, he wrote on the same sheet of paper, the following words, viz. "Memorandum — Blackman-Street, 5th January 1754: Whereas I have laid out, &c. on a lighter called, &c. and the barge called the "Lemon," &c. All these, and also all, &c. at my death, all shall be at my present wife Mary's disposal. And this not to disannul any of the former part made by me, the 2d of May 1752: except that my wife shall not be liable to pay to my son John, &c. Witness my hand, J. Griffin, sen."

N.B. The will was written on the first and second sides of a sheet of paper: and the codicil (a)<sup>2</sup> was begun [550] either upon the end of the second or the beginning of the third, and written upon the third side. (Which circumstance Lord Mansfield thought material, though not decisive.)

And all this codicil (or whatever it may be called,) related only to the personal estate; and not at all to the real.

The testator subscribed this in the presence of three witnesses. And then he took the said sheet of paper in his hand, and declared it to be his last will and testament, in the presence of the said three witnesses; and then delivered it to them, and desired they would attest and subscribe it in his presence, and in the presence of each other: which they accordingly did.

Upon this special case, two questions are reserved for the opinion of this Court: viz.

1st. Whether the republication of the said first will, (made in 1752,) upon the

(a)<sup>1</sup> There is nothing worth reporting in this case; for the reasons mentioned by Lord Mansfield, post, 554, make it clear beyond a possibility of doubt, and are obvious on reading the state of the case.

(a)<sup>2</sup> Here the reporter is inaccurate in calling the instrument a codicil, so early at least in the report; if there be any weight in Ld. Mansfield's observations, in the beginning of page 554.



5th of January 1754, be a publication or republication of his first will, within the Statute of Frauds.

2d question. Whether any estate passed by the first will, either to the daughter, or to the mother.

Mr. Barnard argued on behalf of the plaintiff, John Griffin, heir at law to the testator.

This was no good will, to pass lands, beyond all doubt, till the 5th of January 1754. And what happened then was neither a publication nor a republication sufficient to make it a good will within the Statute of Frauds. Here are two distinct instruments, at two different times: the first, unattested, relating to the real estate; the second, signed, published, and attested according to the Statute of Frauds, relating to the personal. But the first was originally bad; and could not be made good, by the subsequent transaction. In support of which assertion, he mentioned the case upon Serjeant Maynard's will, cited in Comyns, 384, in the case of *Acherley v. Vernon et Al'*.

He likewise cited *Penphrase v. Ld. Lansdown et Al'*, H. 11 Ann. Rot'lo. 620, (on the Earl of Bath's will,) which is also cited in the case of *Acherley v. Vernon*, in Comyns, 384, where the first will was only executed, not attested; and on making a codicil to it, the testator took the codicil in one hand, and the will in the other, and said "This is my will, &c. and I publish this codicil as part thereof;" and signed the codicil in the presence of the witnesses, who [551] subscribed it in his presence: it was holden to be no republication of the will. And this case also proves that there can be no republication by implication, (as it was there expressly determined:) but the will ought to be re-executed; or otherwise a devise of lands shall not be good.

Second question. No estate passes by this will, either to the mother or to the daughter: but it descends to the plaintiff John Griffin, as heir at law to the testator.

The Statute of Uses does not operate; because there is no transmutation of estate: without which, no use can arise. Now here the estate never passed out of the heir at law.

He made three subdivisions, under this second question.

1st subdivision. No estate passes to the mother. The words of the will must square with the intent of the testator. And here the words do not extend to the real estate; because they are accompanied with the word "executor." Precedents in Chancery, 471, *Piggot v. Penrice*. "I make my niece Gore, executrix of all my goods, lands, and chattels." Her lands of inheritance did not pass: though she had no term, or interest for years, in any lands whatsoever.

2d subdivision (of the 2d question). Nor does any estate pass by this will to the daughter. The heir at law shall not be disinherited by a strained construction.

3d subdivision (of the 2d question). The Statute of Uses cannot operate for want of a transmutation of estate: for, here, it never passed out of the heir at law: and therefore no use could arise. For, no use can arise without a transmutation of possession. To prove which position, he cited 1 Inst. 271 b. 6 Rep. 17 b, 18 a. *Sir Edward Clev's*. 1 Rep. 176 a. b. 1 Leon. Moore 569. So that no use could here arise. And no estate or interest passed either to the mother or daughter under this will.

Therefore he prayed judgment for the plaintiff.

Mr. Burrell contra for the defendant.

1st question. Whether the publication of the second instrument in the manner as stated, is a publication or republication of the former, within the statute.

2d question. Whether any estate passes, either to the mother or daughter.

[552] First. The first will indeed has not the requisites appointed and required by the Statute of Frauds (29 C. 2, c. 3), as essential to a will of lands. But that statute has been always liberally construed, in favour of wills. 3 Peere Wms. fo. 252, 254, *Stonehouse et Ux' v. Sir John Evelyn*, (the last point,) is a proof of this: where it was holden "that the testatrix's owning her hand was sufficient; though the witness did not actually see her sign." This was a liberal construction as to the person signing. So has been the construction also as to the witnesses attesting. 2 Chancery Cases 109, *Anonymous*: a will attested by three witnesses, who were not present together, but subscribed at several times, was decreed to be good. 2 Salk. 688, *Stearns v. Galscock*. The attestation was adjudged good, because the testator might

have seen the witnesses subscribe, through a broken window. So, 3 Lev. 1, *Lemayne v. Stanley*: as to the testator's signing his name.

The will was dated the 2d of May 1752, and was subscribed by the testator; but was not then indeed, either witnessed or sealed. But it may be considered as intended to be afterwards executed.

Then in January 1754, he added a codicil, on the same sheet of paper; took the said sheet of paper in his hand; declared it to be his will; and desired the witnesses to attest it. This must be either a publication, or a republication. The very case reported in Comyns, 381, of *Acherley v. Vernon*, M. 10 G. 1, in Chancery, was a determination, "that what Mr. Vernon there did was a republication; and that the will and codicil made but one will:" and this determination was affirmed in the House of Lords.

2d question. Whether any estate passed to either the mother or the daughter by this will: (for if any estate passed to either, the plaintiff in ejectment cannot recover). 2 Siderf. 75, *Marret v. Sly*, is a proof of great allowances and indulgence to the testator's manner of expression. (See the third point of that case; where the words were very false English.)

In the present case, they took, (respectively,) a chattel-interest to the wife; and an estate in fee to the daughter: or at least they took such an estate as is sufficient to preclude the plaintiff; (whatever their estate may, in nicety of law, be).

As to the words of the will—the first clause relates only to the wife, as executrix. "I order John Griffin 600l. I have 600l. in, &c. I leave the interest, &c. to help to bring up my daughter, &c. I have two houses, &c. which are [553] to the same uses, viz. to help to bring up my daughter, &c."—He meant a chattel-interest to the mother, for the benefit of the daughter, till she came to twenty-five years of age; and to the daughter from her age of twenty-five.

The remainder is devised to the heir at law, after the death of the daughter, unmarried and without lawful heir, in the lifetime of her mother. Therefore he shall not have it before that event. Carter 26, 27. 3 Rep. 19. 6 Rep. 95. Cro. Jac. 75. Equity Cases Abridged, 179, title Devises, pl. 6. 2 Peere Wms. 194, *Newland v. Shepard*, (a strong case;) where a devise of the produce and interest, in trust for the grand-children, till twenty-one, was decreed to pass the absolute right and property of both real and personal estate, to the grand-children after that age: for, the heir at law was to have no concern in it. So here, John the son of the testator, was to have no concern in this estate, till the death of the daughter.

*Boreaston's case*, 3 Rep. 19, was holden to be a vested remainder. So here, it is a vested remainder in the daughter. Therefore the plaintiff can have no demand. Wherefore he prayed that the postea might be delivered to the defendant.

Mr. Barnard in reply—

1st. The testator taking up the paper in his hand, said "This is my last will and testament," or "it is my last will and testament." Which act and manner of expression can only mean the instrument that he had then signed in their presence.

The present codicil has no words of confirmation: nor does it at all relate to land; but only to personal estate.

2d point. Neither the mother or daughter took any estate. The words are, "I likewise have two freehold houses, which are to be, &c. to help to bring up my daughter Lavinier, and her heirs for ever, &c. And if my daughter dies unmarried and without lawful heir, in the life-time of her mother, then to go to my son John and his heirs for ever." As to the mother the words are, "I make my wife Mary Griffin sole executrix of all that it hath pleased God to bless me with." And there is no other disposition, to the mother.

An estate shall never be taken by implication, but from necessity. And here is no necessity.

Lord Mansfield. The case is accurately stated: for it [554] is not stated to be either a will, or a codicil; but a sheet of paper written, &c.

First. This is a will of an illiterate man, drawn by himself.

At first, in 1752, the testator did not know that any witnesses were necessary. In 1754, he had found that they were necessary. Then he makes a subsequent disposition: which is a memorandum to be added to it. But he does not call this a codicil; nor does the case state it to be so. He plainly considers the whole as one



entire disposition: and he expressly declares in the latter, "that he does not thereby mean to disannul any part of his former devise or dispositions."

There is not a tittle in the latter, that relates to the real estate. Therefore the only intent of having the three witnesses, was and must be to authenticate the former.

The signing the former, does no harm; it makes it more solemn; but does not hurt it.

Then the publication of it is as of a will—he takes up the sheet of paper, and holding up the said sheet of paper, says "It is my will." And certainly, he did not mean a part of it only; but the whole of it. And he desires them to attest it. All this must relate to the whole that was written on this paper.

The second point is as plain upon the bare reading, as any argument can make it.

There can be no doubt of the devise to the daughter; whatever may be the doubt of the interest bequeathed to the mother, till the daughter comes of age, for her maintenance. But it is sufficient to bar the plaintiff, that an interest is given to one of them.

Therefore it is clear for the defendant on both points.

Mr. Just. Denison concurred—A man may make his will at different times: and the witnesses may attest at different times. Here, an illiterate man makes and signs his will; in which there is a devise of lands. To be sure, if he had died before attestation, the devise of the land had not been valid. But afterwards, he adds more to it, on the same sheet of paper, and declares "that he does not thereby mean to disannul any part of his former [555] devise and disposition:" and signs it; and then takes the sheet of paper in his hand, and declares it to be his last will and testament, in the presence of three witnesses; and desires the witnesses to attest it: which they do in his presence, &c.

This must be considered as one entire will, made at different times; and attested agreeable to the Statute of Frauds.

As to the second point—It is not at all material, what sort of interest the wife and daughter, or either of them, take under this will: it is sufficient, that they take some sort of interest sufficient to preclude the plaintiff's demand. And this they certainly do.

Mr. Just. Wilmut concurred with Lord Mansfield and Mr. Just. Denison. He also considered this as an entire instrument, and as a continuation of the former Act.

The testator himself calls it a "memorandum," (not a codicil;) and declares "that he did not mean thereby to disannul any part of his former devise or dispositions." He only takes up the consideration of something further, that had occurred to him since his writing the former: and it is not material, whether he does this, at two days, or at two years distance from writing the former part. A man is not obliged to make his whole will, all at the same time.

And the testator's having originally signed the former part, is out of the case, and makes no difference: for, it was not at all necessary or material to it, as a will of personal estate; and the signing alone, unattended with the other requisites, was not sufficient to render it effectual as a will of land. Therefore it was totally immaterial. And in January 1754, having written the memorandum with his own hand, on the same sheet of paper, he takes the said sheet of paper in his hand, and declares "it is his last will and testament:" and desires them to attest it as such, in his presence, and in the presence of each other:—which they do. So that there can be no sort of doubt that this was a good publication of this as his will, within the Statute of Frauds.

As to the second point—it is not all material, what species of interest the testator's wife and daughter or either of them may have in these houses; provided that they or either of them have such an interest as is sufficient to entitle them to the possession of the estate: for if they have such an interest in them or in either of them, the plaintiff cannot recover in ejectment against them.

[556] Now I should think that there is a chattel-interest in the mother. But be that as it may, here is a devise "to the daughter and her heirs," expressly; (however inaccurately this illiterate testator has worded what accompanies it:) and therefore she seems to have a fee (though liable to be controlled by certain events that may happen). But thus much, at least, is clear; viz. that his son John Griffin (the plaintiff's lessor) was not to take, till the testator's daughter should be dead without issue.



So that it is extremely clear and plain, that either the mother or the daughter have such an interest as intitles them to the possession of the estate.

Per \* Cur. unanimously,

Let the postea be delivered to the defendant.

REX *versus* YOUNG AND PITTS, ESQUIRES. Thursday, 20 April 1758. Information for refusing an ale licence refused. [See 2 Burr. 653. 3 Burr. 1317, 1318. 1 Durn. 692.]

[Referred to, *Sharp v. Wakefield*, 1888-91, 21 Q. B. D. 73; 22 Q. B. D. 239; [1891], A. C. 173.]

A motion was made on the 10th of May 1757, for an information against these two justices of the peace, for arbitrarily, obstinately, and unreasonably refusing to grant a licence to one Henry Day, to keep an inn at Eversley; where it was alledged and sworn to be fit and proper, and even necessary that there should be an additional one, (there being one there already;) and for which occupation of keeping an inn, this man was (as these two justices themselves had allowed on a former occasion) a proper person, they having before licensed him to do so at another place.

Upon this original motion—

Lord Mansfield and Mr. Just. Denison were of opinion, that notwithstanding this was a matter left in a great measure to the discretion of the justices, yet if it appeared to the Court, from sufficient circumstances laid before them, that their conduct was influenced by partial, oppressive, corrupt, or arbitrary views, instead of exercising a fair and candid discretion, the Court might call upon them to shew the reasons whereby they guided their discretion; and therefore they were for granting the rule to shew cause, as prayed. But,

Mr. Just. Foster (who happened to know the place, and said there was another house of good entertainment there already,) thought it sufficient to make a rule upon the two justices “to shew cause why they should not grant this licence.” And

[557] Lord Mansfield and Mr. Just. Denison concurred with him, to express the rule in that manner, though the substance was the same: because, if they did not shew sufficient cause, the consequence must be granting an information.

The Court therefore unanimously—(Mr. Just. Wilmot being absent in Chancery) made a rule upon these two justices to shew cause, “why they did not grant this licence to this Henry Day.”

On Monday, 27th of June 1757, upon shewing cause—the justices, by their affidavits, made no personal objections to Day; but considered the certificate as insufficient because not signed by the parson, vicar or curate.

The Court was of opinion “that the certificate, being signed by three or four reputable and substantial house-keepers, &c. was sufficient.” But though the justices had mistaken the act, the Court cleared them from any wrong motive.

But it being suggested “that the present parson and church-wardens were ready to sign a certificate in his favour.” The Court enlarged the rule to the first day of next term; with a view that he might be licensed at Michaelmas, if there should be no other objection than what arose from the certificate’s not being signed by the parson and churchwardens; and the matter (which seemed to have raised great heats, and was strongly supported by Sir John Astley, on the part of Day,) be accommodated.

The rule was accordingly enlarged in these terms, viz. “that the first day of the next term be farther given them, to shew cause why they have not granted, &c.”

N.B. By 26 G. 2, c. 31, § 1, it is enacted, that upon granting licences by justices of peace, to any person, to keep an ale-house, inn, &c. every such person shall enter into a recognizance in 10l. with two sufficient sureties, each in 5l. or one sufficient surety in 10l. under the usual condition, “for maintaining of good order and rule within the same.”

By § 2, it is enacted, that no licence to keep the same shall be granted to any person not licenced the year preceding; unless such person produce, at the general meeting of the justices in September, a certificate under the hands of the parson, vicar or curate, and the major part of the churchwardens and overseers, or else of

\* Mr. Just. Foster was absent.

three or four reputable and substantial house-keepers and inhabitants of the parish or place where such ale-house is to be ; setting forth "that such person is of [558] good fame, and of sober life and conversation." And it shall be mentioned in such licence, "that such certificate was produced : " otherwise such licence shall be null and void.

By § 3, no licence shall intitle any person to keep an ale-house in any other place, than that in which it was first kept, by virtue of such licence : and such licence, with regard to all other places, shall be null and void.

On Friday 18th of November 1757, Mr. Norton again moved (and moved it as a new original motion) for an information against these two justices of peace ; who, he said, had at their last general September meeting for granting licences, still persisted in refusing to grant this licence, notwithstanding what had already passed in this Court upon the same subject and occasion. Of this fact he had affidavits : and he also produced fresh and circumstantial affidavits, as to the merits ; viz. the necessity of such a licence, and the conduct of the justices in their opposition to it.

Lord Mansfield—What passed before, was, "that the Court did not think any thing criminally imputable to these justices." The Court then gave no opinion as to obliging them to grant the licence, but, on the contrary, expressly adjourned the consideration of the reasons of their refusal.

This former rule was only kept on foot, in order to obtain the material end of it : but as to the behaviour of the justices, with regard to the criminal complaint against them, the Court discharged them from any imputation of crime or arbitrary intention to oppress the man.

The Court therefore now made the like rule, upon these fresh affidavits, as they had made upon the former ; and ordered that both rules should come on together.

Sir Richard Lloyd (on Saturday 11th of February 1758,) accordingly shewed cause upon both rules.

He observed that it was a sort of rule never before granted ; and which he had known refused twenty-five years ago. He said he never knew a rule made upon justices, to shew cause "why they did not grant a licence," or to enforce them to do so ; unless there was some charge of corruption, partiality, bias, or other imputation upon the justices.

Lord Mansfield answered that the affidavits upon which the original motion was made did import such a [559] charge ;—and the motion was originally made upon that foot : and that the rule was put into its present form, out of tenderness to these gentlemen, and regard to the fairness of their character.

And they did indeed, upon the former cause shewn, appear to be free from blame, as to any criminal imputation.

But yet if they have no reasonable objection to the man, they ought to licence him : and if they have any reason, they ought to give it.<sup>(a)</sup> For though they have, it is true, a discretion in these cases, yet, it must not be permitted to them to exercise an arbitrary and uncontrolled power over the rights of other people, and in cases where their livelihoods are so essentially concerned.

Sir Richard Lloyd argued and insisted that the Legislature has made them the sole Judges, as being such who, from their residence on the spot, must best know the persons and their characters, and also the circumstances of time and place : and the Legislature has even excluded justices of peace, of other divisions. And the justices thus intrusted have a right to judge for themselves : no man can judge for another. And this power is trusted to them, by the Constitution, by the Legislature.

It may be very dangerous to them, to be obliged to give their reasons publicly : though they may have very sufficient ones to satisfy their own minds, and to direct their own judgment.

And if they are thus intrusted, why are they liable to be called to an account by any other jurisdiction : unless they act faultily and wilfully wrong ? Indeed, if they do wilfully wrong, let them be punished : but where they act quite conscientiously, they are not accountable to any body.

Now these gentlemen say, and they swear too, "that they really judge this house

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(a) It seems that though the man was unexceptionable, yet, if there was a sufficient number without the new one, that was a sufficient reason for refusing the licence, for the reason given post, 563, per Foster, J. clearly ; and as it seems per Lord Mansfield, post, 562 and 564.

to be an improper house ; and this person to be an improper person ; and that this is their real and sincere opinion."

This question affects all the justices in England : (I mean, setting aside the imputation of wilful misbehaviour).

Lord Mansfield—Most certainly. No body doubts of the thing: setting aside every degree of imputation: it will not bear an argument.

Sir Richard repeated the justices reasons for their refusal; and concluded with insisting on their right to judge for themselves.

[560] Mr. Young being in Court, spoke (very handsomely) in exculpation of himself from any ill intention; and declared very solemnly, "that he had acted according to his real sentiments, and the best of his judgment."

Lord Mansfield—It is a matter of too much consequence, and too much length too (as I am obliged to go away), to be determined now immediately; and it may as well stand over till next term, as so little time of this term is left.

Adjourned.

On Thursday 13th of April 1758. This case being mentioned again—Lord Mansfield proposed altering the rule, by making it "to shew cause why there should not be an information against them:" for so, he said, it was originally moved, and this was the true and proper foot to argue it upon; (and Mr. Norton declared that he proposed to argue it upon that foot:)—though in tenderness to the justices, and lest the country should run away with a notion of their being under a criminal charge, it had been put into the form that it at present stands in. (V. ante, p. 557.) And Mr. Nares, counsel for the two justices, not opposing or objecting to this alteration—the rule was altered accordingly.

And now this affair coming on again, (for the last time;)

Lord Mansfield again declared that the argument ought to be taken up upon the foot of criminality in the justices: for, it was so originally moved; it was the proper nature of the question; it was so understood by every body, and so meant by the Court. For, (as he again explicitly declared,) there was no pretence, upon any other foot, to make a rule upon the justices, who have a discretionary jurisdiction given them by the law. But though \* discretion does mean, (and can mean nothing else but) exercising the best of their judgment upon the occasion that calls for it; yet if this discretion be wilfully abused, it is criminal, and ought to be under the control of this Court.

Mr. Nares and Mr. Thurlow, for the defendants, thereupon argued strongly and very largely, that the justices had been so far from acting criminally, that they had acted rightly, properly, and honestly: and they hinted that the Court had already exculpated them from any criminality of behaviour.

The Legislature have left this jurisdiction so absolutely to the justices of the particular division, that no appeal will lie from their determination; as appears by 1 Salk. 45: which is expressly so, and is cited in 2 Strange 881, as a proof of this position.

[561] Neither will any mandamus lie to the justices, to oblige them to grant the licence; even though they should appear to have refused it upon reasons which may be looked upon as very suspicious at least, if not very improper. 2 Strange 881. (*Rex v. Justices of Worcester*) *Giles's case*.

Nor will the Court grant an information, for refusing to grant a licence. *Rex v. Justices of Nottingham*: where, they said, an information was denied.

But per Cur. That case was an abuse, a gross abuse, of their discretion: and the information was therefore granted. And so it was in the case of *Bridgewater*, upon the same foot, of abuse of the discretion intrusted to them.

The counsel for the two justices next observed that Day's having for many years had a licence to keep a public house in another parish, was quite an immaterial circumstance: for, by 26 G. 2, c. 31, § 3, such licence was absolutely null and void, with regard to all other places. (V. ante, 558.)

The affidavits on both sides being then all distinctly read, it appeared (upon the whole matter) that these two justices had acted in this matter, with fairness, impartiality, candor, and justice; that they really and sincerely thought both the man and

\* V. post, 578, a fourth definition of discretion.



the house improper to be licenced : and that they had very good and sufficient reasons for so thinking and determining.

Whereupon, their counsel concluded with praying that the rules made upon them might be discharged with full costs.

Contra, for the prosecutors, Mr. Norton, &c. urged their reasons for making the rules absolute.

The main tendency of the arguments of the counsel in support of these rules, was, to shew that the refusal to grant this licence to Day, arose from partiality to Mr. Barker the lord of the manor, who was the proprietor (the landlord) of the other public house already established in the parish.

Lord Mansfield once more declared "that this Court had no power or claim, to review the reasons of justices of peace, upon which they form their judgments in granting licences ; by way of appeal from their judgments or over-ruling the discretion intrusted to them."

But if it clearly appears that the justices have been [562] partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information ; or even, possibly, by action, if the malice be very gross and injurious.

If their judgment is wrong, yet their heart and intention pure, God forbid that they should be punished ! and he declared that he should always lean towards favouring them ; unless partiality, corruption, or malice shall clearly appear.

The present question therefore only is, "whether these gentlemen have been guilty of any partiality or malice, (for corruption is not pretended,) in the refusal of this licence."

Then he went minutely and accurately through all the particulars both of the charge and of the defence. And he thought that upon the first original motion, the justices appeared to have been mistaken in the grounds of their refusal ; in that they fixed it upon the want of the ministers and churchwardens signing ; which they judged to be requisite by the 26 G. 2, c. 31 (when it was not). However, in this, they were not criminal ; though they were mistaken. And at that time, they had no personal objection to Day. And therefore it was (from all that then appeared) reasonable to expect that, upon enlarging the rule, they would at their next meeting grant the licence ; which they had before refused, upon a mistake, of which they were subsequently informed.

But since this, and antecedent to such next meeting, there are come out several strong personal objections to Day himself ; (which these justices were the proper judges of ;) namely, his keeping and having long kept a house for publicly retailing ale, wine and spirituous liquors, without being licensed thereto ; his having been twice convicted of selling spirituous liquors without a licence ; his suffering a day-labourer to drink a whole day in his house, in harvest-time, and afterwards vindicating it ; his having been charged with a fraud, upon oath ; besides an allegation in one of the affidavits, "that two notorious highway-men and robbers appeared at least to have used his house as a public house, if they enjoyed no other and more particular kind of harbour and protection in it."

And in respect to the house, the justices now swear that they are clearly of opinion "that one house is sufficient." And they likewise clear themselves, by the most solemn assertions in their affidavits, of all criminal imputation.

[563] Therefore he concluded with declaring it as his opinion that there was no sufficient foundation for a criminal charge against these justices.

Mr. Just. Denison concurred.

He also expressly allowed the discretionary power of the justices in granting licences ; without appeal from their judgments, or having their just and honest reasons reviewed by any body. But yet an improper and unjust exercise of the discretion, he said, ought to be under control.

But it must be a clear and apparent partiality, or wilful misbehaviour, to induce the Court to grant an information : not a mere error in judgment. And here is certainly no clear and apparent partiality, or wilful misbehaviour, in these justices.

Therefore the rules ought to be discharged.

Mr. Just. Foster concurred in the general principles before laid down : and he thought that there was no evidence of partiality, malice or corruption, in the present case.

He declared against increasing the number of public houses; and gave several strong reasons against it: and therefore he thought the justices far from being to blame, in having come to a resolution "not to increase them." And he was satisfied that the justices had reason sufficient to refuse this particular licence; both with regard to the house, and also with regard to the man refused.

Mr. Just. Wilmot concurred.

He was very explicit, that the sole discretion of granting licences, is in the justices of the division: and he moreover gave very good reasons why it should be so.

And this point (he observed,) is admitted at the Bar.

Then, the sole discretion being in them, the rule is invariable, "that this Court will never interpose to punish a justice of peace for a mere error in judgment."

Therefore, even supposing them to have been mistaken from beginning to end, yet there is no ground, [564] from any of the affidavits, to infer any partiality, malice, or corruption: there is not the least fact, whereupon sufficiently to found any such apprehension and belief, even in the complainants; and the justices themselves do most solemnly deny it in their affidavits.

Per Cur. Both rules discharged, with costs.

Lord Mansfield—There are two distinct reasons why we should give costs: one, with regard to the person complaining; the other, with regard to the persons complained of. For, it appears, upon the affidavits, that Day (the person complaining) has persevered in keeping this house without a licence: and it now appears that the justices who are complained of, have acted both honestly and legally in refusing to grant it, in a place where there was already a sufficiency.

V. post, pa. 653, *Rex v. Athay*, Esq. M. 1758. 32 G. 2, B. R. a like point: and *Rex v. Williams*, *Rex v. Davis*, and *Rex v. Baylis et Al'*; all three in P. 1762, 2 G. 3, post, pa. 1317, & 1318.

REX *versus* INHABITANTS OF MACCLESFIELD. Saturday, 22d April, 1758.

See this case at large, in the quarto-edition of my *Settlement-Cases*, No. 146, pa. 458.

[567] REX *versus* EPISCOPUM DUNELMENSEM. Monday, 24th April, 1758.

Mandamus to a visitor to exercise his power during a vacancy denied.

Mr. Willes, on behalf of Dr. Sterne, prebendary of the second stall in the cathedral church of Durham, moved for a mandamus to the bishop, commanding him to exercise his visitatorial power over the temporalities of that church, in the instance herein after mentioned: (in which Dr. Sterne had applied to the bishop to exercise it; who refused to do so, unless under the authority of this Court).

And he alledged that such visitatorial power is given to the bishop, by the 40th of their statutes.

And there is no other method of trying this question, but before the bishop as visitor.

Mr. Norton, for the bishop, said that the bishop was not satisfied that he had such a power; and therefore he proposed that the dean and chapter should be called in, to litigate it. \*

N.B. The merits of the question were "whether the successor-prebendary (Dr. Sterne) had a right to two years and a half profits accruing during the vacancy of the stall, from the death of Dr. Benson, Bishop of Gloucester, (the last preceding prebendary :) which intermediate profits the other prebendaries had received, and divided amongst them."

Lord Mansfield thought that an action at law was the proper method; and instanced the case of *Dr. Young v. Dr. Lynch*, P. 26 G. 2, 1753, B. R.; and mentioned likewise *Canon Seagar's case* (who was a canon of the church of Salisbury) in Chancery.

"Whether the bishop can have a jurisdiction to determine this point; or whether matters of property in cathedrals can be determined otherwise than according to the course of the law of the land, is a great question." And certainly, the dean and chapter must have an opportunity to shew cause against a mandamus being issued to the bishop, to exercise such a jurisdiction.

[568] In this particular case, the question must be litigated, not only with

members of the body ; but with executors and administrators of deceased prebendaries : over whom, the bishop (supposing him visitor, and as visitor to have conuzance of such a case), can have no power. Which alone is decisive against his jurisdiction in this question.

Mr. Willes, perceiving the Court so strongly against him, agreed to take nothing by his motion.

REX *versus* PETERS, ET AL'. or CAVIL *versus* BURNAFORD ET AL'. 1758. Inferior Court may set aside an interlocutory judgment to try the merits ; but cannot set aside a verdict, except for irregularity. [See 7 Mod. 84. Salk. 201, 650. 7 Vin. 24, pl. 10. Sayer, 202.]

Mr. Hussey shewed cause against the issuing of a mandamus.

A motion had been made by Mr. Whitaker (on 13th February 1758) for a mandamus to be directed to the defendant John Peters, the county-clerk, (who was the steward of the Court,) and also to the free suitors of the County-Court of the county of Cornwall, commanding them to proceed to final judgment in a certain cause by plaint in replevin, commenced in the said County-Court, between John Cavil plaintiff, and John Burnaford, Anthony Pomery, and Nicholas Pelyne, defendants ; in which cause the said John Cavil obtained an interlocutory judgment in the said County-Court.

The case in short, was—that Burnaford distrained Cavil, for rent ; Cavil brought a replevin, in the County-Court of Cornwall ; an interlocutory judgment was regularly entered ; and a writ of inquiry of damages executed thereupon ; and 2d. assessed for damages, and 5s. for costs, and so much more costs as the Court should allow. This inquisition was set aside for irregularity, (viz. want of notice of executing the writ of inquiry).

The defendant's advocate there then moved “to set aside the said (regular) interlocutory judgment itself ; upon the defendant's paying the costs of entering it, (to be taxed by the steward,) and on avowing issuably :” and afterwards, on a subsequent motion “to make such rule absolute,” it being urged by the other side, “that that Court had no power to set aside a regular judgment,” the Judge took time to advise. At a future Court, after inquiry from ancient practisers in the said Court, and being informed that it had been the constant [569] custom and usage of it “to set aside interlocutory judgments, any time before executing writs of inquiry therein, on the defendant's paying the costs of entering the same judgments, and pleading issuably to such actions instantier ;” and after having fully considered the affair in all its circumstances ; and apprehending it to be agreeable to the practice of this Court ; he declared his opinion “that it ought to be set aside, and the defendant's avowry received, they having paid the costs, at the time of filing it *de bene esse*,” (which had been done in the interim :) and accordingly, he made a rule, thus—“*Caril v. Burnaford et Al'*. It is ordered, &c. that the interlocutory judgment entered in this cause be set aside, on payment of costs taxed ; and that the avowry filed in this cause *de bene esse*, last Court-day, be now, on consideration of the Court, made absolute : and therefore rule for the plaintiff in replevin to plead in bar to the avowry.”

And the Judge of this Inferior Court swears “that he acted with the utmost impartiality in the affair, and according to the best of his judgment and understanding ; and, he apprehends and believes, according to the constant usage and practice established and observed in the said Court.”

Mr. Whitaker's motion was grounded upon the Inferior Judge's having exceeded his authority. And he had cited 2 Strange, 823, *Fox v. Glass*, H. 1728, 2 G. 2, as the first time that even this Court had set aside regular judgments ; and 1 Strange, 392, *Bayly v. Boorne*, M. 7 G. 2, where they doubted of an Inferior Judge's having such a power.

On Friday last, (21st April, 1758,) Mr. Hussey shewed cause why this mandamus should not issue. And he made the two following questions—

1st. Whether the Judge or steward of an Inferior Court has a right to set aside interlocutory judgments regularly obtained :

2d. Whether in this particular case, the steward of this Inferior Court had a right to do as he had done, and as is the practice of that Inferior Court.

As to the 1st question—he agreed they cannot grant new trials, 1 Salk. 201,



*Regina v. Hill et Al*, and 2 Salk. 650, the case of *Bristol* (which is S. C.) *Brooke v. Ewers et Al*, 1 Strange 113, S. P. a mandamus issued to a Judge of an Inferior Court, "to give judgment;" though he had granted a new trial. Therefore he would not contend that an Inferior Court has a right to set aside a regular judgment, unless it be to let in the merits.

[570] But they may do it in order to try the merits, 2 Salk. 650. In the case of *The Mayor and Aldermen of Bristol*, it was holden, "that an Inferior Court could not grant a new trial." However, it was long since done by this Court: and they would also formerly set aside regular judgments, on putting the plaintiff in as good condition as before. And it does not appear how the Court came to leave it off; as Sir John Strange says (in the case of *Fox v. Glass*) that they had done.

And it seems right in itself, and agreeable to natural justice, to permit Inferior Courts to set aside regular interlocutory judgments, in order to let in a trial of the merits. Indeed it is reasonable, not to permit them to set aside the verdicts of juries; which is an exceedingly different case from a judgment by default.

As to the 2d question—in the present case, the steward acted rightly and reasonably, upon the circumstances attending it.

Mr. Whitaker contra, for the mandamus.

"The letting in the trial of the merits, makes no difference. I say that an Inferior Court can not set aside a regular judgment after they have once exercised their authority. In 1 Strange, 392, *Baily v. Boorne*, M. 7 G. 2, B. R. the Court thought it a question that deserved consideration, "whether the Judge of an Inferior Court could do it." And there is no more reason why they should have this power, than that of setting aside verdicts. They have no such discretion. "Discretion" is another word for "arbitrary will."

Lord Mansfield denied this interpretation of the term discretion; and referred to what was said (a few days ago in the case of *Rex v. Young and Pitts*, V. ante pa. 560, 561, and 562). And he said that discretion is, as Lord Coke says, *discernere per legem, quid sit justum*.

To which observation, Mr. Just. Wilmot desired to add another, from 5 Co. 100 a. *Rooke's case*: "discretion is a science and understanding of distinguishing and discerning between falsehood and truth, &c. &c. and not to do according to arbitrary will and private affection."

Mr. Whitaker.—But these Inferior Judges have no sort of discretionary power of any kind.

Lord Mansfield.—That case of *Baily v. Boorne*, in 1 Strange 392, only says "that it was a question that deserved consideration." But there is no precedent or autho-[571]-rity to the contrary of their having such a power.

And it seems a power necessary to the exercise of judicature; and is very different from the case of setting aside verdicts.—This power to set aside interlocutory judgments, seems incident to justice.

However, both Lord Mansfield and the other \* two Judges, thought it might not be amiss to look into it. And—

Mr. Just. Denison intimated as if there was something of this sort before the Court, in † P. 28 G. 2, B. R.

Cur' advisare vult.

And now Lord Mansfield delivered the opinion of the Court; having first desired Mr. Hussey to state the case, for the sake of the students: and he took this opportunity of observing and declaring "that nothing misleads so much as reporting the determination of Courts of Justice, without having a sufficient and correct state of the case:" which, he said, was only an *ignis fatuus*, leading people into error and mistake.

Here, the question, upon the true state of the case, (which v. ante, pa. 568) appears to be "whether an Inferior Court has power to set aside a regular interlocutory judgment in order to let in the trial of the merits."

And we are all of us of opinion, "that they have such a power." There is no

\* Mr. Just. Foster was absent.

† It was in Hil. 1754, 27, and P. 1755, 28 G. 2, *Eastwell v. Livermore*: v. post, 572.

authority nor even dictum, to the contrary: nor is there any reason why they should not have such a power: which is incident to the doing of justice.

Indeed there are authorities which say, "that an Inferior Court can not grant a new trial, or set aside the verdict of a jury, but for irregularity."

But there may be many reasons why they may be permitted to set aside an interlocutory judgment, in order to let in the merits; which reasons will not hold so far as to make it allowable for them to set aside the verdict "of a jury; (one of which reasons may be that no attain lies upon a verdict given in an Inferior Court)." And indeed the setting aside a verdict of a jury, is too great a power to be intrusted to an inferior jurisdiction. Yet, we are, all of us, clearly of opinion "that they may set aside regular interlocutory judgments, in order to let [572] in the merits;" both upon the reason of the thing, and for the convenience attending it.

That case in 1 Strange 392, of *Bailey v. Boorne* (v. ante, p. 570) proves nothing at all against this. And in 1 Strange 499, *Jewell v. Hill*, H. 8 G. 1, an Inferior Judge set aside even a verdict, for irregularity, (or rather for surprize:) which this Court allowed he might do.

Mr. Just. Denison added, that in the case of *Eastwell v. Livermore*, (v. ante, p. 571, in note) it seemed to be understood and agreed at the Bar, "that an Inferior Court could not set aside a verdict,\* at all:" but he finds that he has written a note at the bottom of that case, importing that he himself thought that it ought not to be taken for granted, so generally as this is laid down, "that they cannot do it \* at all;" for that he thought that an Inferior Court may set aside even a verdict, for irregularity; though they are not to be trusted with a power of setting aside verdicts, upon the merits.

And this, he said, was certainly the right distinction: viz. that they may set aside even verdicts, for irregularity; but not upon the merits.

Wherefore per Cur. unanimously,

Let the rule made "that John Peters the county-clerk and the free suitors of the County-Court, shew cause why a mandamus should not issue, directed to them commanding them to proceed to final judgment in a certain cause by plaint in replevin commenced in the said County-Court, between John Cavil, plaintiff, and John Burnaford, Anthony Pomery, and Nicholas Pelyne, defendants, in which said cause the said John Cavil obtained an interlocutory judgment in the said County-Court on the 12th day of October last;"—be discharged.

Rule discharged.

[573] REX *versus* COLLINGWOOD FOSTER, EDWARD GALLON, GEORGE SELBY, AND THOMAS MILLS. 1758. Several informations in quo warranto, consolidated into one.

Four rules having been made absolute, (last Tuesday,) for four informations in nature of quo warranto, against these four defendants, respectively, "to shew by what authority they claimed to be chamberlains of Alnwick in the county of Northumberland"—

Sir Richard Lloyd, on behalf of the defendants, moved (on Saturday last,) that there should be only one information against all the four defendants, instead of four distinct and separate informations.(a)

Which the Court thought very reasonable, upon the 4th section of 9 Ann. c. 20, which runs thus—"and if it shall appear to the said respective Courts, that the several rights of divers persons, to the said offices or franchises, may properly be determined on one information, it shall and may be lawful for the said respective Courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises."

\* It is true that there was no distinction expressed, in the discussion of that case. But no irregularity was there pretended, or any other reason attempted to be given for setting aside that verdict, but because it was a hard one, and such as ought to be set aside.

(a) There is nothing in this case: it being as clear on the words of 9 Ann. c. 20, cited below as possible, as no reason appeared or was so much as offered against joining the informations. See Cowp. 494, 495, 496, 500.

Mr. Norton contra, for the prosecution, urged that though the Court might indeed give leave for this joining several persons rights in one information, yet they would not do so, if the prosecutor judged that it might be inconvenient to him.

Sir Richard replied that the Court would direct it, unless it was shewn to be attended with inconvenience.

It ended in Mr. Norton's taking time to consult his client.

Which having done, he (this day) said his client had no objection to it; provided no exception should be afterwards taken to such union of the several causes.

Cur. The defendants cannot object to it, when the Court judge it to be proper.

**[574]** CHALLONER *versus* WALKER. Tuesday, 25th April, 1758. The obligee in an indemnity-bond, on being damnified, has an immediate right to be reimbursed.

An action of debt on a bond, conditioned as follows; after first reciting that whereas G. Needham being seised in fee, &c. died intestate, &c. leaving a son James, &c. and Anne Needham his widow, then living; and whereas James, &c. were about to sell the estate; and also reciting the said Anne's being married to a second husband David Kinneir; and reciting a doubt having arisen concerning her right to dower; and whereas it was agreed that 30l. part of the purchase-money of the estate, should be left in the defendant's hands, in order to indemnify, &c. from the said claim, &c. And all costs, charges, &c. Then the condition is, that if the defendant and one Coulson, or their heirs, executors and administrators, should indemnify the plaintiff from all and all manner of claim of dower that might be made by the said Anne Needham, as widow of the said G. Needham, out of the said premises; and of and from all costs, charges, damages, demands, &c. that may arise or happen by or from such claim, &c. then, &c.

•Plea. That he has indemnified the plaintiff.

Replication—that David Kinneir married the widow; and exhibited a bill in Chancery for arrears of dower—he answered the bill; and expended 8l. 10s. for costs in the said suit.

To this replication, the defendant demurs specially, and shews several causes of demurrer; viz.

1st. The replication is not a direct answer to the plea.

2d. No issue can be taken upon this replication.

3d. No breach of condition is sufficiently alledged in this replication.

Mr. Altham for the defendant, made two points:

1st point. The condition only extends to a claim of dower to be made by Anne Needham in her life time.

2d. The plaintiff has brought his action too soon: he ought to have stayed till the suit in Chancery had been determined.

First point—conditions shall be construed favourably for obligors. 1 Saund. 66, *Butler v. Wigge*—It is so declared by the Court. Cro. Eliz. 396, *Greeningham v. Ewer*—There the same rule was laid down. 2 Saund. 411, *Ld. Arlington v. Merricke*.

And a condition shall not be extended further than the words of it. 1 Ro. Abr. 489. 1 Ro. Abr. 426, pl. 6. 1 Strange, 227, *Stibbs v. Clough*. 1 Lutw. 536, *Wilson v. Constable*.

Second point—his expences will be repaid him, if the bill should be dismissed with costs. It is not like the payment of a debt admitted to be due: this condition is only to indemnify against a claim.

Mr. Ashburst for the plaintiff.

1st point. 1st. This breach is within the words and letter of the condition.

2d. It is clearly within the meaning of it.

First—Ashburst and Walker purchased the estate. The widow had claimed dower. The indemnification is against any claim of dower that should be made by her. And the suit is brought upon that claim.

Secondly—But it is clearly within the intent of the condition. And Mr. Altham's cases will not hold now: because Courts of Equity will now relieve against the penalty. And Courts of Law therefore are less strict than formerly. M. 29 G. 2, B. R. *Drummond et Ux' Administratrix of Ash, Esq. v. Duke of Bolton*.

In the present case, there was a treaty for the sale of the estate: and a bond



(instead of incumbering the deed with a covenant) to indemnify against all claim of dower, and all expences, costs and damages arising from any such claim. Mr. Altham's cases of 1 Ro. Abr. 326, &c. are not applicable to the present case.

2d point—The plaintiff is certainly already damnified: and he is not obliged to wait for reimbursement, till a Chancery-suit shall be determined. Nor can he have interest for his money, if he was to wait till then. 1 Vent. 33, 36, & 78, *King v. Atkins*.

Mr. Altham in reply—1st point. The condition is “to save him harmless from the dower or thirds that are or shall be claimed by Anne Needham, and from all costs, charges, damages, &c. arising, &c. therefrom:” that is, from her claim.

[576] 2d point—in 1 Vent. 35, 36, 78. The shilling was an absolute damnification: for, there no costs were recoverable, upon the scire facias issued against King, to which he was obliged to appear.

Lord Mansfield—This is the plainest case that can come before a Court. He stated the pleadings: and he treated the objections, and the cases cited in support of them (and thus applied to them) as quite frivolous and nugatory; and, without the least doubt or difficulty, over-ruled them. For the case is most clearly within the words and meaning of the condition; and the obligee has been already damnified, and therefore has a right to be immediately reimbursed.

Mr. Just. Denison concurred in both. And he added that here was 30l. left in the purchaser's hands, to indemnify the plaintiff: and the indemnification is against the claim, and all consequences of it. The obligee has nothing to do with the claimant's right: it is enough, that he is damnified by the claim. And he is not to stay till the determination of the suit: he has an immediate right to be reimbursed.

Mr. Just. Foster and Mr. Just. Wilmot were clearly of the same opinion: and both of them explicitly declared themselves to the above effect.

Judgment for the plaintiff.

REX *versus* INHABITANTS OF THE TITHING OF MILLAND. 1758. Assessing one parish to the poor rates in aid of another affirmed.

On shewing cause against quashing two orders, viz. an original order of two justices, made for taxing, rating and assessing the inhabitants of the tithing of Milland, in aid of the parish of St. Peters, Cheeseshill, in the same county; and the order of sessions confirming it;

The question was, whether it was sufficiently stated “that both these places (viz. Milland and St. Peter's) lie within the same hundred:” which is a circumstance essentially necessary to be ascertained, in order to give the two justices any jurisdiction in the case.

For, by 43 Eliz. c. 2, § 3, power is given to two justices, in cases where they perceive a parish not to be able to maintain its own poor, “to tax any other parish within the hundred where the parish is:” (which is all the authority given to two justices). Then the Act goes on, further, [577] “and if the said hundred is not able, then the sessions shall assess any other parish within the county.”

Now it is here only stated “that the tything of Milland and the parish of St. Peter's Cheeseshill both lie in the same liberty of the soke, where the said parish lies.”

It was therefore objected that non constat that they are within the same hundred: for “liberty” and “soke” are words of vague, indeterminate meaning, not equivalent to the known legal term “hundred” nor co-extensive with it; and perhaps the liberty may extend into several hundreds. However, it is plain that the two justices have not shewn that they have jurisdiction: and the Court cannot intend that they have any.

In support of the objection, were cited the following cases; viz. *Foley's Laws* relating to the Poor 31, (or 42 in 3d edition,) *St. Benedict Parish v. St. Stephen's and St. Mary Magdalen's in Norwich*. Reports temp. Qu. Ann. 269, S. C. *Viner*, title Poor, pa. 416, S. C. with *Foley* 31.

The Court thought it best, to send it back to the sessions, in order to have the matter better explained and more particularly stated.

But they did not think themselves bound down by the particular word “hundred,” which is the term used in the Act, so as to be confined to this single species of division of counties. For if such division be called by any other term or name synonymous

or equivalent to that of "hundred," it must be equally within the intention of the Act, and the Court may adjudge according to such intention.

And now, the case having been newly and particularly stated,

Mr. Gould, who was for the orders, prayed the opinion of the Court.

And Mr. Norton, who was against them, candidly owning that, as the facts are now stated, he could not contend but that it does appear (substantially) to be a hundred, though the division was called by another name ;

The Court discharged the rule, and affirmed the orders.

Both orders affirmed.

[578] JOHNSON *versus* HOULDITCH. Wednesday, 26th April 1758. [S. C. Sayer's La. C. 118.] Rule to pay money into Court, and have it struck out of the declaration on payment of costs discharged as to the costs, the action having been vexatiously brought.

In an action upon the case for the use and occupation of a house, the defendant had, in Hilary term last, obtained the common rule, for liberty "to pay 2l. 5s. into Court, and to have it struck out of the declaration, on payment of costs." The plaintiff's attorney applied to get these costs taxed, and take the money out of Court. Upon and after which application,

Mr. Whitaker, for the defendant, had moved (in the beginning of this term) to discharge this rule so far as it related to the costs ; and also that the plaintiff should pay the costs of the suit itself, and also the costs of that application : for that the plaintiff had the very same offer of the very same sum, before the Judge.

The case he went upon, (and from whence he argued the plaintiff's conduct to be oppressive,) was as follows—A quarter's rent, (amounting to 2l. 5s. and nothing more, was due from the defendant to the plaintiff. The defendant was always ready to have paid it ; but the plaintiff kept out of the way in order to prevent a tender : and yet brought this action as above stated, by bill returnable last term. The defendant summoned the plaintiff before a Judge to shew cause "why, upon payment of the debt and costs, proceedings should not be stayed." The plaintiff's attorney pretended that the plaintiff had other demands, and therefore refused to take the 2l. 5s. and costs. And so the Judge was precluded by this allegation, from interfering : and could make no order. This obliged the defendant to apply to the Court, for the common rule "to pay the 2l. 5s. into Court, with the costs then incurred ;" (after which, if the plaintiff proceeds, it is at his peril).

But as this common rule is always made upon the terms of the defendant's paying costs to the plaintiff, Mr. Whitaker's motion made as above mentioned, was "to set aside so much of the said rule as put upon the defendant those terms of paying costs to the plaintiff : " and he had even added to this motion, "that, on the contrary, the plaintiff should pay the costs of the suit itself, and also of that application, to the defendant ; " it being most manifest that the plaintiff was determined to oppress the defendant, as it now appeared that only this 2l. 5s. was really due to him.

Mr. Norton, on behalf of the plaintiff, now shewed cause against Mr. Whitaker's rule. And

[579] He insisted, that however oppressive this action might appear, yet the plaintiff had, by law, a right to bring it : and consequently he was intitled to his costs of suit, to be taxed and paid to him, upon the defendant's obtaining this rule under the \* statute, which gives liberty to pay "the rent due into the Court : " for, those are the terms prescribed by that Act.

But the Court, upon full consideration of the matter, looked upon these proceedings thus carried on by the plaintiff, to be oppressive : and therefore they did discharge so much of the above mentioned rule as directed the payment of costs by the defendant to the plaintiff.

The rule now made was this ; viz.

"It is ordered that the said rule (made in this cause on Wednesday next after three weeks from Easter-Day in this same term) be discharged : and also that so much of the rule made in this cause in the last Hilary term, for the payment of

\* I take these rules to be discretionary, and founded upon the course and practice of the Court ; not upon any particular statute.

2l. 5s. into Court, as relates to the payment of costs to be taxed by Mr. Clarke, be discharged."(a)<sup>1</sup>

HUTCHINS *versus* CHAMBERS ET AL'. Friday, 20th April 1758. [S. C. Bull. 82, cited. See also 7 Durn. 658. 3 Salk. 136.] Beasts of the plough are distrainable for the poor rates.

[Referred to, *Grunnell v. Welch* [1905], 2 K. B. 656; [1906], 2 K. B. 555.]

This was a special case from Surry Assizes, before Ld. Ch. J. Willes.

It was an action of trespass against the justices of peace, the parish officers, the constables, and their assistants; for executing a warrant of distress made by the two justices, upon a poor-rate amounting to 13l. 2s. And a verdict was found for the plaintiff against all the defendants, subject to the opinion of the Court upon the whole matter.

The distress at first taken, was five geldings, stated to be beasts of the plough and cart; with their halters; which first distress not being sufficient, they distrained a second time, under the same warrant; and took three other geldings, which were and are stated to have been also beasts of the plough and cart, of the value of 36l. 17s. with their halters. It is expressly stated, "that upon the former distress, there were other goods, &c. more than sufficient to answer the value of the demand, besides these beasts of the plough and cart."

[580] This case was first argued on Tuesday 31st of January 1758, by Mr. Knowler for the plaintiff, and Mr. Gould for the defendants; and again, on Friday the 14th of April 1758, by Mr. Stowe for the plaintiff, and Mr. Williams for the defendants.(a)<sup>2</sup>

There were five questions stated for the opinion of the Court, viz.

1st. Whether the rate and assessment was a good and sufficient rate and assessment, in point of law; and if not, then whether the plaintiff can avail himself of any objection to it.

2d question, whether the warrant ought to have fixed and limited the time \* within which the geldings and goods distrained were to be sold: and whether, for want thereof, the warrant is void, and the defendants, or any, and which of them, are trespassers.

3d question, whether the second distress is at all justifiable.(b)

4th question, whether the geldings, being beasts of the plough, and used by the plaintiff, both for the plough and cart, were liable to be taken and distrained for the said rate and assessment.

5th question, whether upon the whole state of the case, the plaintiff's action is maintainable against the defendants, or any, and which of them.

And a 6th question, ("whether the second distress was not excessive,") arose upon the argument.

After the first argument, (in which the distress was treated as a common-law distress; and Mr. Knowler expressly denied it to be an execution, because it was replevable; and insisted that the Statute de Distractione Scaccarij, is general,

(a)<sup>1</sup> The case was stronger than it appears on this report, if what is stated in Sayer's Law of Costs, ed. 1767, p. 146, be true, viz. "that it appeared that there had been a tender of the rent before it was due, that the plaintiff had kept out of the way all the day on which it became due, in order to deprive the defendant of an opportunity of tendering the rent that day."

(a)<sup>2</sup> If in pleading a custom to distrain, it be alledged generally, it shall not be intended that the custom is to distrain things not distrainable by law. 1 Sid. 18.

"It seems to be a rule that the construction of statutes must be accommodated to the rules of common law in like cases." Foster, 109.

\* V. 27 G. 2, c. 20, and 17 G. 2, c. 38. [And note that this distress was not for a penalty, if it had then it seems this would have been a material objection, as appears by the above statute 27 Geo. 2, c. 20, s. 1. Salk. 609.]

(b) This distress was not for a penalty; if it had, then it seems this would have been a material objection, as appears by the above stat. 27 Geo. 2, c. 20, s. 1. Salk. 609.



is declaratory of the common law, and extends to all distresses for any cause whatsoever).

Lord Mansfield finding that the parties proposed speaking to it again, took notice that all about the rates is clearly out of the present case; for, if they are bad the parties who thought themselves aggrieved, should have appealed.

So all about the warrants may be laid out of the case. For, the warrant is not void, so as to make it a trespass *ab initio*.

Therefore the future argument may be confined to the other objections.

*Uterius concilium.*

[581] Mr. Stowe, who argued for the plaintiff, on Friday the 14th of April 1758, passed over first and second questions, upon what the Court had intimated after the former argument; and proceeded directly to the third question.

3d question. It is stated that here was sufficient distress, the first time; and therefore the second was not justifiable, Co. Lit. 272 b. Cro. Eliz. 13. Moore, 7. 2 Lutw. 1532, *Wallis v. Savill*. Fitz. H. N. B. title Recaption. 8 Co. 50, *Iehu Webb's case*. And this is a duty of a less nature than rent: and yet even in that case, a double distress is unlawful.

A second reason why the second distress was not good nor justifiable, is because the warrant is not an authority to take it: for, the warrant having been once executed, had performed its office: and consequently was no more than a piece of waste paper, at the time of taking the second distress.

4th question, beasts of the plough (though used both for plough and cart) cannot be distrained for a rate, when there are other goods sufficient. 51 H. 3, Stat. 4, de *Distractione Scaccarij*. "None shall be distrained by his beasts that gaigne his land, nor by his sheep, &c." 2 Inst. 133, is large and express, "that this was so by the common and civil law; and that this statute extends to all sorts of distresses whatsoever; also to all manner of executions, as well at the suit of the King, as of the subject."

The words "levy the debt," cannot be applicable merely to lord and tenant; but are general, and extend to all distresses whatsoever. 1 Inst. 289 b. 2 Inst. 133.

6th question. "Whether the second distress is not excessive."

He argued that this distress was excessive; being a distress taken of three geldings, of triple the value: for, the value was 36l. 17s. and the sum distrained for, only one-third (or very little more of that sum, viz. 13l. 2s. which is excessive upon the face of it. And he cited 1 Roll. Abr. 674: where instances are given of distresses excessive upon the face of them. 1 Inst. 107.

And this distress is not an entire distress; but a distress of three distinct things. And an excessive distress [582] of several distinct things is not maintainable: and an action of trespass will lie for it. H. 28 G. 2, *Moir v. Munday et Al'* which was a distress of a great quantity of pedlar's goods (of the value of 100l.) which might have been severed; for only 6s. 8d. Therefore both the first and the second distress are illegal.

Wherefore he prayed judgment for the plaintiff.

Mr. Williams—contra, for the defendants.

He confined himself to these three questions; viz. first, whether under the Statute of 43 Eliz. *averia carucæ* can be distrained for the poor's rate, where there is other sufficient distress. 2dly, whether under the warrant for levying the sum assessed, a second distress can be made, where the first is deficient, and a sufficient distress might have been taken in the first instance. 3dly, if a second distress can be made: whether the second distress is not excessive: and whether, on that account, this action can be maintained.

And he observed that the two justices are not concerned in these present questions, now remaining before the Court. He observed, likewise that the first distress's being a trespass or not, depended entirely upon the first of his three questions; and the second distress's being a trespass or not, depended entirely upon the two last of them: and all the three questions depended principally upon the Statute of 43 Eliz.

He begun with his own first question, (which was the 4th original question:) and he first considered the nature of the duty created by the 43d of Elizabeth, and then the nature of the remedy thereby given for the recovery of that duty.

The duty is not a tax upon the land, nor payable out of it: but a charge upon the person: and it is a tax throughout the kingdom, and for public benefit. This is not to be considered upon the foot of a common law distress: the nature, design, and

end of this public duty required the most effectual and speedy remedy that could be devised.

The reason why beasts of the plough could not be distrained at common law will not hold in the present case.

This is similar to an execution, and essentially different from a distress at common law.

At common law the distress could not be sold; it was only taken nomine pœnæ; not as a satisfaction, (which this is,) for the duty.

[583] The reasons of the privilege do not now hold. Agriculture then wanted and required encouragement, and must have been impeded by a common-law distress. Now, it does not. Then, the thing distrained could not be sold; and remained useless: now, it may be sold. The debt there, was of a private nature: this, here, is of a public nature.

This distress is not taken as a pledge, or as a mean to compel: but for a satisfaction for the duty itself, a personal duty, and of a public nature.

1 Lord Raym. 386, *Vinkensterne v. Ebdon*. Sir T. Raym. 332, *Prideaux v. Warne*. 2 Lev. 96, S. C. Cro. Eliz. 710, *Smith v. Shepherd*, prove that the rule is not applicable to distresses for such duties. They are prescriptions for toll-through; and the first and last are instances of sheep, &c. taken for tolls.

As to the Statute de Distractione Scaccarij—Comparing that statute with the Statute of Articuli Super Chartas, 28 Ed. 1, c. 12, (which refers to the Statute de Distractione Scaccarij,) and attending to the words of it, it can never be taken to extend to such cases as the present; to Parliamentary remedies, at that time unknown. It is confined to such distresses as should be sold: to cases of the grantees of the Crown, or where the prerogative of the Crown was concerned.\* The mischief, at that time, was the unbounded power of the prerogative in distresses, and the great abuse and oppression exercised by the King's bailiffs and by lords of liberties.

The King, by his prerogative at the common law, might take the land, as well as the goods and chattels, in execution; (*Sir Wm. Harbert's case*, 3 Co. 12:) consequently the beasts of the plough.

And though sheep are expressly mentioned in that Act, yet sheep may be distrained for toll. Which proves "that this Act does not extend to all distresses." Cro. Eliz. 710, is so: *Smith v. Shepherd*—where sheep were taken for a toll of 2d. for every twenty sheep; and no sort of objection, "that sheep were not distrainable." (a)

Besides the Act of 43 Eliz. c. 2, is an implied repeal of the Stat. de Distractione Scaccarij.

Another answer to this Act is—that if they would have availed themselves of it, a special action ought to have been brought upon this particular statute. Register, 97 b. & F. N. B. 89, & 90, are particular forms of writs upon it.

[584] So, upon the Stat. of Marlbridge, c. 4, (which prohibits unreasonable distresses,) trespass will not lie for an unreasonable distress: but the remedy must be by a special action founded on the statute. In 2 Strange, 851, *Lynne v. Moody*, it was adjudged "that trespass will not lie for taking an excessive distress: but the remedy ought to be by special action founded on the Statute of Marlbridge." And on the same statute, "that distresses taken in one county, shall not be driven into another," there are writs formed. Register, 97, F. N. B. 82. But trespass will not lie: it must be a special action. 3 Lev. 48, *Woodcroft v. Thompson*—the three Judges held, (against North,) "that he that would take advantage of the Statute of Marlbridge, c. 4, and 1, 2 P. & M. c. 12, ought to do it by way of action, &c."

Their argument would prove too much. For, sheep were privileged by the common law; and by the Stat. de Distractione Scaccarij, expressly "no man shall be distrained by, &c.—nor by his sheep." But sheep are now allowed to be distrainable for a poor's rate. So are the other things mentioned by Lord Coke (from the *Mirror*) in his

\* Vide 51 H. 3, stat. 4, A.D. 1266.

(a) Sheep are never privileged in any case except where there be no other distress not privileged to be had; as is notorious to all who are the least acquainted with the subject; and the sheep which were distrained in this case, were for toll in passing over a bridge, and therefore there could be no other distress.

Vide also this subject best explained by the case of *Simpson v. Hartop*, Willes, 512.



2d Inst. 133,\* as not distrainable at common law, if there were other goods sufficient. All these are surely distrainable for this rate. 1 Ld. Raym. 386. Raym. 232, & 2 Lev. 96, S. C. Cro. Eliz. 710.

Therefore the 43 of Eliz. is not confined to common law distresses.

But these beasts are stated to be "beasts of the plough and cart." Therefore they are distrainable; for, beasts of the cart are not privileged.(a)<sup>1</sup> 1 Sid. 422, 440, *Welch v. Bell*. 2 Keb. 595, S. C. Bract. Lib. 4, 217 b. speaks of oxen, as beasts of the plough.

However, this is an execution: and therefore none of the arguments relative to the distresses can be applied to this case.

When goods are seised in execution on a fieri facias, the debt is discharged. So is 2 Ld. Raym. 1072, *Clerk v. Withers*.

This is a distress for a satisfaction of the demand; not for a pain, or penalty, or pledge. Consequently, it is an execution. This is the essential difference between an execution and a distress at common law,

In the case of *Rex v. Speed*—Cases temp. W. 3, 328, a levary facias out of B. R. after affirmance of a conviction for deer-stealing was holden regular: and it was [585] considered as an execution; for, per Holt, "when a statute says money shall be levied by distress, this is an execution." Therefore, it being an execution, beasts of the plough might have been taken.

And so they may here, this being an execution.

What has been urged on the other side, from 2 Inst. 133, "that the Statute de Distractione Scaccarij extends to all distresses whatsoever, and likewise to executions," is one of the very few mistakes of that excellent writer. And this opinion of Lord Coke is not only contrary to common experience; but also to the opinion of Ld. Ch. J. Holt, in Comberb. 356, *Hardisty v. Barney*—where Holt said, "that upon a fieri facias the sheriff may take any thing but wearing clothes; nay, if the party has two gowns, he may take one of them."

And sheep are notoriously distrainable now: and yet they are expressly and by name, within the Statute de Distractione Scaccarij.

The Stat. Westm. 2, c. 18, which gives the elegit, expressly excepts beasts of the plough. At that time the Legislature thought such exception necessary. And Dyer, 7 b. pl. 10, says that a man shall not have execution of the profits of a filacer's office; because he cannot grant and assign it. So that the rule seems, from that case, to be, "that whatever may be assigned by the party, may be taken in execution, et c. contra."

The doctrine on which these gentlemen build their arguments, is now obsolete, and unknown to the generality of mankind: and it would be very inconvenient to re-establish it. And this distress is for the benefit of the debtor, as these things are most saleable; and of no prejudice to any body. And no case is cited on the part of the plaintiff.

In 3 Salk. 136, it is said to have been adjudged "that the rule of common law, to exempt, &c. extends to cases where a distress is given in the nature of an execution, by any particular statute, as for poor-rates, &c." But perhaps this is no authority to be relied on.

As to the next question. I agree to 2 Lutw. 1532, "that a second distress can not be taken for the remainder of the same rent, where the first distress was only for parcel of the whole rent due." But in this present case, if the officer is deceived in the value of the first distress, he may take a second: so, if the first dies in the pound,(a)<sup>2</sup> Dyer, 280 b. pl. 14, or is by accident become [586] ineffectual; or if the

\* V. Comment on c. 15, subfinem: which mentions beasts and living things; and also mort-goods as armour, apparel, vessels, jewels, &c. and even saddle horses.

(a)<sup>1</sup> Beasts of the cart are expressly mentioned in the writ in the Register, 97, prohibiting their distress as long as there are other cattle.

(a)<sup>2</sup> If the distress be put into the common pound, the owner is bound to provide sustenance, and if it die in the pound it is at the peril of the owner, and not of the distrainor; and therefore (donques) he may take a new distress for the first cause, because he is not yet satisfied, Dy. 280 b. pl. 14; but this authority and Salk. 248, pl. 3, seem to proceed on this reason, that there was no default in the distrainor; and it was holden by the three Judges in Salk. who gave judgment there, that if a



officer did not know that there were such other goods; (which last might be the present case). These cannot be looked upon as two distinct distresses for one entire demand.

But if this be considered as an execution, then there can be no doubt about it. For, the sheriff may, in such case, re-enter before the return of his writ, to complete his execution. And this last reason equally answers the objection to the warrant: for, that is not completed and finished, till the whole demand is levied.

6th question. As to the excessiveness of the second distress—

He did not much contend that it was not so, but he insisted that an action of trespass will not lie for taking an excessive distress. For proof of which, he relied on the case of *Lynne v. Moody*, 2 Str. 851, and the case in 3 Lev. 48, *Woodcroft v. Thompson*.

The declaration contains two counts: one for each trespass: and the damages are given jointly for both. Therefore it is incumbent upon the plaintiff, to shew that both these distresses are illegal.

Mr. Stowe in reply—

The cases of tolls are not applicable to the present case.

Agriculture deserves encouragement now, as well as formerly.

I suppose the King's distress might be sold at common law. Therefore the Act de Distractione Scaccarij does extend to executions. And the 43 of Eliz. has not repealed it.

These beasts are privileged, if there be sufficient besides: and here was sufficient besides. Beasts of cart are within the same reason, as beasts of plough: they gaignont son terre, as the Statute of 51 H. 3 says.

The arguments of obsolescence and ignorance will not hold: for the former is not true; and the latter will not excuse. It is no part of the case, "that they did not at first know the value." And it is begging the question to say "that he may take a second distress, when the first [587] was not sufficient." That is the very thing that wants to be proved.

As to the case of *Lynne v. Moody*—the entry there was at first lawful; and there was nothing subsequent to make that lawful entry a trespass. But here the second entry to take the second distress, was tortious: and therefore they are liable to an action. So that that determination does not affect the present case.

Cur' advis.

This cause now standing in the paper, for the resolution of the Court,

Lord Mansfield delivered their opinion.

The rule of *Nisi Prius* is so conceived as to submit the case to the opinion of the Court, be that whatever it may; and so as to obviate all objections to the form of the pleadings and finding of the verdict.

In stating the case, he observed that there were other things which might have been taken upon the first distress, besides those which were actually distrained: but not upon the second (from any thing that appears).

Upon the first argument, the two first objections were laid out of the question: especially since the 17 G. 2, c. 38. So that the justices were out of the case. For, a defect in the rate (unappealed from) could not avoid the warrant; nor is the warrant void, so as to make it a trespass ab initio. And the justices could not be trespassers, by what the officers afterwards did.

So that it was reduced to three questions: viz.

1st. Whether (upon the first distress) averia caruacæ could be taken and distrained for a poor's rate and assessment; when there were other things that might have been distrained, and which were more than sufficient to answer the value of the demand.

The second question turned upon two objections to the second distress: viz. 1st. Whether the second distress, under the same warrant, was at all justifiable, when there was enough that might have been taken upon the first; and 2dly. Whether this second distress, being excessive, that circumstance alone was not a sufficient ground to maintain this action of trespass, independent of any other consideration.

distress was put into the common pound, and escaped without the distrainer's assent, unless it appeared that it was without his default, the action should not revive, for his own default ought not to entitle him to another action. Qu. If the reasons of these cases do not make against the resolution in the principal case?

On the second argument, Mr. Williams not only argued very well as counsel for his client; but he explained the whole learning of distresses at common law; which were a *nomine pœnæ*, not a satisfaction: and as I adopt the reasoning of his argument throughout, to avoid repetition now, I will in a great measure refer to it for the grounds of the opinion which the Court is of.

The 1st question is “whether *averia carucæ* may be taken for a distress upon the poor’s rate, where there are other distrainable goods sufficient.”

As to this—the solid distinction is, “that the seising under the 43 of Eliz. and such like Acts of Parliament, is but partly analogous to the common law distress, (as being replevisable, &c.) but is much more analogous to the common execution;” (like a *fieri facias*, where the surplus, after sale, shall be returned).

In the old common law distresses, which were in nature of a (*a*) *nomine pœnæ* to compel payments, it would have been absurd to have suffered the implements by which a man gains his livelihood to be holden as a pledge; because that would have been taking from the man, the only means he had, of being able to pay the debt. But this reason does not hold, where the things distrained may immediately be sold by way of satisfaction: which, though called a distress, yet really is, in this respect, an execution.

The adjudication said to have been made in *M. 8 W. 3, C. B.* in 3 Salk. 136, was very properly cited by Mr. Williams, as no sufficient authority, and not (of itself) to be relied upon: but I take it, that the same reason was gone upon, in the case in 1 *Ld. Raym.* 386, *Vinkensterne v. Ebdon*, *M. 10 W. 3, B. R.*, where *Ld. Ch. J. Holt* says, “It is true, a horse cannot be distrained in a smith’s shop, &c.: but there is no such restriction, where the distress is for a personal duty.” And he observed that the duty, in that case arose out of the goods laden to be exported: so that by their being laden, the duty commenced, and the ship became chargeable; and *à fortiori*, any part of her. I take the meaning of what he there says of personal duties, to be applicable to the case of Parliamentary duties alluded to in 3 Salkeld, and consequently to be agreeable to 3 Salk. 136, which says, it was adjudged “that this common law exemption of utensils, tools, instruments of husbandry, &c. from distress, holds only in distresses for rent-arrear, amerciaments, &c. but doth not extend to cases where a distress is given in the nature of an execution, by any particular statute; (as for poor rates, &c.)”

Therefore it is more analogous to an execution, than to a distress at common law: and there, (in cases of execution) \* *averia carucæ* may be distrained; although there be other sufficient distress. (*b*)

[589] And on this ground, we are all of opinion, that there is no objection to the first distress, from the *averia carucæ* being taken: for that they are distrained under the 43 Eliz. and such like Acts of Parliament.

Thus far, you see, relates only to the first distress.

As to the second distress—

The 1st question relating to that, is “whether this second distress can be at all justified: as it was a second distress taken under the same warrant; when enough might have been taken at first, if the distrainor had then thought proper.”

Now a man who has an entire duty, shall not split the entire sum; and distrain for part of it at one time, and for other part of it at another time; and so toties quoties, for several times: for, that is great oppression; and that is the case of *Wallis v. Savill et al* in 2 *Lutw.* 1532: where the second distress was holden unjustifiable,

(*a*) How can this be when the distress in this case is repleviable, but certainly not so in the case of an execution.

(*b*) The writ in the Register, 97, founded on this stat. expressly recites quod nullus distringat p. *averia carucarum suaru vel poves suas pro debito nro aut alieno seu alia quacunque occasione per ballivos seu ministros nros aut aliorum quamdiu alia habeat averia per quæ rationabilis districtio super ipsum fieri possit pro debitis illis levandis exceptis duntaxit averiis illis quæ in damno alicujus inventa secundum, legem et cons. regni Angl’ imparcari contigerit.*

Note also that it is a rule that wherever a new right or property is created by Act of Parliament, the same is to be construed according to the rules of the common law, respecting other rights of the same nature. 3 *Co.* 13 b. 85 b. 1 *Wms.* 252.

[\* *Contra* 2 *Inst.* 133, and the writ in the register.]



because both distresses were taken for one and the same rent; and it was the lessor's folly, that he had not taken a sufficient distress at first.

But if a man seises for the whole sum that is due to him, and only mistakes the value of the goods seised, (which may be of very uncertain, or even imaginary value, as pictures, jewels, race-horses, &c.) there is no reason why he should not afterwards complete his execution by making a further seizure. And how can the officer who seizes, judge of the real or perhaps imaginary value of the horses or goods seized? The value of them may be quite unknown to him; or may even depend upon whim and fancy.

It is to the advantage of the owner of the goods, that this should be so: it is better for him that the officer should be at liberty to seize a second time, in case he makes an insufficient seizure the first time. Or else, it might induce him to a necessity of taking effects of a very great value, at first: for, if he is to be precluded from thus making up the deficiency, he will certainly take care not to take too little at first.

Now pictures, horses, jewels, books, and some other such effects, may be of so uncertain and even imaginary or fancied value, that it may be exceedingly uncertain how much money they may fetch, when they come to be sold: so that the person seizing may not be at all able to judge how much they may produce upon sale.<sup>(a)</sup><sup>1</sup>

[590] And if he does not take the value of the whole at first, (out of tenderness and moderation perhaps,) there is no reason why he should not complete it by a second seizure; provided it be for the same sum due.

Therefore this first objection to the second distress, fails.

3d question. The second objection to this second distress, is the third remaining question; viz. its being excessive, and as such being a sufficient ground for an action of trespass.

Now as to this third question, "whether the taking an excessive distress, is a sufficient ground to maintain an action of trespass;" several authorities have been cited,\* to shew "that an action of trespass will not lie for taking an excessive distress;" but "that it ought to be a particular action grounded upon the statute;" and particularly, one case, which is in 2 Strange, 851, *Lynne v. Moody*, M. 3 G. 2, B. R. where it had been adjudged for the plaintiff in C. B. But the judgment of C. B. was reversed.

And it was said "that the remedy ought to be by special action founded on the Statute of Marlbridge."

So that it has been sufficiently established "that a general action of trespass can not be maintained for taking an excessive distress."

One case indeed was cited to the contrary: which was the case of *Moir v. Munday*, H. 28 G. 2, B. R. And that was an action of trespass; where six ounces of gold, and one hundred ounces of silver were taken for 6s. 8d. which was holden to be an excessive distress: and judgment was given for the plaintiff.

But that appeared upon the face of it, and upon the pleadings, to be excessive: and so the Court expressly declared. And it was a distress of gold and silver; which are of a certain known value; and even the measure of the value of other things. But it was there holden, "that in all other cases of goods or other things of arbitrary and uncertain value, it must be an action upon the statute." And this (as I am told) was the distinction there taken: and that is therefore an exception (and was there considered as being so) from the general rule; and serves to confirm the rule itself.

We are therefore all of us of opinion that there is no cause of action maintainable by the plaintiff in the present [591] case, nor has he any right to recover against any of the defendants: and that the defendants be at liberty to enter a non-suit.

The rule taken was,

"That the postea be delivered to, and judgment entered for the defendants."<sup>(a)</sup><sup>2</sup>

(a)<sup>1</sup> Vide Hargrave's Co. Lit. 49 b. Where the opinion here given is cited with the following addition to it, viz. see ac. Saund. on 22 Car. 2, against Conventicles 39, which is referred to in Comyns's Dig. Distress, b. but not cited in the case in 4 Burr.

\* Vide ante, pa. 582, 583, 584, 585, 586.

(a)<sup>2</sup> By the first point adjudged in this case a different rule, or law is introduced with respect to distresses given by Act of Parliament, from which is and always was the case, as to distresses at common law.

By the second resolution, the authority of 2 Lutwych, 1532, is overruled, though clearly law before; and this second resolution is also contrary to what the Legislature took to be law, when they passed the stat. 17 Car. 2, c. 7, as appears by s. 4.



REX *versus* INHABITANTS OF CAVERSWALL. Monday, 1st May, 1758.

See this case at large in the quarto edition of my Settlement-Cases, No. 147, pa. 461.

[595] BALDWIN ET UX' *versus* BLACKMORE, ESQUIRE. Tuesday, 2d May 1758. Pauper returning to the parish from whence removed without a certificate, may be committed to the house of correction. [See 3 Durn. 725. 6 Durn. 581.]

This was a case reserved at the assizes for the county of Lancaster in an action for an assault upon, and false imprisonment of the plaintiff's wife.

Case—That the plaintiffs William Baldwin and Susannah his wife, being paupers, legally settled in the township of Banknewton in Yorkshire, had been regularly and properly removed by an order of two justices of the county of Lancaster from Marsden in Lancashire, to the said township of Banknewton in the said county of York, as the place of their last legal settlement; which order was not appealed from. That afterwards, they (both of them) returned of their own accord, and without bringing any certificate with them from Banknewton (to which they belonged,) to Marsden aforesaid, from whence they had been so removed by the said order of two justices. Of which, complaint being made in writing, and upon oath, to the defendant, who was a justice of peace of the said county of Lancaster, wherein the said parish of Marsden lay, by the overseer of the said parish (from which the paupers had been lawfully removed, and to which they unlawfully returned,) he issued his warrant to bring the two [596] paupers (the man and his wife) before him: who being accordingly brought before him, and the facts being fully proved, upon oath, made by Thomas Murgatroyd, one of the churchwardens of Marsden aforesaid, he committed both of them, the man and his wife, to the house of correction, "there to remain until they should be discharged by due course of law." The warrant was directed to the constable of Marsden, to convey, and to the master of the house of correction in Preston, to receive; and was in these words, "Whereas Thomas Murgatroyd, one of the churchwardens of the township of Marsden in the said county, hath made oath before me, one of His Majesty's justices of the peace in and for the said county, that William Baldwin and Susan his wife, poor persons having been lately removed by an order under the hands and seals of Roger Hesketh and Rigby Molineux, Esquires, two of His Majesty's justices of the peace and quorum in and for the said county, from the said township of Marsden unto Banknewton in the West Riding of the county of York, as to their last lawful settlement, are now returned back, to inhabit in the said township of Marsden, contrary to the statute in this behalf made; these are therefore, in His Majesty's name, to command you forthwith to convey them the said William Baldwin and Susan his wife to the house of correction abovesaid, and deliver them to the master thereof; hereby requiring him to receive them into his custody, and them safely to keep until they shall thence be discharged by due course of law. Hereof fail not, at your peril—Given, &c. this 8th day of February, &c."

That under this warrant of commitment, the plaintiff and his wife were kept in prison in custody of the keeper of the house of correction at Preston, from 12th February to 17th March following.

Notice was proved to be given to the defendant of bringing the action, one month before it was brought.

Upon the trial of this cause, there was a verdict for the plaintiff, and 1s. damages, subject to the opinion of the Court upon the two following questions: viz.

1st. Whether there ought not to have been a previous conviction of vagrancy.

2dly. Whether the wife could be convicted of vagrancy, or be liable to be sent to the house of correction for returning without a certificate; as she only accompanied and resided with her own husband.

N.B. By 13, 14 C. 2, c. 12, § 3, it is provided that any person or persons may go to work in any parish or [597] place, carrying with them a certificate of their being inhabitants of their proper parish: and, in such case, if they shall not return when their work is finished; or shall fall sick or impotent, whilst they are in the said work; it shall not be accounted a settlement; but two justices of the peace may convey the said person or persons to the place of his or their habitation as aforesaid. And if such person or persons shall refuse to go, or shall not remain in such

parish, but shall return of his own accord, to the parish from whence he was removed ; it shall and may be lawful for any justice of the peace of the city, county, or town-corporate where the said offence shall be committed, to send such person or persons offending, to the house of correction, there to be punished as a vagabond ; or to a public workhouse (in the Act after-mentioned) there to be employed in work or labour.

By 17 G. 2, c. 5, § 1, it is enacted, that whereas the number of rogues, vagabonds, beggars, and other idle and disorderly persons, daily increases, &c. all persons who threaten to run away, and leave their wives or children to the parish ; and all persons who shall unlawfully return to such parish or place from whence they have been legally removed by order of two justices of the peace, without bringing a certificate from the parish or place whereunto they belong ; and also all persons who, &c. &c. shall be deemed idle and disorderly persons : and it shall and may be lawful for any justice of peace to commit such offenders (being thereof convicted before him, by his own view, or by their own confession, or by the oath of one or more credible witness or witnesses,) to the house of correction ; there to be kept to hard labour, for any time not exceeding one month.

As to the two points, it was insisted on behalf of the plaintiff—

1st. That there ought to have been a previous conviction of vagrancy, before the justice could commit to the house of correction at all.

2dly. That Susannah the wife, following and residing with her own husband to and at Marsden, could not be convicted of vagrancy, for returning thither without a certificate.

This cause was first argued on Tuesday the 21st of June 1757, by Mr. Yates for the plaintiff, and Mr. Clayton for the defendant ; [598] and again on Friday the 11th of November following, by Serjeant Poole for the plaintiff, and Mr. Norton for the defendant.

For the plaintiff it was argued to the following effect.

1st point—On 17 G. 2 a previous conviction is expressly made necessary ; the words of it are, “being thereof convicted, &c.” And three methods of conviction are specified ; viz. view, confession, and proof by one or more witnesses.

Now here was nothing but the mere complaint and information of the parish officer ; without any adjudication by the justice, “that it was true.”

Therefore the justice proceeded without any authority.

On 13, 14 C. 2, c. 12, § 3, no previous conviction is indeed necessary, by any express words of the Act of Parliament. But such an arbitrary and extraordinary power ought to be very narrowly watched. However, this cannot be a proceeding under the Statute of 13, 14 C. 2, for the foundation of this warrant is the information of the churchwarden on oath ; which plainly goes upon an offence created since that Statute of C. 2, viz. “returning without bringing a certificate from the parish to which they belonged.”

2d point—This return of the woman cannot be considered as an unlawful return. A feme covert is obliged to follow her husband. If she commits theft, in company with her husband, it shall be taken to be done by the coercion of her husband. 1 Hawk. P. C. fo. 2, 3, sect. 9, 10, 13. Bro. Coran. 108. Kelynge, 31, 37. Hale's H. P. C. vol. 1, pa. 47, and pa. 516. 3 Inst. 108.

Indeed there are cases where the wife is the principal actress, (as keeping bawdy-houses,) where she is punishable with her husband. But here she is guilty of no offence at all.

As to its being a hard action—our's is a very hard case.

Contrà for the defendant, (the justice of peace, who had committed the woman,) it was argued to this effect :

1st point—if this proceeding should be taken to be on 17 G. 2, and even supposing a conviction to be previously necessary, yet it is not necessary that such a conviction should be expressly stated upon this case ; but the justice may, at any time, draw up a conviction in form, upon the facts here stated ; which conviction he was not obliged to draw up in form, till called upon.

[599] But this proceeding is upon 13, 14 C. 2, c. 12, § 3. And the case is within the words of that Act, viz. “returning of her own accord, to the parish from whence she was removed.”

And these two Acts (of 13, 14 C. 2, and 17 G. 2,) are consistent ; and the latter

does not repeal or vacate the former: it operates as a saving, under that Act: and upon this former Act, no conviction is necessary.

2d point. A wife may be guilty and liable in committing a crime with her husband, from trespass \* up to murder and treason. In *Dr. Hussey's case* in Hob. and in Lord Coke, a general rule is laid down, as to married women, "that where they offend voluntarily and knowingly, they are liable to punishment."

This is a new law; and the wife was intended to be included in it: and if wives are within the mischief of a statute, they shall be included in it. The matrimonial vow must be understood as restrained to lawful acts: the wife ought not to obey her husband in unlawful acts.

In trespass vi et armis, the wife might be seized for the fine. The coercion of the husband only excuses her from suffering for the crime: it does not make the act lawful. She ought not to commit theft; although the supposed coercion of the husband excuses her from punishment.

This Act expressly includes all persons whatsoever. The words are general; and so also was the intention.

And the husband's act (of returning) is unlawful: and therefore she ought not to follow him, and thereby commit an unlawful act herself. Nor is she obliged to follow him for maintenance: for, the parish to which they were removed, is obliged to maintain her, in the same manner as if her husband had run away.

If it were otherwise, here would be an innocent parish, who must be at a continual expence of removing the wife back, toties quoties, without being reimbursed for their charges: and if she was obliged to return with her husband once, she would always be obliged equally so to do, whenever he should return himself.

All their reasoning would hold just as strongly in obliging the wife to assist her husband and obey him in [600] keeping a bawdy-house, as in any other illegal act. Yet for keeping a bawdy-house, she is certainly punishable with her husband.<sup>†1</sup>

This is not a commitment in execution, and by way of judgment for an offence: it is a commitment on 13, 14 C. 2, and not on 17 G. 2, nor for any definite time. They might have been bailed on this commitment: for it is only, "till discharged by due course of law." And though the words of the Act of 13, 14 C. 2 are "there to be punished as a vagabond;" yet this is only in order to be amenable to justice upon a future indictment. And so the sending them "to a public<sup>†2</sup> workhouse, there to be employed in work and labour," is no punishment to a poor person, who is used to work and labour.

It would be highly unreasonable that the husband (who could not bring an action in his own name and on his own account) should be permitted to bring it on account of his wife, and in her name, against a magistrate who has acted for the public good: and himself receive the benefit of what has been originally occasioned by and taken its rise from his own unlawful act.

The counsel for the plaintiff replied to the following effect.

As to the conviction being still in the power of the justice to draw up in form.—It does not appear that there ever will or can be such a conviction: but it is plain that there is none.

It does not any how explicitly appear, upon what Act, this commitment is founded. But however, it must be on 17 G. 2, because the information is for an offence expressly within that statute; and the warrant of commitment is founded upon the information. Therefore there ought to have been a previous conviction.

The certificate could not be in the wife's power to produce: her husband must have it, if there was any.

We do not deny that the wife was so far within the intent of this Act of Parliament, that she was capable of being a vagrant; she might have gone about begging; she might have returned to this parish without her husband. But we say that here is no act of vagrancy stated; and for the particular fact that is stated her

\* V. Hob. 96, and 9 Co. 73, *Dr. Hussey's case*; where whatever may be to the purpose in the present case (if any part of it is at all so,) will be found.

<sup>†1</sup> 1 Salk. 384, *Regina v. Williams*, M. 10 Ann. B. R. and *Rer v. Hayward*, a later case.

<sup>†2</sup> But this commitment is "to the house of correction."



being sub potestate viri, was an excuse to her: she is within all the excuses mentioned in *Dr. Hussey's case*, for persons guilty against the letter of a law.

The hardship of the parish to which these persons returned cannot destroy the general law of the land.

[601] A married woman's keeping a bawdy-house jointly with her husband, varies from the general principle: because there she is the principal actor, and chief manager and conductor.

The present commitment is, "till discharged by due course of law." But still it may be a commitment on 17 G. 2: as it does not exceed a month; though it does not indeed fix it to a month.

It is a quite new doctrine, "that imprisonment in a house of correction is no punishment:" certainly, it is a punishment, and no small one.

As to the husband's becoming intitled to the damages, when recovered; that arises from the law itself: but it is properly the wife's action, and will survive to her; though she (being covert) cannot by law bring it in her own name. This therefore is the act of the law; and ought not to be objected to the husband; much less, to the wife, whose action this properly is.

Lord Mansfield desired to be informed how the usage was: (though it would not indeed, as he observed, alter the law).

The counsel had not made this inquiry. But both the counsel, and also Mr. Just. Foster and Mr. Just. Wilmot said, that the Act of 13, 14 C. 2 had been always considered as general, and not as tied up by the particular words of reference to that particular case of going to work, only. And

Lord Mansfield said that perhaps that might have been practised for the sake of general good.

He strongly intimated that it would be a right thing to compromise this cause: and if it should not be so, he desired to know the practice and usage, about sending the wife to the house of correction, with the husband.

As to 13, 14 C. 2, he said he was now satisfied by his brother Foster, "that it had always been taken as a general law;" notwithstanding the words of reference; (which had struck him on the reading).

Mr. Just. Foster desired to know also how the practice had been as to children.

Mr. Clayton (who was counsel for the defendant in the former argument) said he had known the children also committed.

[602] Cur' advis,' (i.e. eventually if not compromised).

On Tuesday, 25th April 1758, this case being mentioned at the Bar, as standing for the opinion of the Court.

Mr. Norton (for the defendant) then said he had several certificates of its being the practice, for justices to commit the wife, as well as the husband, for returning to the parish from whence they had been removed; although she so returned, with her husband.

Lord Mansfield now (on Tuesday 2d May 1758,) delivered the resolution of the Court.

He first stated the whole case very fully. And he prefaced, that it was manifest that the justice had not acted intentionally wrong: and it is plain that the jury were of that opinion, as appears by their giving only 1s. damages. The Court would gladly therefore have leaned towards excusing this gentleman from suffering for what he had honestly and without any bad intention done; if they could have found him justifiable by any legal excuse.

But there is one fatal objection to his proceeding, which we cannot get over; and which puts all the other points, out of the case: and that is, that the warrant of commitment is illegal.

The legality of the warrant depends upon two Acts of Parliament, or at least upon one of them: for, there are two Acts of Parliament, upon one of which two, this warrant must be founded; though it does not appear, upon which of the two the justice proceeded.

These two \* Acts are, 13, 14 C. 2, c. 12, (a law made before certificates under the † late Acts existed,) and 17 G. 2, c. 5, (which relates to persons returning, &c. without bringing such a certificate).

\* Vide ante, p. 597.

† 8, 9 W. 3, c. 30, first introduced them.

Now this warrant is not within this former Act, of 13, 14 C. 2, nor is the case itself within it.<sup>(a)</sup> These persons did not go to any parish, *carrying with them* a certificate of their being inhabitants of their proper parish: nor is the commitment made "to the house of correction, *there to be punished as a vagabond*;" nor to a public workhouse, "*there to be employed in work or labour*:" as that statute directs. So that the warrant is not at all agreeable to the *directions* of that Act, which specifies the particular [603] manner of sending the offender to the house of correction, or to a public work-house: for, it is, only, "to remain till *discharged by due course of law*."

Neither can this warrant be good upon the latter Act, of 17 G. 2, c. 5, because though this is indeed a commitment to the house of correction, (which the latter Act directs,) yet it is "to remain there till discharged by due course of law:" whereas, by this Act, the power given the justice is "to commit such offenders to the house of correction, there to be kept to hard labour for any time not exceeding one month." But this warrant is quite general: it is an indefinite commitment; not for a precise limited time, as this Act expressly directs and requires.

Therefore the warrant of commitment is totally illegal: and consequently, the plaintiff is entitled to the damages that he has recovered.

And you will observe, that we go only upon the warrant: which, for the reasons I have mentioned, we hold to be totally illegal.

Rule that the postea be delivered to the plaintiff.

THOMAS *versus* POWELL. Friday, 5th May, 1758. Costs upon a feigned issue ordered to be taxed. [S. C. Law of Costs, 117, 2d ed. 114. See also 1 Wils. 324.]

A feigned issue had been agreed upon, between the parties and by approbation of the Court, in order to try a corporation-right.

This feigned issue had been now tried: and it was found for the prosecutor in the original motion for the information in the nature of a quo warranto.

The question now was, (upon a motion for the direction of the Court, to the Master,) whether the prosecutor should have all his costs previous to the feigned issue: or any, and what part of them: or whether he should only have his costs from the feigned issue.

Mr. Aston and Mr. Nares, who were counsel for the plaintiff, insisted to have all the costs: viz. costs of the original application; also costs of settling the issue, (which had been disputed and squabbled about;) as well as the costs of the trial of the issue, in the common course. They cited *Rex v. Griffiths*, M. 1755, 29 G. 2, B. R. *Rex* [604] *v. Justices of Walsall*, alias *Stubbs et Al' v. Nichols et Al'*, Tr. 1755, 28 G. 2, B. R. *Herbert v. Williams*, P. 25 G. 2, B. R. *Baskerville v. Redding*, there cited. And 1 Strange, 33, *Dominus Rex v. Powel et Al'*, (which last was only to shew that an information in the nature of a quo warranto, is to be considered as a civil suit, with regard to costs).

And they said that this being of the nature of a civil suit, in the original application to the Court, was different therefore from cases where the original application was of a criminal nature, where no costs were payable by the defendant.

Mr. Morton, on behalf of the defendant, denied that any more costs ought to be

(a) In the preceding page the counsel, and also Foster and Wilmot Justices, said the Act had always been considered as general, and not tied up by the particular words of reference to that particular case of going to work; and afterwards Lord Mansfield said, he was satisfied by his brothers that it had always been taken as a general law, notwithstanding the words of reference which had struck him on the reading. Now if it be a general law, the pauper's going without a certificate could not be a reason why the case might not be considered within that Act; and it would be strange that a pauper going without a certificate should make his case better than if he went with one. The power to commit by the Act is not for any particular time, and the warrant of commitment being so, gave the defendant a right to apply it to that Act; for where there are two Acts of Parliament a prosecutor as a magistrate has a right to apply his proceeding to that which best suits his case, and as to the omission in the text, lines printed in italics, they were in favour of the pauper; and it would be odd to allow an action against a magistrate because he had omitted a circumstance of severity in the punishment, and only confined instead of confining and punishing.

here taxed, than merely those of the feigned issue; and even those, only from the time of the issue joined.

For he insisted that the original rule "to shew cause why the information should not be granted," was actually discharged, even before this feigned issue was agreed upon as a proper method of trial of the right: so that there was no pretence for the costs of that application being now included. And the disputes about the person to be made defendant in the feigned issue, were, and could not but be, prior to its being joined.\*<sup>1</sup>

Mr. Just. Denison and Mr. Just. Wilmot were clear that the costs to be taxed upon such a feigned issue, were only the costs of the feigned issue itself, and not any costs antecedent to the consent to "try the right in a feigned issue." And this was settled (as Mr. Just. Wilmot said) in the case of *Walsall*.\*<sup>2</sup>

And they both said, that it would be endless to enter into the costs previous to the feigned issue: for they would always be sure to have disputes, "which party was right, and which wrong, at first and upon the original motion."

Lord Mansfield concurred in their opinion: which he explained to mean, (and to which they assented,) "from the time when the feigned issue was first ordered and agreed to."

Note—In the present case, the costs of the disputes about settling the feigned issue, after it was agreed upon and ordered, were considered as part of the costs which were to be taxed to the plaintiff; (who had prevailed in the questions disputed, both before the Master, and before the Court.)

[605] DEARDEN, Assignee, &c. *versus* HOLDEN. 1758. Plea that a bond given to the sheriff was for ease and favour, contrary to stat. 23 Hen. 6, c. 10, is an issuable plea, within an order for time.

The question was, "whether a plea of the statute of 23 H. 6, c. 10, (against sheriffs taking bonds colore officii, &c.) and that this bond was taken for ease and favour, &c. be or be not an issuable plea, within a Judge's order giving the defendant time to plead, upon the usual terms of pleading an issuable plea, &c."

In the present case, the plaintiff had signed judgment, upon the defendant's having thus pleaded, under the usual order from a Judge, "for time to plead, on the common and usual terms:" for, the plaintiff considered this plea, as a nullity; and now insisted that it was so; and therefore that he had a right to sign judgment, without giving any rule to plead.

But the Master reported this judgment to be irregular: and to this, the Court also assented—for,

Per Cur'. This is an issuable plea: for if the plaintiff had taken issue "that the sheriff did not let the defendant go, for ease and favour," it would have brought all matters suggested in the plea, to issue.

The Judge's order does not confine the defendant to plead the general issue. The present plea is within his order: and the plaintiff might here have taken issue (as above) "that the sheriff did not let the defendant go, for ease and favour:" which would have let in all the matters in issue.

Rule "for setting aside the judgment, with costs," made absolute.

But it being suggested by the plaintiff's counsel, "that the plea was, in truth and reality, only a sham plea, put in merely to gain time;"—

Mr. Norton, on behalf of the plaintiff, moved that the defendant might plead as he would stand by.

Which being consented to on behalf of the defendant,

This also was made part of the rule.

The end of Easter term 1758, 31 Geo. II.

[\*<sup>1</sup> It is the same case as that cited in Sayer's Rep. 229.]

\*<sup>2</sup> It was so on 2d June 1755, Tr. 28 G. 2.



## [606] TRINITY TERM, 13 GEO. II. B. R. 1758.

REX *versus* JAMES CLARKE, ESQUIRE. Friday, 26th May, 1758. Lady brought up on a hab. corp. issued in vacation.

A habeas corpus had been issued during the last vacation, by Lord Mansfield, bearing teste the 8th instant, being the last day of the preceding term, directed to James Clarke, Esquire, commanding him to have before his Lordship at his chambers in Serjeant's Inn, immediately, the body of Lydia Henrietta Clarke, his daughter, then detained in his custody, together with the day and cause of her taking and detainer; then and there to undergo and receive what His Majesty's said Chief Justice should then and there consider of, concerning her in this behalf.

The writ was now returned here in Court: and the said Lydia Henrietta Clarke produced.

Mr. Clarke the young lady's father, returned that she was his daughter; and that on the 22d of March last, she, without any leave or notice to him or to his wife (her mother,) secretly went away from his house in Great Ormond-Street, and took with her a box or bundle containing several sorts of wearing apparel and about 27l. in money.

That, in about twelve or fourteen days time, he being credibly informed "that his said daughter had been inveigled away from him by the instigation of one James Mervin, a person of no visible occupation or substance, nor keeping any house; with design to marry her to one Joseph Isgrave, who is under age, and who about two years ago served the said James Clarke as a foot-boy, and is yet in no better condition: and that they were all gone together into the Isle of Thanet, where they were to get a licence for such marriage;" he being under great concern for the welfare of his said daughter, and in order to prevent the [607] said marriage, (she being intitled to a considerable fortune, after her said mother's death, and being likewise his only child,) took a journey to find them out, and (if in his power) to prevent the said intended marriage; and gave directions to his nephew Mr. Peter Starkie Floyer, to go in quest of them, and if he found them, to endeavour to prevent the marriage and to bring his said daughter to him.

That his said nephew found them out at a place called Broad Stairs, in the Isle of Thanet: where the said James Mervin represented himself as, and passed for, the uncle of his said daughter.

That the said Lydia Henrietta Clarke came home with his said nephew to his (the said James Clarke's) house in Great Ormond-Street; where she arrived the 7th of April last: and the said James Mervin came with her as far as Canterbury. But the said Joseph Isgrave run away: and the said James Mervin pretends he is gone to Holland.

That on her being thus brought home to him, he did, in the tenderest manner, represent to her the ruin she was inevitably falling into, if she pursued a design to marry a person so much inferior to herself; and who having no visible way of livelihood, must reduce her to the utmost necessity and want, as well as disgrace and shame. Whereupon, she assuring her said father "that she was not married," he, through his duty as a parent, and from the affection he bore towards her, did receive her into his house; and the mildest and best endeavours have been used, to dissuade her from such marriage; such endeavours extending no further than what he humbly conceives to be consistent with that parental care which may be used by a father towards his child: and no severity whatsoever hath been used to her.

That she hath, ever since the said 7th of April last (when she came home to his house as aforesaid) hitherto, of her own accord, continued to live and reside with him (her father) and still doth live and reside with him, at his said house, of her own accord and under no restraint whatsoever.

And there is no other cause of detaining the said L. H. C. &c.

Note—This habeas corpus was issued upon an affidavit made by the above named James Mervin; who made out a very plausible case, fully sufficient, (if true) to obtain the writ; but which was now alledged by Mr. Norton (of counsel with Mr. Clarke) to be absolutely and utterly false in fact.

[608] In it, the young lady was sworn to be of full age, (viz. about 22); which

was true : but it also alledged " that she had been hardly used, and confined by her father," and other circumstances which were false.

Note also—That although this habeas corpus directed her to be brought before Lord Mansfield at his chambers ; and although she was actually brought before him whilst he was sitting at Guildhall, on Wednesday last ; yet, the father desiring to have an opportunity to take the advice of counsel, in settling the return ; and the young lady declaring publicly, " she had no objection to continue with her father, who had always used her with great tenderness, and much better than she deserved ; " his Lordship judged it proper to adjourn it, and direct her to be brought into Court the first day of term ; the rather too, that she might have a chance of being better advised : for, if she had been then taken from her father, it was plain she would have pursued her improvident design ; and Mervin appeared at Guildhall, ready to have carried her off. She was now brought into Court by virtue of the same writ, which was returnable before his Lordship, at his chambers immediatè.

Lord Mansfield now only asked her, " whether she desired to continue with her father, or to go elsewhere." She answered—" To continue with her father."

Upon which, the Court told her, she was at liberty to go. Which she accordingly did.

Then Mr. Norton moved that Mervin's affidavits might be filed, (together with the return of the writ ; ) as Mr. Clarke was determined to prosecute him for perjury.

The Court ordered it to be so ; and recommended the prosecution very strongly to Mr. Clarke.

[609] WILFORD *versus* BERKELEY. Saturday, 27th May, 1758. Verdict in crim. con. not to be set aside for excessive damages. [S. C. Law of Durn. 217. See also 4 Dam. 653.]

Mr. Morton, on behalf of the defendant, moved for a new trial, for excessiveness of damages. It was an action for criminal conversation with the plaintiff's wife : and the jury (a special one) had given 500l. damages. The defendant was a clerk in the Exchequer, during pleasure, at a salary of 50l. a year, only : which was his whole substance.

The Court were, all \* three, clear and unanimous, that although there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, in cases where the quantum of the damage really suffered by the plaintiff could be apparent, or they were of such a nature that the Court could properly judge of the degree of the injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury ; yet the case was very different, where it depended upon circumstances which were properly and solely under the cognizance of the jury, and were fit to be submitted to their decision and estimate. And they held the case of criminal conversation with another man's wife to be of this latter kind. For, the injury suffered by the husband, and the estimate of the damages to be assessed, must, in their nature, depend entirely upon circumstances, which it was strictly and properly the province of the jury to judge of : and in the present case, the Court could not say that 500l. was too much ; or that 50l. would have been too little.

Note the case of *Chem v. Brigg*, M. 6 G. 1, B. R. : before Ld. Ch. J. Pratt, was exactly similar to this ; and the very same sum of 500l. was given : and the like motion was rejected then, upon the same principles as the Court have now rejected the present one.

Motion denied.

REX *versus* LITTLE. Saturday, 23d June, 1758. Single act of selling does not constitute a man a hawker as that he ought to take out a licence. [See 1 Durn. 251.]

In the Crown paper.

This was a conviction, returned to a certiorari directed to William Bailye, Esq. a justice of peace for the City and county of Litchfield, for offering to sell goods, &c.

\* Mr. Just. Foster was absent.

as a hawker and pedlar, without licence, contrary to the statute in that case made and provided.

It was dated 24th October, 31 G. 2, and set forth, that one Thomas Preston, gentleman, came before the said justice (William Bailye, Esq.) and gave him information, that one Thomas Little (in the writ named) after the 24th of [610] June 1698 : that is to say upon the said 24th day of October 1757, in the parish of St. Mary in the said city and county of the said City of Litebfield, was found offering to sale silk handkerchiefs, and trading as a hawker, pedlar or petty chapman ; and that the said Thomas Little did then and there offer to sell a parcel of silk handkerchiefs ; and that he the said Thomas Little did not, although required so to do, produce any licence, as the law in that case made and provided directs, to qualify him for his said trading : and the said Thomas Preston then and there prayed that he the said Thomas Little might be thereof convicted according to the form of the statute in such case made and provided. Whereupon, the said Thomas Little being brought before me, and being then and there present, and having heard the said information read, and being charged therewith, he the said Thomas Little is then and there asked by me the said William Bailye, "if he hath any thing to say, or can say any thing, why he the said Thomas Little should not be convicted of the said offence so charged upon him in form aforesaid, according to the form of the statute in such case made and provided." Whereupon he the said Thomas Little doth now here freely and voluntarily confess, before me the said William Bailye the justice aforesaid, "that he the said Thomas Little did offer to sell silk handkerchiefs to the said Thomas Preston, in such manner as is mentioned in the aforesaid information ;" and "that he hath no licence for selling thereof." And the said Thomas Little is now here required by me the said William Bailye the justice aforesaid, to produce a licence granted to him to impower or qualify him to travel or trade, pursuant to the statute in that behalf made and provided. And he the said Thomas Little doth not produce before me any such licence or any licence granted to him in that behalf. And the said Thomas Little doth not pretend or alledge that he is the real worker or maker of the said goods, or the child, apprentice, agent, or servant of or to any such worker or maker ; nor doth alledge any other matter in his defence.

Whereupon, and upon due and full consideration by me had, of and upon the said matters and premises, I do adjudge that the said Tho. Little is a hawker, within the true intent and meaning of the statute in such case made and provided : and it manifestly appeareth to me the said justice "that the said Tho. Little is guilty of the offence in the said information above laid to his [611] charge, in manner and form as by the said information is above alledged ;"

Therefore it is considered and adjudged by me the said justice that the said Tho. Little be, and he is convicted by me of the said premises in the said information specified above laid to his charge, according to the form of the statute in that case made and provided ; and that the said Tho. Little forfeit the sum of 12l. for his said offence ; to be levied and paid according to the form of the statute in that case made and provided. In witness, &c.

WILLIAM BAILYE (L.S.).

V. 8, 9 W. 3, c. 25 § 1, 2, 3, and 9, 10 W. 3, c. 27, § 1, 2, 3, and 12 W. 3, c. 11. V. also 3, 4 Ann. c. 4, § 1, 4, for continuing these duties : which refers to the description in the former Acts.

Mr. Yates, on behalf of the defendant, took two exceptions—

1st. That the defendant is not brought within the description of the Acts, as going from town to town, &c. and travelling, &c. but he is only generally described to be a person that traded as a hawker and pedlar, and offered to sell a parcel of silk handkerchiefs to the informer.

2d exception. That there is no evidence at all of his guilt. For, it is a conviction upon a confession ; and the confession extends no further than barely to the simple fact of offering to sale silk handkerchiefs to the said T. Preston in such manner as is charged upon him : but that charge is an insufficient one.

First—he cited 1 Strange, 497, 498, *Rex v. Sparling*. A conviction for profane cursing and swearing was held bad, for not specifying the oaths and curses : for, the Court, not the witness, were to judge of their being profane. So here, the Court, not the witness, are to be the judges whether he was a hawker, pedlar or petty chapman, within the description of the Acts of Parliament.

So in the case of *Colebourne v. Stockdale* there cited and reported in 1 Strange, 493 ;



civil action of debt on bond: and plea "that part of the money was won by "gaming, contrary to the statute;"—it was adjudged that the game played at, ought to be mentioned in the plea: for, it is matter of law, and not barely evidence. So, in convictions for killing game, not being qualified, the want of the due qualifications must be negatively specified. And he cited the case of *Rex v. Chapman*, 30th April 1755; a conviction on 43 Eliz. c. 7, for robbing an orchard; "the said robbing not being felony, by the laws [612] of this realm:" this was holden not to be a sufficient charge for the Court to judge upon. *Rex v. Burnaby*, 2 Ld. Raym. 900, 901, was a conviction on the same Act of Parliament of 43 Eliz. c. 7, for cutting down trees, without mentioning the number: and it was holden insufficient; and laid down as a rule, "that convictions ought to be certain and are always taken strictly."

Second exception. All the evidence to support this conviction is the confession of the party: and that is only "that he did offer to sell silk handkerchiefs to the said Thomas Preston in the manner charged upon him in the information." But it does not appear by the preceding charge, "that he was a hawker, pedlar or petty chapman," such as is described by the Acts of Parliament: and if not, he cannot be liable to this penalty.

Mr. Luke Robinson for the conviction.

This question depends, and the conviction is founded, upon the following Acts of Parliament; 8, 9 W. 3, c. 25; 9, 10 W. 3, c. 27 (which is in the very same words, and is now in force), and 3, 4 Ann. c. 4, § 4, pa. 116.

And 1st. The defendant is sufficiently brought within the description of these Acts. The selling silk handkerchiefs is only one overt act of his trading, which is specified by the conviction. And the justice of peace is to judge whether the person is or is not a hawker or pedlar or petty chapman. And he has adjudged him to be a hawker within the true intent and meaning of the Act of Parliament.

2dly. The defendant has confessed the charge, as laid; and that he had no licence, &c. If he had any defence, he ought to have made it, before the justice.

And these convictions upon the revenue-laws ought not to be taken so strictly as others. For which, he cited what is laid down in 1 Ld. Raym. 581, *Rex v. Chandler*. Per Holt Ch. J. "that the justices are not confined to legal forms, in these cases: it is enough to pursue the intent of the Act."

And the Court will presume the conviction to be right, unless the contrary appears upon the face of it. And so is 1 Str. 608, *Rex v. Theed*: where the Court presumed that the officer came by day, and not by night; because no such thing as coming in the night was apparent upon the face of the conviction.

[613] He said that Mr. Yates's cases are not ad idem. In game-convictions it is not necessary to set out negatively, "that he had not such and such qualities;" nor is it necessary to set out the particular oaths and curses, in convictions for profane cursing and swearing; nor in *Chapman's case*, was it necessary to set out that it was not felony by law.

Mr. Yates, in reply.

1st. Urged the necessity and reasonableness of specifying the act of trading, &c. in the conviction. But this man was not, in fact, within the definition of going from town to town, and travelling; for he resided at a fixed place.

In game-convictions, it is necessary to specify negatively and particularly, "that the defendant was not so and so qualified."

Mr. Just. Denison—That has been so settled.

Mr. Yates proceeded in his reply.

2dly. The confession is only "that he did offer to sell handkerchiefs, &c." Not "that he traded as a hawker, pedlar or petty chapman."

Lord Mansfield—The Act of 3, 4 Ann. refers to the descriptions in those of W. 3.

A single act of selling a parcel of silk handkerchiefs to a particular person, is not a proof that he was such a hawker, pedlar or petty chapman, as ought to take out a licence, by virtue of these Acts of Parliament.

Now it is certainly of the essence of the crime "of not producing a licence," that he must be such a person as ought to take out a licence.

And the confession is only of the fact, \* "that he sold the handkerchiefs to Thomas Preston:" not "that he traded as a hawker, &c."

\* V. post, 2279. *Rex v. Uriah Corden*, Hil. 1769, accord. [4 Burr. 2281.]

Convictions ought to be taken strictly: and it is reasonable that they should be so; because they must be taken to be true, against the defendant; and therefore ought to be construed with strictness. I do not say that it is necessary to define exactly, what a hawker, pedlar or petty chapman is; but it is necessary to alledge and shew that he sold the goods, or traded, as one.

[614] Mr. Just. Denison concurred, for the same reasons: and thought the material averment to be here wanting; it not being averred "that he was such a hawker, pedlar, or petty chapman, as ought to take out a licence."

And he mentioned a case of *Rex v. Gardiner*, Tr. 1738, 11, 12 G. 2, B. R. Where the justice convicted a man of keeping a gun, being an instrument to destroy game. And so it certainly was: but, in fact, the man had never used it as such: but only to keep pigeons off from his grounds. And the conviction was quashed.

Mr. Just. Wilmot concurred clearly, for the same reasons. For, certainly a man may sell goods, as a hawker, pedlar, or petty chapman, without being such a person as is obliged to take out a licence. And if he is not obliged to take out a licence, most undoubtedly he ought not to be convicted in a penalty for not producing one.

Now, here, it appears, that the justice has convicted the man of an offence, of which he has not proved him to be guilty.

Per Cur.\* unanimously,  
Conviction quashed.

DOE, ON THE DEMISE OF HITCHINS AND ANOTHER, *versus* ——— LEWIS, ESQ.  
Tuesday, 6th June 1751. Ejectment brought by a tenant against his landlord near twenty years after the latter had obtained judgment against the tenant in a former ejectment, and executed a writ of possession, the landlord is not obliged so shew that he obtained the judgment on the usual affidavit of the service of the declaration.

This was a special case from the assizes, upon an ejectment brought by a tenant against his landlord, who had formerly obtained a judgment by default, in a former ejectment brought by him against this same tenant.

The special case stated for the opinion of the Court was as follows.

Thomas Lewis, being seised in fee, demised to John Hitchins (in consideration of a fine, &c. of £49, 13s. 6d. to hold for 99 years, if three persons should so long live: at 11l. 5s. payable at Michaelmas yearly: subject to a proviso that if the rent should be in arrear, &c. for the space of one month, being lawfully demanded: and no sufficient distress upon the premises, &c. &c. that then it should be lawful to the said Thomas Lewis, his heirs and assigns, to re-enter, &c.

[615] That John Hitchins, the lessee, entered and was possessed, &c. and then died: having first made his last will and testament, &c. whereby he devised the said term to his son Edward Hitchins (the lessor of the plaintiff), and made his wife executrix. The testator's wife, his executrix, duly proved the said will, and duly assented to the legacy: and the said devisee, Edward Hitchins, the lessor of the plaintiff, entered into the premises, and became possessed of the said term, being then and still unexpired; and continued in possession, till the 15th of April 1737.

Thomas Lewis, the original lessor, by his will, &c. devised to several trustees, &c. in trust for Morgan Lewis, an infant, &c. The said Thomas Lewis died seised, &c. and the said devisees in trust became seised, &c. And there being three years rent due and in arrear from the said Edward Hitchins for and upon the premises, a declaration in ejectment was served upon the said Edward Hitchins, under and by virtue of the statute of 4 G. 2, c. 28 (a), for the said premises, on the demise of the trustees and

\* Mr. Justice Foster was not present.

(a) Query. How does it appear that it might not be brought under the clause for re-entry in the lease independent of the Act? for it seems it might, if there was a lawful demand of the rent; for then if the rent was one month in arrear, and there was no sufficient distress, and both these last facts appeared at the trial, there was no need of the Act to support the ejectment, consequently there was no ground for presuming the ejectment to be brought pursuant to the Act.

Query also, whether that part of the Act which dispenses with the necessity of a demand, could operate in this case contrary to the stipulation of the parties? for every one may waive the benefit of a law introduced for him; and therefore the landlord

devises aforesaid; and judgment was obtained thereupon, by default, against the casual ejector: and a writ of possession issued thereupon: and possession was delivered according to the said writ, to the said trustees, on the said 15th of April 1737: which said trustees have been in possession of the premises ever since. And the said Edward Hitchins (the now lessor of the plaintiff) has not since paid nor tendered the rent in arrear or any part thereof, nor the costs; nor filed any bill for relief in equity.

On this trial of the second ejectment now brought by Edward Hitchins against the said Lewis, no affidavit was produced, "that half a year's rent was due before the first declaration in ejectment was served upon the said Edward Hitchins; and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due: and that the lessors in that first ejectment had power to re-enter."

On this trial of the said second ejectment, (viz. the ejectment brought by the said Edward Hitchins,) a verdict was found for the plaintiff; but subject to the opinion of this Court, "whether or no the plaintiff therein ought to recover."

This general question "whether Edward Hitchins the lessor of the plaintiff in the present ejectment ought to recover, or not;" depended upon the following [616] question, viz. "whether it was necessary for the defendant Mr. Lewis to produce an affidavit, that half a year's rent was due, &c. ut supra; and that the lessors in that former ejectment had power to re-enter."

Mr. Nares, who argued for the plaintiff, made two questions: viz.

1st. How far this case is within the second section of 4 G. 2, c. 28, "for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, &c."

2d question. If it is within it, then how far the plaintiff has proved his title under that statute, upon the particular circumstances of this case.

The first point may be rendered the more clear, by considering how it stood before the statute: and how since.

1st. Before that statute, the plaintiff in ejectment must have proved "that there was rent in arrear;" and "that there was no sufficient distress to be found upon the premises:" (a) and thirdly, "that he had made a lawful demand of the rent in arrear."

This condition here annexed to the lease in the present case, is in derogation of the party's own grant, and tends to defeat the estate: and therefore Mr. Lewis would have been kept strictly to prove all these previous facts. And if it had been a judgment against the casual ejector; the judgment would have been no bar against the real tenant, in an action for the mesne profits. Indeed if the judgment had been obtained against the real tenant, or against the owner of the estate, the person who obtained such a judgment needed not prove any thing over again, in an action for the mesne profits. And so the Ld. Ch. J. at Nisi Prius at Guildhall, in 2 Strange, 960, *Jefferies v. Dysom*,\* expressly lays down this distinction. And here the real tenant did not enter into the rule: but it is *res inter alios acta*.

This judgment in ejectment had therefore (before the statute) no relation to the real tenant: and consequently, Mr. Lewis must have shewn his title to re-enter.

Then, to consider the case as subsequent to the statute, here is not an acquiescence of twenty years. And what seeming acquiescence there was, arose from the poverty of the party.

[617] 2dly. The next point in question is, "whether, according to the state and circumstances of this case, it can be considered as a case within the statute; and that the plaintiff has proved a title under the statute."

The Court will not presume any thing in support of a judgment obtained by confession or default, or in any other way than upon a trial of the merits. *Skinner*, 586, *Sanders's case* is a proof of this: where Holt, Ch.J. makes the like distinction.

An inconvenience would arise from too great a latitude in construing this statute.

seems to have waived the benefit of that part of the Act which hath dispensed with a demand.

(a) This is a mistake, for it was not before the statute necessary to prove it, unless it was made part of the condition of re-entry as it was in this case; and therefore what is here said is to be understood as spoken in relation to this case only.

\* See this case stated at large, by Mr. Justice Denison, post, 619.



As in case of fraud and connivance, in recovering the judgment against the casual ejector : it would be very hard, if, in such case, the real tenant could not bring an ejectment.

Mr. Nares was now departing from the facts stated in the case ; in which he said it was omitted to be inserted, "that there was sufficient distress."

Lord Mansfield—We must judge upon the case as stated ; if it is misstated, you must apply to amend it. However, I do not see that this would be very material.

He observed that it was also stated, only, "that no affidavit was produced : " not, "that there was no affidavit at all." Also that presumptions are not dependant upon certain fixed rules ; but must be guided by circumstances : and such circumstances are proper for the consideration of a jury.

(Here was an acquiescence of twenty years within a few months. And it is stated to be a case, "within the Act of Parliament : " which is a material part of the case. The ejectment is stated to have been served "under and by virtue of this Act.")

Mr. Morton was beginning to speak on behalf of the defendant : but

Lord Mansfield told him that the case was so clear on his side of the question, that it was not necessary for him, to give himself any trouble.

Then his Lordship repeated the case exactly as it was stated : (which see ante, p. 614, 615).

The general question, "whether the plaintiff in his [618] last ejectment ought to recover," depends upon this particular question, viz. "whether the first ejectment was regularly brought and proceeded upon by the trustees under Thomas Lewis's will, pursuant to the directions specified in the Act of 4 G. 2, c. 28, § 2." This last ejectment is brought near twenty years after the former.

Now, besides the general presumption "that the proceedings were regular, and omnia solemniter acta, unless something had appeared to the contrary ;" and the rule, "that stabitur presumptioni, donec probetur in contrarium ;" here is, in this case, a decisive fact stated : which fact is "that the proceeding under the first ejectment was under and by virtue of this Act of Parliament."

Indeed Edward Hitchins was in possession, as appears by the case stated, till the 15th April, 1737, the time when possession was delivered (by virtue of the writ of possession) to the trustees. So that, being the tenant in possession, he must have been served with the declaration in ejectment, whether it was a common law proceeding, or a proceeding upon this Act of 24 G. 2.

But the case itself states it to have been a proceeding under this Act : and if it was so, the judgment must have been founded upon such an affidavit as that Act expressly directs and requires, viz. an affidavit "that half a year's rent was due, before the declaration in ejectment was served ; and that no sufficient distress was to be found upon the demised premises, countervailing the arrears then due ; and that the lessors in that ejectment had power to re-enter."

And the case does not state, affirmatively, "that the judgment was irregular ; or, expressly and implicitly, that there was no affidavit at all ;" or indeed any thing whatsoever, to take off a presumption which is immensely strong the other way. For, Edward Hitchins acquiesced under this judgment, execution and possession, for almost twenty years, and never tendered the rent and arrears, together with costs (pursuant to the Act ; ) nor filed any bill for relief in equity, within six months after the execution executed, nor indeed at any subsequent time. So that he is barred by the statute, and foreclosed from all relief or remedy in law or equity, other than by writ of error ; and the landlord is by virtue of the Act of Parliament to hold the premises discharged from the lease ; upon supposition that his former proceedings were regular.

[619] The affidavit may be lost after this length of time ; or the landlord may be unable to come at it ; although there were, in fact, a proper one made, to support his judgment and execution : and it would be too hard to put the labouring oar upon the landlord, of proving the regularity of all the circumstances upon which his judgment and execution were founded.

As to what has been suggested (v. ante, 617,) "that there may be fraud, connivance or collusion with the under-tenant, in the manner of recovering judgment against the casual ejector ;" it is merely imaginary, in the present case. Besides, fraud will infect every thing : and upon the principles of *Fermor's case*, 3 Co. 77, it would not stand.

There can be no suspicion of any such thing here. For, this Edward Hitchins, the present lessor of the plaintiff, the person who has thus long acquiesced under this judgment and execution, and never attempted to be relieved from it either at law or in equity, is himself the very man upon whom the declaration in the first ejectment was served.

The true end and professed intention of this Act of Parliament was to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession, (from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity,) and to limit and confine the tenant to six calendar months after execution executed, for his doing this; or else, that the landlord should from thenceforth hold the demised premises discharged from the lease.

His Lordship was therefore clearly of opinion "that, in this case, the plaintiff ought not to recover."

Mr. Just. Denison concurred in opinion "that the plaintiff had no title to recover."

The former ejectment brought by the landlord against Edward Hitchins the tenant, who is now become lessor of the plaintiff in the present ejectment, is stated to have been served upon Hitchins "under and by virtue of this Act of 4 G. 2, c. 28." Now this Act (v. § 2) expressly recites "that great inconveniences frequently happen to landlords, in cases of re-entry for non-payment of rent, from the many niceties attending re-entries at common law; and that expences and delay often happen from injunctions out of equity, after judgment in ejectment:" and the [620] Act is professedly made in order to prevent these inconveniences. It prescribes a method of proceeding, in two cases or manners of recovering upon the proceeding in ejectment which it directs; viz. one, in case of judgment against the casual ejector; the other in case of its coming to a trial. In the former case of judgment against the casual ejector, (and so also upon nonsuit on not confessing lease, entry and ouster,) it directs "that it shall be made to appear to the Court where the suit is depending, by affidavit, that half a year's rent was due before the declaration was served; and that no sufficient distress was to be made upon the premises, countervailing the arrears then due; and that the lessor or lessors in ejectment had power to re-enter:" in the latter case, (of its coming to a trial,) the same thing must be proved upon the trial.

The present question is upon a judgment of the former kind, viz. against the casual ejector, by default; and upon an ejectment brought under and by virtue of this Act. And we must take and presume it to be a right, regular, and good one; as nothing appears to the contrary.

This case is not at all like the cited case of *Jefferies v. Dyson*, 2 Strange 960. Where, "in an action for mesne profits, the plaintiff offered a recovery in ejectment against the casual ejector; upon which no writ of possession had issued: and when the defendant would have gone into the title, the plaintiff insisted that he was estopped from doing so, by the judgment against the casual ejector." But the Ch. Justice held "that though it would have been an estoppel, if the then defendant had been made a defendant in the ejectment, and the verdict against him; yet that that judgment to which he was no party could be no estoppel to him:" and therefore the Ch. Just. admitted the defendant to controvert the title. And that distinction is right, there: but it is not like the present case.

I am of opinion, the plaintiff here has no title.

Mr. Just. Foster was of the same opinion.

The judgment is certainly good, till set aside. The present objection, "of the not producing such an affidavit," is grounded upon the Act of 4 G. 2, c. 28. And that Act does require such an affidavit: and for that very reason, we must presume "that there was such a one made; and that the judgment was founded upon it." But the plaintiff in that ejectment has it not: it remains in Mr. Cowper's office.

[621] Clearly, the plaintiff has no title.

Mr. Just. Wilmot also concurred.

He said it would be unreasonable that the now plaintiff should recover from the landlord, after almost twenty years acquiescence; and after the landlord may have improved the estate.

He also agreed to the case of *Jefferies v. Dyson*; but denied it to hold in this case.

This Act was made to compel lessees to bring their ejectment, or their bill in equity, within a limited time. And this is stated to be a proceeding "under and by virtue of that Act." Therefore there must have been such an affidavit, though the present defendant did not produce it.

Per Cur. unanimously,

Judgment for the defendant.

[622] *REX versus INHABITANTS OF PAINSWICK.* Wednesday, 7th June, 1758.

See this case at large, in the quarto-edition of my *Settlement-Cases*, No. 148' pa. 465.

*COTTINGHAM versus KING.* Friday, 9th June, 1758. Ejectment, in Ireland affirmed upon a writ of error here.

Pasch. 31 G. 2, Rot'lo 179.

This was a writ of error brought upon a judgment of the Court of King's Bench in Ireland; who had affirmed a judgment in ejectment given for the plaintiff by the Court of Common Pleas there, after a general verdict for the plaintiff.

In this ejectment, the parcels are described to be (amongst others therein mentioned and included) 5000 messuages, 5000 cottages, 10,000 acres of land, &c. in all those the lordships, manors, and late dissolved abbey or monastery of Boyle and Insemaeranaw; and [624] quarter of land of Tallagh, with the town and tenement of Boyle, and fairs and markets thereunto belonging, in the county of Roscommon; and all those the lands and hereditaments called Grangemore, (with many other parcels, described by the name of quarters, some containing so many, others so many acres;) and part of Sumternat, &c. a large deer-park, &c. and the parsonage of Longford, &c. in the county of Roscommon; and a small park or field, in the possession of, &c.

On this ejectment, there had been (as is above mentioned) a general verdict for the lessor of the plaintiff: and judgment for him in C. B. in Ireland. And afterwards, a writ of error was brought upon it, in B. R. in Ireland: and general errors were assigned. The Court of B. R. in Ireland affirmed the judgment of the Court of C. B. there. And upon this judgment of affirmance, the present writ of error was brought.

Many exceptions had been taken in Ireland, on the part of the plaintiff in error, upon the writ of error brought in the King's Bench there. But

Mr. Ashurst, who argued for the plaintiff in error here, said he would now only take exception to the uncertainty of the description of the premises specified in the declaration: whereas, in ejectment there ought to be a sufficient certainty; that the sheriff may know how to deliver possession. 1 Brownlow, 142, *Challener v. Thomas*: "an ejectment will not lie, de aquæ cursu." 1 Ld. Raym. 277, *Shalmer v. Pulteney*, seems to concede that an ejectment will not lie "de quodam ædificio;" for the uncertainty of the term ædificium. In Style, 30, it was doubted whether an ejectment lies "de unocrofto." Dyer, 84 b. in assize "de quodam portione decimarum, &c." It was objected that the plaint was uncertain.

This is an entire judgment, and entire damages: and it is particularly liable to exception, in the following instances; viz.

1st. No vill at all is mentioned throughout the whole declaration: the lands, &c. are only described to lie (generally) "in the county of Roscommon:" this defect runs through the whole declaration.—Cro. Eliz. 822, *Gray v. Chapman*, is in point; and by the whole Court: "the declaration in ejectment was holden ill, for not alledging in what vill the tenements were." Hob. 89, *Rich v. Shere*, is most expressly in point: and the judgment was, for this very cause, reversed in Camm' Scacc' 2 Barnes, 150, *Goodright, on the demise of Griffin v. Fawson*: the judgment was arrested for the same uncertainty, [625] "in which of two parishes the messuage stood."

2d. The words are—"with the town and tenement, of Boyle and fairs and markets thereunto belonging." Now ejectment will not lie for a town; nor for a tenement, generally. 1 Sid. 295, *Birbury v. Yeomans*: ejectment "de 7 messuagiis sive tenementis," was holden ill, after a general verdict. Cro. Eliz. 186, *Wood v. Payne* was



the same determination, in an ejectment "de uno messuagio, sive tenemento." 1 Lord Raym. 191, *Copleston v. Piper*: the two Powells justices said, and Treby Ch.J. agreed, that ejectment "de uno tenemento" is ill, for the uncertainty. 2 Strange 834, *Goodtitle v. Walton*:—after verdict for the plaintiff in ejectment, judgment was arrested; and it was holden that an ejectment "de uno tenemento" will not lie. 1 Barnes 117, *Makepeace v. Hopwood*; judgment in ejectment was arrested for the uncertainty of the words "one messuage or tenement."

3d. "A quarter" is another term used in the declaration: which term is totally uncertain; and even appears to consist of different numbers of acres; some, more; some, less. Yelv. 117, *St. John v. Commyn*:—ejectment "de castro villa et terris de Kilbrough in com' &c." was holden insufficient for want of expressing the number and certainty of acres. And that case is like the present; which is "the lands called, &c.:" but they are described by the name of "one quarter, &c.," which term does not convey an idea of any determinate number of acres.

4th. It is of "part of S. M. & D.:" which is absolutely uncertain and vague.

5th. And of "a large deer-park in the county of Roscommon:" which is vastly too uncertain and indeterminate.

6th. "Of a small park or field, in the possession of, &c. not specifying where." 11 Co. 55, *Edward Savel's case*: ejectment of "a close called Dove-cote Close, containing three acres." The judgment was arrested, for not specifying what nature and quality the three acres were of. 1 Shower, 338, *Knight v. Simmes*: ejectment of "five closes of pastures and meadow, called Faldowne, containing ten acres:" But did not distinguish how many of one and how many of the other. Judgment was arrested, after a verdict for the plaintiff; for want of sufficient certainty. 1 Salk. 254, S. C. And Holt Ch.J. is there said to have affirmed *Savel's case* for law.

7th. The quantity and quality of the lands is not sufficiently shewn.

Therefore for these exceptions, he prayed to reverse the judgment of the Court of King's Bench in Ireland.

Mr. Williams, who argued for Sir Edward King, the defendant in error, said that the merits of the title to this estate (an estate of 8000l. per ann.) came in question in C. B. in Ireland; where Lord Kingsborough's pretended will was found to be a forgery: and the Court of King's Bench there affirmed the judgment of C. B. there. And being after a verdict upon the merits, the Court here will presume what they can in favour of the judgment.

And as to the exceptions—

1st. "5000 messuages, 5000 cottages, &c. &c. in the lordships and manors of, &c. late belonging to the dissolved abbey or monastery of, &c. in the county of R." is sufficient without naming any vill. For a manor is as notorious in its boundaries, as a parish: so also is a lordship.

The "parish of A. or B." has been holden sufficient. For proof of which, he cited a case (which does not perhaps quite prove it;) viz. 3 Lev. 334, *Goodwin v. Blackman*; which was an ejectment of lands in K. & G. whereas the whole lay in K.

And after a verdict, this manor shall be intended to be a vill. "Parish" shall be intended to be a vill, prima facie, 2 Salkeld 501, *Rudd v. Moreton*:—It is said to have been so adjudged in the case of *Wilson v. Laws*, in M. 6 W. 3.

And if a place be named generally, that place shall be taken to be and intended a vill—This was adjudged, (as is also said in 2 Salk. 501) in the case of *Vinckelston v. Edden*, M. 10 W. 3, B. R.

2dly. As to ejectment not lying for a town, or for a tenement.

After a verdict, the Court will intend the lands to be parcel of the township, and they shall pass with it. And to support this position, he cited Cro. Car. 168, *Gennings v. Lake*: where the Court conceived that the land might be said to be appendant to the house. 3 Keble, 44, *Smith v. Martyn*; where a garden was allowed to be demisable, as parcel of a messuage. *Doe, ex dimi Saville v. Borlace et Al* determined in the House of Lords (on a judgment in the Exchequer) 11 March 1735: (which he cited from the respondent's case, upon the 4th exception,) "that the advowson and common should be intended to have been appendant to the manor." So here, the lands [627] may pass as appendant or belonging to the township; though not alleged to be part of it. So, "communia pasturæ" generally, shall, after verdict, be intended to be such common, for which an ejectment will lie, as common appendant or appurtenant. 1 Strange, 54, *Newman v. Holdmyfast* is expressly so

determined. And an ejectment will lie for a town; and also for a tenement, where it is reduced to a certainty.

Most of Mr. Ashhurst's cases are in the disjunctive: "messuages or tenements." However, here the word "vocato" renders it certain enough. 1 Lev. 65, *Lady Dacre's case*: Twysden said that though an ejectment will not lie of a croft; yet it will lie of a croft called "Black Acre." 1 Siderf. 295, *Burbury v. Yeomans*; he repeats the same assertion. And in both places, he gives the reason: viz. "that this renders it certain." And here, "it is the town and tenement of Boyle;" which appellation of it by its name, ascertains it sufficiently. And this is agreeable to what is said in 3 Mod. 238, *Hexam v. Coniers*: "that the adding vocat. the Black Swan, to the words messuagium sive tenementum, makes it certain that the tenement intended is a house."

And the old rule about the sheriff's being necessarily to be informed so exactly upon the record, "what he is to deliver possession of," is now out of use, and is not to be regarded. For the plaintiff in ejectment is to take possession, at his peril, according to his own shewing. Savile, 28, case 67, *Queen v. Ayleworth*; Manwood, Chief Baron, expressly declares this; and says "it was the opinion of the Chief Justices in the Star-Chamber." 1 Strange, 695, *Sullivan v. Segrave*—an ejectment "de parte domûs," was holden sufficient, upon the same principle. 2 Ld. Raym. 1470, *Bindover v. Sindercomb*: an ejectment of "part of a mote, parcella aræ, parcella pomarij, &c." was holden good, upon error, after verdict. 2 Ld. Raym. 789, *Camell v. Clavering*: an ejectment was brought in the Exchequer, "de minutis decimis:" and, after verdict and motion in arrest of judgment, judgment was given for the plaintiff, by all the Barons. 1 Salk. 255, *Whittingham v. Andrews*: ejectment "de mineris carbonum," (generally,) without shewing the number of mines, was holden good, in Durham, where the course was so, and of which the Court took notice. And so the Court will take notice of the kingdom where this ejectment was brought: and \*<sup>1</sup> eight of the Judges there have determined this to be a sufficient description, in that country; and this Court will give credit to them. 2 Keb. 745,† *Jane v. Polyxphen*; the Court conceived an ejectment brought in Ireland, of "twenty villis et terris," to be good. Cro. Car. 511, *Mulcarray et Al' v. Eyres et Al'*; an ejectment in Ireland, "of 100 acres of bogge, in villis et territoris de D. S. & V." was holden good. 1 Strange, 71, *Ld. Kildare [628] v. Fisher*. An ejectment "of 100 acres of mountain," was held good in Ireland. And this last mentioned case was a solemn and unanimous judgment, after consulting the Lord Chancellor and Judges of Ireland.

3dly, as to the term "quarter"—The case cited from \*<sup>2</sup> Yelv. 117, is not the determination of the Court: nor was that the point before them. And "a quarter" is a known description in Ireland: every child knows them. That country was divided into quarters, when Ld. Strafford was Lord Lieutenant there.

As to the 4th, 5th and 6th objections, his answer was, that they all belong to the township: and besides, they may be the names of the closes.

7thly. And as to the last objection—he insisted that that quantity and quality of the lands are sufficiently set forth: and then answered the cases cited on the other side. As to *Savel's case*—that case was doubted in Ld. Raymond's time; and has been since disallowed, or at least called in question. V. 2 Ld. Raym. 1472, *Bindover v. Sindercombe*. Comberb. 198, 199, *Knight and Symms*; per Eyres Just.—The latter opinions are against *Savel's case*; though the Chief Justice indeed there says "that an ejectment ought to be as certain as a præcipe quod reddat."

Mr. Ashhurst, in reply—I know nothing of the merits of this case: I am only to argue upon the record.

2d exception. These premises cannot possibly be intended to lie within the township of Boyle; they are only described generally to be within the county of Roscommon. I say that an ejectment will not lie of the town and tenement itself: therefore, consequently, neither will it, of these premises as belonging thereto.

Possession must be delivered at the peril of the sheriff, as well as of the plaintiff. "De parte domûs" is much less uncertain, than an undefined part of a great estate.

\*<sup>1</sup> So he said, but they could not, in Ireland, be so many as eight. [It should be six.]

† This case was adjourned.

\*<sup>2</sup> It is reported to be per Curiam; and with a nota bene, too.



I agree that if the description be known in Ireland it is enough. But I say that this description is every where uncertain.

3d exception. In Yelv. 117, the point for which it is cited, is taken † also into consideration, as well as the principal objection.

Lord Mansfield—This is after a trial and verdict in C. B. in Ireland: and the objection is, the uncertainty of the claim or description of the premises in the declaration.

[629] In a præcipe in a real action, which is a formed writ, precision is requisite: because it was necessary to follow the form prescribed by the register.

Whilst ejectments were compared to real actions, and arguments were drawn from analogy with them, they must be, of course, fettered; and this was so, till after the reign of King James the First. But of later times, an ejectment has been considered with more latitude; as a fictitious action to try titles with more ease and dispatch, and less expence.

Even in a præcipe, I do not know whether the sheriff could always be quite certain, which were the particular acres, &c. of which he was to deliver possession. But in this fictitious action, the plaintiff is to shew the sheriff; and is to take possession at his peril, of only what he has title to: if he takes more than he has recovered and shewn title to, the Court will, in a summary way, set it right. So that such a very exact description is not equally necessary in this action, as in a præcipe.

However, there are in this case, (as it is particularly circumstanced,) two things, which carry it much farther than the general case of ejectments, and are decisive: for it is after verdict \* and it is from Ireland. The title has been tried by a jury of Ireland, where the lands lie; evidence has been given to them, upon which they have found for the plaintiff; and two Courts there have given judgment for the plaintiff, without difficulty.

The denominations of land may be certain and known there; though unknown here: for words and names are arbitrary. Ejectments have been brought there, of mountain, of bogg; nay of mountain in a bogg: and a certificate has been given by Judges of Ireland, that the term "mountain" does not necessarily include situation, but describes quality; that fines, recoveries, writs of dower, and settlements of it, are frequent there; and ejectments usually brought of it.

And there, it is frequent to describe the lands of great estates, even in their settlements, by "towns:" I know this, of my own knowledge.

Ireland was planted and settled by degrees, both formerly and lately; and towns came, by degrees, to be known and certain descriptions: and so, "quarters" might be, after Cromwell's settlements there, and the division of it into quarters, "town and tenement," are here used as synonymous terms.

[630] However, the jury of that country understood it; and the two Courts of that country understood it, and have made no difficulty about it: and therefore I am sure I will not, after this, say "that it is not to be understood."

Mr. Just. Denison was of the same opinion "that the judgment ought to be affirmed:" and he held the descriptions to be sufficient.

In a præcipe quod reddat, it was necessary to describe the lands formally, once: but it is not so, in an ejectment.

I take this present ejectment to contain, first, a general description, which takes in the whole: and afterwards, the estate demanded in it, is described particularly and in parcels, "what it consists of." This was settled in the case that has been mentioned, *Doe ex dimiss. Savill v. Borlace*, Tr. 9 G. 2, in Cam' Scacc.; (which I argued). It was after a verdict; and was an ejectment for tithes of various kinds: and two things were there holden: 1st, that being after verdict, it was to be intended as brought of such tithes only for which an ejectment would lie; and 2dly, that there was no objection to a bis petitem in an ejectment. And so here, I take it that this manner of describing the premises is a bis petitem, a second description of the same thing.

And as to the cases that have been urged in support of the objections—there has been a greater latitude of late years, than formerly: whatever strictness was used at first, it is certain that ejectments are now considered upon a more liberal foot.

† Not directly and principally, indeed; but positively and explicitly.

[\* This is nothing, for the Judge at Nisi Prius if the objection were taken would answer it is on the record.]



"Town" appears, by what has been said, to be a common and known description in Ireland. "Mountain" also appears to be a known description there; and fines, recoveries, writs of dower, ejectments and settlements use it as such. In the case of *Ld. Kildare v. Fisher*, the case of *Holbourn v. Babington* in Dom' Proc' is said to have been reversed upon another point: and they gave credit, in that case of *Ld. Kildare v. Fisher*, to the certificate of the Irish Chancellor and Judges.

And "quarter" may be a term as well known in Ireland as "mountain" is: and in this case, I shall intend it to be so.

Mr. Just. Foster concurred, for the same reasons.

So also did Mr. Just. Wilmot. And he added that he never could understand that manner of reasoning, so often urged upon arguments of this sort, viz. "that the description must necessarily be so certain that the sheriff [631] may be able exactly to know, without any information from the plaintiff, of what to give possession:" which is not true; for such precision is not necessary in an ejectment.

After verdict, this description must be intended to be sufficient.

Per Cur. unanimously,

Judgment affirmed.

REX versus EARL FERRERS. Saturday, 10th June 1758. Peers must yield obedience to writs of habeas corpus.

On Wednesday 26th January 1757, Mr. Norton moved, either for an attachment against the earl, for not returning a habeas corpus already issued, and returnable immediately, commanding him to bring up the body of his countess (sister to Sir William Meredith; ) or for a new habeas corpus, accompanied with an attachment.

He said that the latter had been done in the case of *Rex v. Dr. Wright*, M. 5 G. 2, B. R. and that the reason of issuing the attachment at the same time with the habeas corpus, was, for prevention of a delay which might, in certain cases, render the remedy ineffectual.\*1

Lord Mansfield asked Mr. Norton, whether he knew any instance of an attachment accompanying a writ. He said he understood an attachment going, for not having obeyed a writ: but did not know any instance of an attachment going out together with the writ.

Mr. Norton stated *Wright's case*, from a note taken by a gentleman who has now left the Bar; † where Lee, then a puisne Judge, held it might be done: though, in that case, Wright did afterwards return the writ in Court.

Note—In the present case, Mr. Justice Foster had granted a habeas corpus: which was served on the earl, by Sir William Meredith. But Sir William at length agreed not to prosecute it; on condition that his Lordship should carry Lady Ferrers to Bath; which the earl promised, but had not performed.

Mr. Norton said he would take nothing by his motion. And

Mr. Clayton moved for a new writ, returnable in Court immediately, which was granted.

[632] Lord Ferrers neglecting likewise to obey this second writ of habeas corpus, the counsel for Sir William Meredith, (on behalf of his sister) intended on Tuesday the 8th of February 1757, to have moved for an attachment against Lord Ferrers, for this his disobedience: but some doubts and difficulties having been started by members of both Houses, concerning the privilege of peerage; and "whether the Court of King's Bench could issue an attachment against a peer during the sitting of Parliament, and execute it upon him, only for a \*2 contempt to their Court." Sir William Meredith judged it prudent to petition the House of Lords, for their leave to proceed against the earl; and accordingly, did yesterday, (by the hands of the Earl of

\*1 The case was not at all, as cited. See it in 2 Strange, 915. [See also, Chand. Deb. in H. of C. 1 vol. 94. 12 Som. Tr. 274. Fitz. N. B. 275. 16 Vin. 290.]

† The note here relied upon was erroneous.

\*2 See Bacon's New Abridgment of the Law, vol. 3, fo. 5, title Habeas Corpus, *Lord Leigh's case*, in point; and fo. 6, express, "that an attachment may be granted, if the peer refuses obedience to the writ; for, being a contempt, a peer has no privilege."

Westmoreland,) deliver such a petition, stating the facts. Lord Delaware opposed it; and said, it was too summary and hasty a method of determining upon their privileges; and proposed referring the matter to a committee, and summoning Lord Ferrers to answer it in his place: and to obviate the objections which might be made to this method on account of the delay, he offered some schemes for the intermediate safety of the countess. But Lord Mansfield answered him, and spoke in support of the jurisdiction of his Court, and the unreasonableness, injustice, and inconvenience of allowing such a privilege in criminal cases and breaches of the peace. The Duke of Argyle then spoke to the like effect, and expressed a surprise that there should be any doubt about it; the reason of the thing being so clear and plain. Lastly, the Earl of Hardwicke spoke strongly and particularly in support of the same doctrine, and adduced many instances and precedents in proof of his position: and concluded with proposing, that, to put an end to all doubt about it for the future, the Lords should come to a resolution; and accordingly they did come to the following resolution or declaration, and ordered it to be entered on their journal; viz. "7 Februarij 1757. It is ordered and declared, that no Peer or Lord of Parliament hath privilege against being compelled by process of the Courts of Westminster-Hall, to pay obedience to a writ of habeas corpus directed to him."

(And it was afterwards, viz. "Die Mercurij 8 Junij 1757, ordered and declared by the Lords Spiritual and Temporal in Parliament assembled, that no Peer or Lord of Parliament hath privilege of peerage or of Parliament, against being compelled by process of the Courts in Westminster-Hall to pay obedience to a writ of habeas corpus directed to him." And it was then and thereby further ordered, "that this order and declaration be entered upon the roll of the Standing Orders of this House.") (a)

[633] On the 8th of February 1757, Mr. Norton renewed his motion for an attachment against the earl: and he produced affidavits of his Lordship's disobedience to the writ, and continuing his ill usage of his lady.

All the affidavits (quite from the beginning of this affair) were read.

Lord Mansfield—This is a habeas corpus at common law; which is a prerogative writ, for the liberty of the subject. The Court may enforce speedy obedience to it: and the circumstances of this case (where delay may be very dangerous) require it. It is reasonable that the lady should have opportunity of laying her case before the Court; and swearing the peace, if she thinks proper, in order to obtain the protection of the Court. The end of this course that we now take, in issuing an attachment to enforce obedience to the writ, is to have this lady produced for this purpose.

And therefore we think, under the \* extraordinary circumstances of this case, an attachment should issue; to enforce obedience to this writ of habeas corpus, which so much affects the preservation and security of this lady.

But at the same time, his Lordship intimated to them, not to execute it at all, if it was possible to obtain the end of their application by any gentler or other means: the end and intention of granting it, being only to have the lady immediately brought up.

Mr. Just. Denison (the only other Judge in Court) only said "that an attachment ought to go."

Ordered that a writ of attachment issue against the right Honourable Laurence Earl Ferrers.

In consequence whereof, the earl having been served with the writ (or at least having had it notified to him) by the under-sheriff of Leicestershire, accompanied by a brother of the countess;—on the Saturday following he appeared in Westminster-Hall; and about one o'clock, sent a message into Court, to Lord Mansfield, "desiring to speak with him."

Lord Mansfield bid the messenger tell his Lordship, "that when an affair was depending before the Court, he could not speak with any body about it, but in Court."

[634] Soon after, the earl came upon the Bench, and spoke to Lord Mansfield. It was not easy to understand what he said, as he spoke pretty low: but I imagine,

(a) Note: there was an habeas corpus to the Bishop of Durham, who returned he was a count palatine and not bound to answer: and for this he was fined 4000l. 3 New Abr. 10, S. C. 3 Keb. 279.

\* One of these was detaining Sir William Meredith (who himself served the first writ upon the earl,) and drawing a pistol upon him, and challenging him.



he proposed putting some certain questions to his lady ; for Lord Mansfield's answer was, "that when she came into Court, all proper questions would be asked her."

Some time afterwards, on the same day—

Lady Ferrers came into Court, and had articles of the peace ready to exhibit against the earl.

Note—Nothing more was said concerning the habeas corpus or the return of it ; the real end of it being sufficiently answered, by her being left at liberty to come to this Court, in order to obtain its protection.

Sir Richard Lloyd and Mr. Gould, for the earl, desired leave to ask Lady Ferrers one or two questions, previous to her swearing to the articles which she had prayed leave to exhibit.

But Lord Mansfield told her ladyship, that she was not obliged to answer any question previous to her swearing the peace.

And he told Sir Richard that the present business was only to obtain security of the peace.

Just at this time, the earl came into the body of the Court, (upon the floor, not upon the bench ; ) and desired to ask Lady Ferrers "whether an affidavit which she had lately made, in the country, before a commissioner authorized by this Court to take affidavits, was made by her voluntarily or involuntarily."

Note—This was an affidavit (in which she had joined, during her being in his power in the country, after issuing of the habeas corpus ; ) wherein she was made to swear "that she was content to remain with her husband ; that she had no complaint against him ; and that the application made by her relations for the habeas corpus was without her desire and against her will." Which affidavit her friends said was so far from being voluntary, that it was extorted from her under duress ; and was the mere effect of fear, force, and compulsion, or at least of very undue influence.

[635] Lord Mansfield persevered in permitting her ladyship, without answering any questions, to proceed in exhibiting her articles : and then asked the earl, "if he had security ready."

The earl first, and Sir Richard, afterwards, pressed that Lady Ferrers might answer their questions : and Sir Richard dropped an intimation that the earl's regard or disregard for her would depend upon her answers.

But Lord Mansfield said he had before told her, that she need not answer them ; and now he would not suffer her, he said, to answer them.

Lord Ferrers went in and out of Court once or twice ; but did not, at this time, give the security of the peace ; nor did Mr. Norton press that he should give it immediately.

On Wednesday the 27th of April following, the earl appeared, and gave security : himself in 5000*l.* and each manucaptor in 2500*l.*

Monday (13th February 1758) the earl having broken this recognizance in the month of August 1757, by drawing a pistol upon Lady Ferrers, at the Earl of Westmoreland's at Mereworth Castle in Kent ; he was taken up some time after, upon a fresh warrant from Lord Mansfield : and having given bail on the same 13th day of February 1758, before my Ld. Ch. Justice, (whilst his Lordship was gone out to dinner,) he presently afterwards came into Court, to appear. And upon the return of the Ld. Ch. Justice—

The countess also came into Court ; and swore fresh articles of the peace against the said earl, grounded upon the above-mentioned fact. After which, he (being still present) was called upon to give bail to these recent articles of the peace.

He had previously given notice of two persons to be his bail before the Lord Chief Justice : with one of which, the prosecutors were not satisfied.

After several proposals ; and after several hints which came from Lord Mansfield, as well as from Mr. Norton, "that it was necessary for the earl to give bail at present, and not to pray time to do so, as the giving it now was the only method he could take, if he expected to remain at liberty ;" it ended in a compromise to take both these persons as bail now, and to give a few days time for the justifying the doubtful one, (a peruke-maker,) or for finding a better.

[636] Accordingly, he himself became bound in 5000*l.* Mrs. Shirley (his mother,) in 2500*l.* and Mr. John Bennifold, peruke-maker, in 2500*l.*

The earl's counsel now moved to discharge the former recognizance : to which the lady's counsel afterwards consented.



REX *versus* THOMAS DAWES. Tuesday, 13th June 1758. Impressed soldier not discharged. [3 New Abr. 6, n.]

On Thursday last, the 8th of June, Mr. Morton and Mr. Burrell, on behalf of the commissioners, shewed cause against making absolute a rule of last term, made upon the commissioners in and for the county of Sussex, for putting in execution the late Act \* "For the Speedy and Effectual Recruiting His Majesty's Land-Forces and Marines," for them to shew cause why Thomas Dawes should not be discharged out of the regiment of foot commanded by Colonel Thomas Brudenell.

They produced a number of affidavits; and rested entirely upon the facts contained in them: which fully proved (as they alledged) that he was a proper object of the Act of Parliament; and that the commissioners had done right; and that he ought not therefore to be discharged from the condition of a soldier.

Mr. Harvey and Mr. Norton, on behalf of the defendant Dawes (the impressed man) on the contrary, argued for making the rule absolute, "for discharging him."

They urged that this was a high and unconstitutional authority lodged in these commissioners, and without requiring from them any oath of duty: and they endeavoured to shew, from their affidavits, that the man was not a proper object of the commissioners jurisdiction. They argued therefore that he ought to be discharged; especially, as the Crown did not at all interpose.

Note—The regiment was gone abroad: but the man himself had deserted from it.

The Court did not come to any determination, then; but took time, in order to consider the affidavits on both sides.

[637] Now, Lord Mansfield delivered the opinion of the Court, in which, he said, they were all agreed: and all of them, he said, had separately read over the affidavits.

Then he went minutely through the affidavits on both sides; and made the proper remarks upon the different representations of the case.

The result was, that they clearly thought him to be a proper object; and that the commissioners had done right.

Whereupon, they discharged the rule.

(See the case next following this.)

REX *versus* ANDREW KESSEL. 1758. Another case of an impressed soldier.

This point was exactly similar to the last; being the case of a pressed man, who applied to be discharged out of Captain Temple's company in Colonel Duroure's regiment, upon the foot of injustice done to him by the commissioners, to whom he was obliged by force to submit: and the question turned, in like manner, upon the man's being a proper object of the commissioners jurisdiction, or not; which depended upon the particular circumstances of the case, sworn to, on both sides.

It was argued on the 10th of June, by Mr. Norton and Mr. Bishop for Kessel, and by Mr. Hussey for the commissioners, upon the fact only.

No objection was made, on behalf of His Majesty, or of Colonel Duroure.

The Court had taken time, (as in the former case,) to look into the affidavits. And now,

Lord Mansfield declared the opinion of himself and his brethren, "that upon the circumstances appearing in this case, the man was not a proper object of the commissioners jurisdiction; and that he was, by an undue exercise of the power trusted to them, compelled to serve as a soldier."

And therefore they ordered that he should be forthwith discharged. (But they would not give costs; though asked for, by the man's counsel.)

[638] Note—In both these cases (of *Dawes* and *Kessel*), neither of them could have brought a habeas corpus: neither of them was in custody. Dawes had deserted and absconded: Kessel was made a corporal. Both prayed to be discharged from the condition of soldiers, upon the ground of the commissioners having misbehaved in the exercise of a Parliamentary authority; (for which misbehaviour, they might be liable to an information). In neither case, did the counsel object to the propriety of this method: and the benefit to the subject is manifest.

REX *versus* DAVIS. 1758. Writ of error for reversing outlawry in treason for diminishing the coin. V. *Rev. v. Roger Johnson*, 2 Strange, 824, S. P.

The defendant having been apprehended upon an outlawry for high-treason in diminishing the coin of this kingdom (viz. filing guineas), was brought up by habeas corpus from the place where he was taken : and afterwards committed to Newgate : from whence he was brought up by rule, on Tuesday 6th June 1758.

Mr. Norton for the Crown, immediately prayed that he might be asked "what he had to say why judgment should not pass upon him."

And the outlawry was then ordered to be read ; and was accordingly begun to be read. But

The Court not having had any previous notice of this, nor having even seen the outlawry, adjourned it to the Saturday then next following (the 10th) ; and ordered that copies of the outlawry should be sent to them, in the mean time.

The defendant intimated "that he was out of the realm at the time of the outlawry pronounced:" and he also intimated his desire to have the assistance of counsel.

But per Lord Mansfield—The Court can not assign him counsel, till he has pleaded : and then he may have counsel, upon that collateral matter. However, the Court do not restrain counsel from advising him in private.

N.B. The Sheriff of Middlesex was ready with a jury, in case he had now pleaded "that he was not the same person."

[639] On the said Saturday (10th June) the defendant being brought to the Bar, was called upon to hold up his hand ; and then arraigned (by Mr. Athorpe secondary of the Crown-Office,) upon an outlawry upon an indictment in London, for high treason in diminishing the coin of this kingdom ; and asked what he had to say for himself "why this Court should not proceed to give judgment and award execution against him according to law."

Note—The Sheriff of Middlesex was again ready with a jury, (as before,) in case he had denied his being the identical person.

Mr. Whitaker, who was counsel for the prisoner, prayed that the outlawry might be read. Which being done—

Mr. Whitaker said, that if the outlawry is bad, the defendant, or even any *amicus curiæ*, may assign errors upon it ; and the Court will either give him time to apply for a writ of error, or give him leave to plead to the indictment.

Now this outlawry is bad, (he said) upon the face of it.

1st exception—The second *capias* ought to have had three or four months between the teste and return : whereas this has only fifteen days. 8 H. 6, c. 10, is express "that it shall be returnable three months after, where the counties are holden from month to month ; and four months after, where the counties are holden from six weeks to six weeks." 10 H. 6, c. 6, confirms the former Act ; and extends it to indictments removed by *certiorari*. And for want of this, the outlawry is void.

2d exception. Here is a discontinuance of process for a whole year : there being a chasm of a whole year, in which it does not appear that any writs were issued out ; (though the sheriff's returns to such writs are indeed set out).

3d exception (to the exigent). This exigent is in London : and the outlawry is returned to be pronounced by Mr. King, the coroner. Whereas the Lord Mayor of London is perpetual coroner in London ; and the recorder is to pronounce it. Cro. Jac. 531, *Garrard v. Regem*, proves that the mayor for the time being is perpetual coroner. 2 Ro. Abr. title *Utlagarie*, fo. 805, 806, prove both positions ; pa. 806, "that the mayor is coroner ;" [640] and pa. 805, per *quer*, pl. 1, "that the judgment is given by the recorder ; and not by the coroners."

4th exception. He is not said to be outlawed, "*secundum legem et consuetudinem regni*:" which the writ requires. And Dalton gives the return in that manner.

5th exception. The name of office of the sheriffs is not set to the return of the second exigent : it is only "the return of W. A. and A. C. esquires. 2 Hale's Hist. P. C. 204, is express that it must be so ;" "the sheriff's name and office also must be subscribed to the return of the exigent ; e.g. A. B. arm' vicecomes."

N.B. The record appeared to be right. But Mr. Whitaker said it was not so in the return upon the writ itself.

6th exception was to the writ of proclamation. Which he alledged to be faulty,

both in its teste and in its return. This writ is founded upon the statute of 31 Eliz. c. 3. Which gives it in personal actions, and directs the particular manner, &c. ; and to be of the same teste and return with the exigent. 4, 5 W. & M. c. 22, § 4, extends this writ of proclamation to criminal cases as well as civil ; and directs it to be delivered to the sheriff, three months before the return.

Now this writ of proclamation is tested and returned upon the same day. And the return of the sheriff is only "that he caused him to be proclaimed according to the form of the statute." But non constat, what statute he means : there is none mentioned in the writ.

The return ought to be particular ; and to specify the respective proclamations, and to shew that they were a month before the quinto exactus by virtue of the exigent. And so Dalton says.

7th exception. The man was abroad, out of the kingdom, at the time when the outlawry was pronounced against him.

This, indeed, is an error in fact ; and must be verified.

8th exception. The hustings (where it was pronounced) are not said to be "holden in and for the City of London."

Mr. Norton contra, pro Rege, said he would be under the direction of the Court, whether to defend it now, or take time.

The Court seemed to think that Mr. Attorney General should have been present.

[641] But Mr. Norton said that Mr. Attorney had desired to be excused.

Lord Mansfield—Some of the exceptions seem to have weight : and some of the errors alledged are errors in fact ; and it is a matter of discretion in the Attorney General, "whether he will think proper to confess them, or not."

Mr. Just. Foster—Some of the exceptions go to shew the outlawry to be a nullity, and to avoid it without a writ of error.

Which Lord Mansfield agreed to.

Mr. Just. Denison—The custom of the City of London is a matter of fact.

Lord Mansfield—Mr. Attorney General will consider whether to confess the errors in fact, and let the party in, to plead to the indictment ; or take the longer course of a writ of error : this is a matter of prudence.

Mr. Whitaker prayed that the prisoner might be sent to the prison of this Court ; and not to Newgate.

Per Cur'. Newgate is as much the prison of this Court, as the King's Bench prison is : every prison in the kingdom is the prison of this Court.

The prisoner was remanded ; and ordered to be brought up again on Tuesday, the 13th.

And now, the defendant being brought up accordingly, Mr. Attorney General allowed that one or two of the exceptions were fatal ; as for instance the first and the sixth.

But though the Act of 31 Eliz. c. 3, declares the outlawry to be void, if had otherwise than that Act directs ; yet he said, he was afraid this making it void could not be done by the Court upon motion ; but it must be avoided by writ of error, in the legal way. For so is Plowd. Com. 137 b. and Hob. 166, and 2 Hawk. P. C. 306, c. 27, § 127.

Lord Mansfield—What do you say to the errors in fact ?

Mr. Attorney General—If there are any that I can confess, I would do it : because I am satisfied it must be reversed upon a writ of error. As to the 7th, if I was to confess it, it would not signify ; because his time is elapsed : the year is expired.

[642] Cur'. There is no getting at it, without a writ of error.

Lord Mansfield—If the Attorney General has an authority from the Crown, he may confess an error in fact, which is not true : but the Court will not permit the confessing an error in law, which is not true.

Mr. Just. Foster mentioned a case of one Mr. Stafford, who was called "esquire ;" and he said he was only a yeoman, and not an esquire : and the Attorney General came in and confessed it.\*

The present defendant was remanded in order to † purchase his writ of error.

N.B. Per Cur' and counsel—There are a great many other errors upon this record.

\* Vide Lucas's Reports, 188.

† "Purchasing" his writ of error is a technical term ; which does not here convey any pecuniary idea, as if he was to pay a price for it.



**CHESTERTON versus MIDDLEHURST.** Wednesday, 14th June, 1758. Action on a bail-bond in a Court below, must be brought there and not here, unless special circumstances warrant it.

A bail-bond was given in a Court of a County-Palatine (Chester,) in an action brought there. Which bail-bond being assigned by the sheriff, an action was brought upon it in this Court.

The defendant filed special bail, below; and then moved to stay proceedings here. And

The Court all held this bringing the action here, to be an unfair practice; unless there had been some special circumstance to warrant it, (as the defendant's living out of the jurisdiction, or the like :) which was not even pretended, in the present case. Therefore the Court held that the plaintiff ought to have proceeded in the \*1 Court below; and accordingly set aside his proceedings in this Court.

**REX versus FLORENCE HENSEY, M.D.** 1758. Trial for high treason in adhering to the King's enemies. [See 6 Durn. 629.]

On Monday 8th of May 1758, the defendant was brought into Court by the keeper of Newgate, upon a habeas corpus directed to him, commanding him "to bring up his body." He appeared (upon the reading of the return) to have been committed by warrant under the hand and seal of the Earl of Holderness one of His Majes-[643]-ty's principal Secretaries of State, for high-treason in adhering to, and aiding and corresponding with the King's enemies; and to be detained in his custody, by virtue of a second warrant of the like kind.

Mr. Attorney General prayed that the return might be filed.

Cur. Let it be filed.

Mr. Attorney General then informed the Court and the defendant, "that there was an indictment of high-treason found against the defendant:" (which indictment was so found by the grand jury by itself singly, and brought into Court, singly by them on Tuesday last). With which indictment, the defendant being now charged, and being called upon by the secondary of the Crown-Office to hold up his hand, the Court ordered the indictment to be read to him.

But the Court, (before it was read to him,) asked him "whether he desired counsel to be assigned to him;" and if he did desire to have counsel, then "whom, by name, he desired to have assigned to him."

He named, and accordingly,

The Court assigned to him, Mr. John \*2 Morton, and the Honourable Mr. Thomas Howard; and Mr. John Pierce for his attorney.

The indictment was then read verbatim to him, by the express direction of the Court: (although he had a copy of it five days ago; agreeable to 7 W. 3, c. 3, "for Regulating of Trials in Cases of Treason and Misprision of Treason"). Upon which indictment being thus read to him by Mr. Barlow, he was immediately asked (by Mr. Athorpe, Secondary of the Crown-Office,) "whether he was guilty or not guilty of the high treason therein charged upon him." To which he pleaded not guilty.

The defendant, after he had pleaded "not guilty," intimated to the Court "that he had received hard and severe usage, during his confinement."

Mr. Attorney General absolutely disavowed his having received any severe treatment at all; and assured him that he would be treated with all possible humanity, so far as was consistent with his being safely secured from escaping.

[644] Then a day was fixed for his trial; viz. Monday 12th June 1758.

Which being settled, without any sort of objection on any part, the defendant was Remanded (to Newgate).

\*1 *V. Walton Assignee v. Bent*, Tr. 1766, 6 G. 3, B. R. that "an action upon a bail-bond must be brought in the same Court when the bail was given." [See also 3 Wils. 348. 3 Burr. 1923. 8 Durn. 153.]

\*2 N.B. Mr. M. is not one of His Majesty's Counsel; (though he has a patent of precedence).

On which Monday 12th June 1758, at the trial, the defendant's counsel took exception to the reading of two papers—(No. 1, 2) being the rough draughts of letters written by himself, and found in a bureau where he kept his linen and papers; and which were only introductory evidence; not any part of the overt-acts, which were to support the species of the treason charged upon him. It was objected to them, that they were not sufficiently proved to be found in his custody; nor sufficiently proved to be his hand-writing: for mere comparison of hands is not sufficient to support their being read against the defendant.

The counsel for the Crown answered, that, the papers being found in his custody, and his hand having been sufficiently proved by persons who had seen him write, it was sufficient to entitle the Crown to read them; though the jury are to judge of them. And they mentioned *Layer's case*; and *Lord Preston's case*; and *Francia's case*; and *Sidney's case*; and *Buchanan's case* in the north, in 1746; and *Crosby's case*, Skinner 578, 579, and 1 Ld. Raym. 39, S. C. *Rex v. Crosby alias Phillips*: where comparison of hands was allowed to be good evidence, if the papers are found in the custody of the person himself. *Sir John Wedderburn's case*, *Sir Cholmeley Dering's case*—for murder; (i.e. *Rex v. Thornhill*).

The Court unanimously over-ruled the objection. These papers were found in his custody; and they have been sufficiently proved by persons who have seen him write, to entitle the Crown to read them. Then the evidence for the Crown being opened, and given; (which consisted chiefly of letters to and from the prisoner;) and being alledged to be a proof of overt-acts of two different sorts of treason, viz. of compassing and imagining the death of the King and also of adhering to the King's enemies;

Mr. Solicitor General declined summing up the evidence; choosing to reserve himself for the reply.

Which the Court held to be within rule, if he so thought proper.

[645] So the counsel for the Crown rested it here.

Then the counsel for the prisoner (Mr. Morton and Mr. Howard) began upon his defence. They declined giving any evidence on the part of their client: but they insisted upon these two topics, in his defence; viz.

1st. That no one act was proved upon him in Middlesex; where the indictment is laid.

2dly. That the evidence, if it had been brought home to the defendant so as to affect him, yet it would by no means have amounted to a proof of any overt-acts of either of the two before named species of treason.

For they were only letters of correspondence. And if a correspondence of this nature, either within or out of the realm, had been treason in general and in all the King's subjects, within 25 Edw. 3, it would never have been particularly enacted to be capital in a soldier, by the Mutiny Acts of 3, 4 Ann. c. 16, § 35, fo. 266, and 30 G. 2, c. 6, § 1.

N.B. The former makes it treason, to do it either "upon land, out of England, or at sea:" the latter makes it capital, or such other punishment as a court martial shall inflict to do it "upon land within or out of Great Britain, or upon the sea."

Mr. Yorke, His Majesty's Solicitor General, then proceeded to reply: in doing which, he made only some general observations upon the evidence that had been given on the part of the Crown, but did not sum it up particularly, (as the prisoner had given no evidence at all;) but confined himself to what the defendant's counsel had urged in his favour, in point of law and reason.

He answered thus, to the objections which they had insisted upon.

1st. That the fifth letter given in evidence bears date "from Twickenham," which is in Middlesex. Which alone, is a full answer to the objection.

2dly. That the correspondence proved was, in point of law, an evidence of an overt-act, of each of the before-mentioned species of treason.

[646] First—Of compassing and imagining the death of the King. To prove which, he cited 1 H. H. P. C. 167. *Cardinal Pool's case*, 3 Inst. 14, S. C. And so Ld. Ch. J. Holt also held, in *Gregg's case*: (which he cited from a manuscript report of Judge Tracy's;) and Baron Smyth and Mr. Just. Dormer seemed to agree to it. And in *Lord Preston's case*, also, Ld. Ch. J. Holt so held.

Secondly—It is also an overt-act of adhering to the King's enemies. In *Gregg's*

case, it was agreed by all the Judges, "that such letters, though intercepted before they arrived, were so."

Lord Mansfield—We have seen three reports of *Gregg's case*; viz. one, by Ld. Ch. Baron Dodd; another, by Mr. Just. Price; and this, by Mr. Just. Tracy: and they all three agree "that such letters though intercepted, were overt-acts of each species of treason before mentioned; and that all the Judges agreed in this."

Mr. Solicitor General—And as to the Statutes of Queen Ann and the present King, the Statutes of 7 Ann. c. 4, and the late Mutiny Act of 30 G. 2, c. 6, go further than the Act 25 Ed. 3, does.

Lord Mansfield summed up the evidence.

As to the law—levying war is an overt-act of compassing the death of the King: an overt-act of the intention of levying war, or of bringing war upon the kingdom, is settled to be an overt-act of compassing the King's death. Soliciting a foreign prince, even in amity with this Crown, to invade the realm, is such an overt-act: and so was *Cardinal Pool's case*. And one of these letters is such a solicitation of a foreign prince, to invade the realm.

Letters of advice and correspondence, and intelligence to the enemy, to enable them to annoy us or defend themselves, written and sent, in order to be delivered to the enemy, are, though intercepted, overt-acts of both these species of treason that have been mentioned. And this was determined by all the Judges of England, in *Gregg's case*: where the indictment (which I have seen) is much like the present indictment. The only doubt, there, arose from the letters of intelligence being intercepted and never delivered: but they held "that that circumstance did not alter the case."

[647] As to the fact, in the present case—the jury are to consider whether they were written by the prisoner at the Bar, in order to be delivered to the enemy, and with intent to convey to the enemy such intelligence as might serve and assist them in carrying on war against this Crown, or in avoiding the destinations of our enterprizes and armaments against them.

Then his Lordship went through the evidence particularly, and having finished his summing it up, he proposed to the counsel, and they agreed to it on both sides, "that the jury should take the letters out with them."

As to the locality of the facts—he said, it is certain that some one overt-act must be proved in the county where the indictment is laid: indeed if any one be so proved in that county, it will let in the proof of others in other counties.

Now here, one of the letters is dated at Twickenham, which is in Middlesex.

The jury went out, a little after eight, taking the letters, &c. with them; and soon sent to desire leave to have candles; which the officer who brought in their message, said he was sworn "not to let them have;" unless it should be so ordered.

Lord Mansfield asked the counsel, if either side objected to it.

And the counsel on both sides agreeing to it—

Leave was given accordingly: and they had them.

In half an hour, the jury returned, and brought in their verdict, "guilty."

Lord Mansfield observed, as to the two Acts of Parliament of 7 Ann. c. 4, and 30 G. 2, c. 6—that they carried the matter further than the law extended to before: and, besides that, they were both of them declaratory, as well as enacting; which was calculated on purpose to avoid the very objection that had been now taken: (v. ante, 645).

The defendant was remanded to Newgate; and a rule made "to bring him up again on Wednesday."

[648] And the prisoner being accordingly brought to the Bar, on this day about four o'clock in the afternoon, by the keeper of Newgate,—

Mr. Attorney General prayed the judgment of the Court upon him.

Mr. Athorpe, Secondary of the Crown Office, called upon him to hold up his hand; and reminded him, "that he had been indicted of high treason, and thereto had pleaded not guilty; and for his trial had put himself upon God and the country, which country had found him guilty;" and then asked him "if he had any thing to say for himself, why the Court should not proceed to give judgment against him according to law."

The prisoner thereupon took out a written paper; and rather read, than spoke it.



It consisted partly of an apology, and partly of a sort of defence against the charge : together with some objections to the proof of it upon him.

The substance of it was—that the correspondence with which he had been charged, as treasonable and giving intelligence to an enemy of his liege sovereign, was nothing more than writing letters to his own brother, who so far from being an enemy, that he was in the service of the King's good brother and faithful ally, as His Majesty himself had stiled the King of Spain, in his speech to his Parliament ; and that these letters contained only coffee-house news and idle speculations ; but gave no such intelligence as could be useful or even unknown to an enemy ; nor did betray any of the secrets of this Government to their enemies.

That he had no malignity in his heart, against the King or his Government ; nor had ever been guilty of an improper behaviour ; but always conducted himself with decency and duty towards his King and country : for the truth of which, he appealed to his character and conversation.

And as to the papers which were seized by the messenger, at the house where he lodged—they might just as well be the woman's of the house, as his : for both of them had access to the bureau, in which the messenger found them.

That the statute of 7 W. 3, c. 3, § 2 & 4, directs that there shall be two witnesses to each overt-act of the same treason whereas his hand-writing had been proved only by one witness, who could pretend to know any thing of his hand-writing, for that the other three knew little or [649] nothing of his hand, and could scarcely be said even to have ever seen him write.

(Note. The Act directs “ that either both the witnesses must be to the same overt-act, or one of them to one, and the other of them to another overt-act of the same treason.”)

And there was no witness at all, he said, to prove any act of treason committed by him in the county of Middlesex, where the indictment lays the offence to have been done.

He alledged, that this case of his was the first instance, since the Statute of Edw. 3, where giving intelligence has been holden to be high treason. And he said, that, as he had not had four days between his trial and his sentence, (as was usual,) his counsel had not had sufficient time to prepare themselves in arrest of judgment.

Therefore, upon the whole, he prayed that the Court would either be so kind to him as to respite his sentence : or, if that might not be obtained, that they would be graciously pleased to recommend him to His Majesty's mercy.

He was then asked “ if he had any point of law to move in arrest of judgment.”

To which his answer was, “ that he had not.”

Lord Mansfield then observed, that the prisoner had been convicted upon a very full trial, and upon very cogent proof ; and that he appeared upon the evidence to have committed many overt-acts of treason.

He took notice, that the prisoner had even solicited this employment, from inclination : as well as undertaken for hire, to act as a spy against his own native country, and to reveal the secrets of the King and Government to the open enemies of both ; and to give them information and intelligence of the enterprises and designs of this kingdom against them ; and all this, with intent and in order to aid and assist them in defending themselves against his King and country.

He observed that the enemy had manifestly shewn “ that they themselves looked upon this correspondence to be an aid and assistance to them ; ” by their giving him a stipend, and paying him a stipulated monthly price, as the purchase and reward of it, under a penalty of his forfeiting 20s. for every omission of a weekly letter from him.

[650] He also observed, that the prisoner appeared to have procured his information of the state of our navy and army and finances, and the other matters contained in his papers and memorandums seized in his bureau, with that very view and intention of communicating them to the enemy : and by his letter of the 22d of July last, he had even advised and invited the enemy to invade his native country ; and to bring war and destruction into the heart of it. The guilt of this offence arises from the nature of the correspondence, which is calculated to betray the secrets of his King and country to the enemy, as a spy ; a treason of a very dangerous kind, and which gives an enemy much more aid and assistance, than a person publicly

and professedly declaring himself an open enemy to his own country could give them.

He laid it down as a point which was never doubted, "that this offence of sending intelligence to the enemy of the destinations and designs of this kingdom and government, in order to assist them in their operations against us or in their defence of themselves, is high-treason; even although such a correspondence should be intercepted, without ever coming to the enemy's hands. And so was the resolution of all the Judges, in *Gregg's case*."

And as to the witnesses to the prisoner's hand-writing—there are four of them that have seen him write, and swear to his hand, of their own knowledge: and these four witnesses are not contradicted by any evidence to his part; but on the contrary, are confirmed by a variety of circumstances.

As to the point of locality—he said that if there had been no evidence at all, of that particular letter which bears date at Twickenham (which is in Middlesex,) yet nevertheless the presumption was strong and stood uncontradicted too, "that they were written in Middlesex, where the prisoner resided, and where his papers were seized."

As to mercy—he told the prisoner, that that was in the King's breast; but was no part of their province: and therefore his application, on that head, must be elsewhere.

The Lord Chief Justice (it being a case of high-treason) pronounced the sentence.

Mr. Attorney General then moved, that the Court would appoint a day for the execution.

Lord Mansfield desired him to name a day.

[651] Mr. Peirce, the defendant's solicitor, said he hoped it would not be an early day.

Mr. Attorney General said, he was willing to give as long a day as might be proper.

Mr. Just. Foster mentioned, that Dr. Cameron had three weeks.

(N.B. Mr. Charles Radcliffe had only a fortnight.)

Mr. Peirce desired that this might be a month.

The Court and Mr. Attorney General very readily agreed to a month. Accordingly, it was ordered to be upon Wednesday the 12th of July.

The prisoner was remanded to Newgate; and bowed respectfully to the Court, and courteously to the Bar and audience, on retiring.—

#### Note.

On the last day of a term §

An attachment may be moved for, in the two cases following; viz.

For \* non-payment of costs: and

against a sheriff, for not returning a writ.

This was alleged by Mr. Clayton, and conceded by the Court to be the practice.

#### Note also

The rule is, that counsel may move, on the last day of term to quash an indictment; but

not to quash an order.

The Court was not up, till near midnight.

The end of Trinity term, 1758, 31 Geo. 2.

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§ V. post, 28th Nov. 1769, *Jacob's case*.

\* This former case confirmed by the Court, expressly and particularly on a motion of Mr. Windmore's, the last day of Michaelmas term 1770.

REPORTS of CASES ARGUED and ADJUDGED in the COURT of KING'S BENCH, during the Time LORD MANSFIELD Presided in that Court; from Michaelmas Term, 30 GEO. II. 1756, to Easter Term, 12 GEO. III. 1772. In Five Volumes. By SIR JAMES BURROW, Knight, late MASTER of the CROWN-OFFICE, and One of the BENCHERS of the HONOURABLE SOCIETY of the INNER TEMPLE. The Fifth Edition, with the Addition of Critical Notes and Observations, and References to other Reports and Authorities. Vol. II. From Michaelmas Term, 32 GEO. II. 1758, to Trinity Term, 1 GEO. III. 1761, inclusive. 1812.

[653] MICHAELMAS TERM, 32 GEO. II. B. R. 1758.

REX *versus* ATHAY, ESQ. Monday, 6th November, 1758. On a motion for an information against a justice of the peace for refusing an ale licence, on grounds set forth; the party must alledge that he was innocent.

On shewing cause why a rule should not be made absolute, for an information against a justice of peace, for a misdemeanor in refusing to grant a licence to one Francis Simes (who had been licenced for several preceding years) to sell ale, as usual: and afterwards convicting him without any previous summons, for having sold it without a licence; it appeared that the pretended grounds upon which this rule had been applied for and obtained, were either false or fallacious. The first was, that the only reason why the licence was refused him, was his declining to pay a sum of money, (5*l.*) which was claimed of him upon a distinct and collateral account, and which he denied to be due from him: the payment of which sum of money was (as he alledged) insisted upon by the justice, as a condition precedent to his granting the licence. The second pretended ground of the motion was "that the justice had convicted him of the offence, without any previous summons."

As to the first—the Court were unanimous, that the allegation appeared to be false in fact; but, at the same time, they declared explicitly, "that justices of peace have no sort of authority to annex any such conditions to the grant of these licences."\*

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\* V. ante, 561, and post, pa. 1318. Pasch. 1762, 2 G. 3. [See also ante, 556. 3 Burr. 1317. 1 Durn. 692.]



As to the second—they esteemed it to be fallacious, as the fact came out upon shewing cause: for, the man was actually present before the justice who had sent for him, and was so far from offering at making any defence, that he rather seemed to apply for mercy; declaring, however, “that if the justice did convict him, he would not pay the penalty.”

[654] Thirdly. The Court observed that the man had not any where alledged “that he was innocent of the offence:” which they thought it incumbent upon him to have done, to entitle himself to make this application against the justice of peace.

Rule discharged.

REX *versus* FIELDING, ESQ. Tuesday, 7th November, 1758. The attorney and complainant shall pay costs upon the discharging of a rule obtained against a justice of the peace upon grounds appearing to be frivolous. [S. C. Sayer’s Law of Costs, 367.]

On shewing cause why an information should not be granted against Mr. Fielding, for a misdemeanor in his office of a justice of the peace, the complaint appeared to be frivolous and vexatious; so that the justice ought to have the costs he had been put to, in defending himself against it: the only question was who should pay them.

The complaint was made upon a joint-affidavit made by the prosecutor and his attorney: which attorney was also sworn to have declared, (and in rude and virulent terms too,) that if it should cost him 100l. he would lay Fielding “by the heels.”

It was strongly urged, on behalf of the attorney, that it would be a very great discouragement to attornies, in the course of their practice, if they were to be made personally liable to costs, in case their clients motions should not succeed; which motions they had engaged in at the application of their clients, and upon facts represented to them by their clients, as being true and candidly stated; and which they themselves could not know or suspect to be otherwise: and that it would be still more hard upon them, to do this without hearing what they could urge in their own defence.

But the Court (viz. Lord Mansfield, Mr. Just. Foster, and Mr. Just. Wilmot) were clear and unanimous, that in this case, they might and ought to do it: because the attorney not only appeared as prosecutor, by joining in the original affidavit of complaint; but had also expressly <sup>\*1</sup>declared “that if it should cost him 100l. he would lay Fielding by the heels.” Therefore they

Discharged the rule; with costs, to be paid by both.

[655] POMP *versus* LUDVIGSON. Saturday, 11th Nov. 1758. Affidavit to hold to bail must be positive.

A rule for discharging the defendant upon common bail was made absolute; the affidavit to hold him to special bail, not being positive: which is the <sup>\*2</sup>“established rule of the Court, that it must be.”

<sup>\*1</sup> The attorney by a subsequent affidavit, denied this. However, the rule stood as above.

<sup>\*2</sup> So was the resolution in *Innys v. Sinclair*, Pasch. 1733, 6 G. 2, B. R. and in *Holmes et Al’ v. Mendes Cesis et Al’*, Tr. 1733, 6 & 7 G. 2, B. R. and in *Leverland v. Basnet*, Tr. 17 G. 2, B. R. and in *Claphamson v. Bowman*, P. 18 G. 2, B. R. and in *Rios v. Belifante*, P. 17 G. 2, B. R. and in *Coillot v. Hague*, Tr. 1747, 21 G. 2, B. R. and in *Van Moorsell v. Jullien*, M. 1748, 22 G. 2, B. R. and in *Kelly v. Devereux*, M. 1752, 26 G. 2, B. R. and in *Prior v. Scott*, H. 1753, 26 G. 2, B. R. To which resolutions the present one being added, this point seems to be most fully settled. *Yet v. Post*, 1032, and *Barclay et Al’ v. Hunt*, M. 1766, 7 G. 3, B. R. [See also 2 Bl. Rep. 740. 4 Burr. 1994, 1996, and note that an affidavit by cestui qui trust, is sufficient notwithstanding the trust is created by deed.]

Lord Mansfield said that the Act of Parliament required a positive oath of the debt.(a) Which positive oath may not be contradicted by the defendant.

But Mr. Just. Foster said, he himself had always thought the rule too strict; and that he had never complied with it at his chambers, though he would not go against it.

The present case was that of a merchant in London, whose correspondent in Sweden had sent him over the accounts from Sweden where the debt arose: and consequently the plaintiff, the merchant here, could only swear to his belief, with a reference to the accounts sent to him from Sweden; the fact itself not being within his own personal knowledge. So that the affidavit could not have been more positive than it was; unless the correspondent in Sweden had come over hither, to swear it: (for, an affidavit sworn there could not have been read here).(b)

See the Act of Parliament of 12 G. 1, c. 29, § 2, entitled, "An Act to Prevent Frivolous and Vexatious suits:" which enacts "that no person shall be held to special bail, upon any process issuing out of any Superior Court, where the cause of action shall not amount to the sum of 10l. or upwards: nor out of any Inferior Court, where the cause of action shall not amount to the sum of forty shillings or upwards." Then the second clause directs the method, in cases where the cause of action does amount to those respective sums.(c)

And the words of this second clause of the Act are—"that in all cases where the plaintiff or plaintiffs cause of action shall amount to the sum of ten [656] pounds or 40s. or upwards, as aforesaid, affidavit shall be made and filed, of such cause of action; and the sum or sums specified in such affidavit, shall be indorsed on the back of such writ or process: for which sum or sums so indorsed, the sheriff or other officer, to whom such writ or process shall be directed, shall take bail; and for no more."

The present defendant was discharged on common bail.\*

BRUCKLESBANK *versus* SMITH, ESQ. Tuesday, 14th Nov. 1758. Navigation is not to be impeded by casting forth of the ballast out of ships.

This was a special verdict from Northumberland Assizes, upon an action of trespass for breaking and entering the plaintiff's ship in the river Tyne, at Newcastle upon Tyne, and taking and carrying away an anchor: to which the defendant pleaded "not guilty."

The special verdict finds, that the defendant was a justice of the peace of and for the town and county of Newcastle upon Tyne; and that the plaintiff was master of a ship called the "Leeds-Merchant, floating, &c. in the river Tyne, being a navigable river; that three tons of ballast and more were unloaded out of the said ship, into a machine or vessel called a hopper, in the said river, with intent that it should be carried therein, into the high and open seas; and that it was accordingly carried out of the said river, into the high and open seas, and was there cast out of the said hopper, where the water was more than fourteen fathom deep, at a distance from any port, haven, channel or navigable river. It finds that Thomas Field, before the time of the supposed trespass, viz. on such a day, &c. came before the defendant being a justice of peace, &c. and laid information of the facts of "putting the ballast into the hopper with an intent that it should be dropped out of the said hopper into the water, and not be cast, &c. upon the land where the tide and water never flows or runs;" contrary to the statute. It finds that the plaintiff was summoned to appear, and that he did appear before the said justice; and that proof was then and there made, by his confession, "that it was so put on board the hopper, in the said river, with intent that it should be therein, carried out of the said river into the high and open sea, and cast therein at the depth of fourteen fathom and upwards at a distance from any

(a) The words of the Act cited above are not so; whether the sense may not be such is another thing.

(b) Strange, 1209. 1 Wils. 231. Vide also 1 Vern. 460.

(c) As to executors see 1 Barnes, 70. 2 Barnes, 58, 65. 1 Barnes, 84, 66.

As to assignees of bankrupts it is said that the affidavit of the assignee is not to be admitted, unless it appears that the bankrupt had refused to make an affidavit. 2 Barnes, 65. And see 4 Burr. 1992, acc.

\* V. post, *Craufurd v. Whittall*, Hil. 1773, B. R. S. P. acc.

haven, &c. (ut supra) where the tide or water never flows or runs." It is found that the defendant thereupon convicted the plaintiff, and adjudged him to be an offender against the statute of 19 G. 2, c. 22. Then it finds the [657] conviction before the justice, in hæc verba; and that the then defendant (the now plaintiff) was adjudged to forfeit 2l. 10s. for the said offence.

It finds that the justice of peace (the now defendant) issued his warrant under his hand and seal, to levy the same by distress, &c. and that William Bruce, a serjeant at mace (to whom the warrant was directed), by virtue of the said warrant took the said anchor, &c.

This case was first argued, on Friday, the 9th of June last, by Mr. Winn, for the plaintiff, and Mr. Serjeant Poole for the defendant.

Mr. Winn rehearsed the statute of 19 G. 2, c. 22, § 1, 2, and said that the fact found to have been proved, is no offence within this Act: and consequently, the defendant was a trespasser, in levying the penalty. Nothing is found to have been proved but a mere intention.

This is a penal law, and must be construed strictly.

34, 35 H. 8, c. 9, § ult., gives the penalty for casting rubbish into havens, roads, channels, &c. Then 19 G. 2, c. 22, describes the offence to be casting, throwing out or unlading any ballast, rubbish, &c. "but only upon the land, where the tide or water never flows or runs." And the preamble describes the mischief to be "casting, throwing out, and unlading their ballast, either on the shore, or on the side, and below the usual and full sea-mark, and doing other annoyances, to the detriment and obstruction of navigation."

In the Thames, this method of disposing of the ballast is never treated as an offence: and that is under the care and inspection of the Trinity-House.

The mischief which the Legislature had in view, was throwing the ballast, &c. either on the shore, or on the sides of rivers, and below the full sea-mark.

But this was in the open and high sea, above fourteen fathom deep; at a distance from any port, haven, channel or river.

He relied upon the intention and spirit of this law, rather than upon the letter of it: which intention of the Act, he said, would plainly appear from the proviso at the end of it, (V. Sect. penult.) and that it was intended solely to prevent prejudice to the navigation in havens, [658] ports, roads, channels or rivers, and for no other purpose. But nothing is stated here of any sort of prejudice actually done to the navigation, or even of any such intention to prejudice the navigation of the haven, port, road, channel, or river.

The ballast was carried out of the river, into the high and open sea; and there cast out, at above fourteen fathom depth, and at a distance from any port, haven, channel or river.—And the intention only is laid accordingly.

And the confession is of nothing more than such an intention. But there is neither proof nor confession of any fact whatsoever: nor was any actual injury done.

Mr. Serjeant Poole, contra, for the defendant—It was impossible for us, in the nature of the thing, to prove "that the ballast was actually dropped in the river:" for, this is done privately from the bottom of the hopper. It was necessary therefore, for us to charge the intent as the offence. And this intent the defendant has confessed. And the offence, as we have charged it, is within the Act; viz. "putting the ballast into the hopper, with intent, &c."

This is a positive law, "that no person shall cast, throw out, or discharge out of, &c. any ballast, &c.; but only upon the land, where the tide or water never flows or runs," to which positive law, the fact charged is directly contrary. The present Act of 19 G. 2, was made to inforce and make more easy the prosecuting offences against the former Statute of 34, 35 H. 8: upon which it was difficult to prosecute the offender, in some cases. And here are proper exceptions, upon proper occasions: in all other respects, it is a general law.

It is said indeed, on the part of the plaintiff, "that here is no actual prejudice done to the navigation." But what the plaintiff has done, may, by some means or other, prejudice the navigation of the river: it is in their power to drop the ballast out of the hopper, in the channel of the river, without any possibility of being discovered.

And this statute is in negative words, viz. "but only upon the land." Co. Lit. 115, affirms that there is a diversity between an Act of Parliament in the negative, and one in the affirmative: and shews such diversity.



Therefore he prayed judgment for the defendant.

[659] Mr. Winn, in reply—This Act ought to be construed strictly; as it is a restraint of a common-law right, which a man has to lay his ballast where he pleases; provided he be not guilty of a nuisance in so doing.

And this is no offence against the spirit and intention of this law. Nothing is charged, but an intent: which intent was not, even if it had been executed, a substantial offence against this law.

Lord Mansfield—This is a general question, which goes farther than this particular case.

Mr. Just. Foster asked if the Corporation of Newcastle were not conservators of the river Tyne.

It was answered "that they were."

Mr. Just. Foster—Corporations ought to be protected in their just and ancient rights.

The Court did not, upon this first argument, give any opinion: but it was ordered to stand for a further argument.

• *Ulterius concilium.*

And now Mr. Clayton argued on behalf of the plaintiff, (as before,) "that this fact found was not an offence within the Act."

Mr. Norton was going to answer him, on the part of the defendant. But

Lord Mansfield stopped him, from entering into it at all; it being a very plain case, and clearly against the express prohibition of the Act: which provides that it shall not be thrown but upon the land: whereas this man says that he has found a better way, than that which the Act has expressly prescribed.

But here is such an opening to fraud, in this way that he has thought a better one, that it would be dangerous to trust to this method, though it were not prohibited. However, it is enough that it is contrary to the direct and express provision of the Act.

Indeed, if it was put upon the hopper, in order merely to carry it upon the land; that would only be the proper means of doing it, and therefore would not be an offence against the Act. But this is with intent to lay it in the water.

[660] And there can be no security as to the place where the hopper may drop it. It is mighty easy, from the construction of the hopper, to drop it privately: and it is also the interest of the person who carries it in the hopper, to drop it as soon as he can; that he may come the sooner again, to fetch more.

The shifting it out of one ship into another, without intention to drop it any where, would not be a case within the Act: for, that would not be a casting or throwing out at all, within the meaning of the Act.

The other three Judges agreed, in terms, with Lord Mansfield; and all of them spoke explicitly to the same effect.

Per Cur. unanimously,

Judgment for the defendant.

MICHELL *versus* CUE ET UX'. 1758. The rule that an execution shall not issue after a year without a *scire facias* when the defendant has delayed execution by his own acts. [S. C. cited by Nares, J. and S. P. acc. 2 Black. 784. 3 Wms. 36, is also against the rule made by the Court in this case. See also 3 Durn. 530.]

On shewing cause against setting aside an execution for irregularity (which irregularity was the suing out the execution above a year after the judgment obtained without any *scire facias* to revive it, (it appeared that the whole delay had arisen from the part of the defendants, by bills in Chancery for injunctions, and by obtaining time for payment, &c.

And though the cases of *Winter v. Lightbound* in 1 Str. 301, and of *Booth v. Booth* in 1 Salk. 322, were urged as authorities in point on the part of the defendants; yet

The Court were unanimous that this rule of "reviving a judgment of above a year old, by a *scire facias*, before suing out execution upon it," which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by a defendant who was so far from being surprised by the plaintiff's delay, that he himself had been trying all manner of methods whereby he might delay the plaintiff: and therefore they not only discharged the rule, but discharged it with costs too.

Rule discharged with costs.

[661] THOMAS BASKETT AND ROBERT BASKETT, Administrators (with the Will annexed) of John Baskett, Plaintiffs; THE CHANCELLOR, MASTERS, AND SCHOLARS OF THE UNIVERSITY OF CAMBRIDGE, JOSEPH BENTHAM, AND CHARLES BATHURST, Defendants. 1758. The King's printers have an exclusive right to print statutes and abridgments. [S. C. 1 Burn. Ecc. L. 347. 1 Black. 105. See also 4 Burr. 2401, and 6 Vez. 697.]

The plaintiffs brought a bill in the Court of Chancery, for an injunction to restrain the defendants from printing or selling a book intitled "An Exact Abridgment of all the Acts of Parliament relating to the Excise on Beer, &c." And on the hearing of this cause, the 24th of January, 1743, the Lord Chancellor ordered that a case should be stated, for the opinion of the Judges of the Court of King's Bench, upon the several Acts of Parliament; letters patent and grants of the Crown insisted on by either side, and any other letters patent appearing upon record relating to the matters in question between the parties.

The several letters-patent insisted on by the plaintiffs in support of their claim, as the King's printer, to the sole and exclusive right of printing and publishing all Acts of Parliament or abridgments of Acts of Parliament, &c. bear date the 22d of April, 1 Edw. 6, the 29th of December, 1 Mariæ, the 24th of March, 1 Eliz. the 27th of September, 19 Eliz. the 8th of August, 31 Eliz. the 10th of May, 1 J. 1, the 11th of February, 14 J. the 20th of July, 3 C. 1, the 26th of September, 11 C. 1, the 24th of December, 27 Car. 2, and the 13th of October, 12 Ann: which letters-patent are several grants of the office of King's printer of all and singular statutes, Acts of Parliament, &c. The letters-patent of the 12th of Queen Ann are a grant, in reversion of the said office, for the term of thirty years, to commence after the determination of a former grant then in being; they expressly grant the sole power of printing all and all sorts of abridgments of all and singular statutes and Acts of Parliament, and prohibit all other persons to print any volume, book or work of which the printing was thereby granted. The estate and interest granted by the said letters-patent commenced upon the 10th of January, 1739; and afterwards became vested in John Baskett, the father of the now plaintiffs; and is now vested in the plaintiffs, as administrators to their said father, with his will annexed: and the plaintiffs have been sworn and admitted into the said office of His Majesty's printer.

The case further stated, that the plaintiffs and other printers to His Majesty and his royal predecessors have, by virtue of the said [662] several letters-patent to them respectively granted, from time to time printed all Acts of Parliament, and abridgments of Acts of Parliament, Bibles, New Testaments, and other books mentioned in the said letters-patent. And the plaintiffs claim the sole right of printing all Acts of Parliament, exclusive of all other persons, during the term granted by the said letters-patent of the 12th of Queen Ann.

The defendants founded their claim upon the several letters-patent and Act of Parliament following.

King Henry the 8th, by his letters-patent, bearing date the 20th of July, in the 26th year of his reign, for him and his heirs, granted licence to the Chancellor, Masters and Scholars of the University of Cambridge, that they and their successors for ever, by their writing under the seal of the said chancellor, from time to time might assign and chuse, and for ever have among themselves, and within the university aforesaid, always remaining and inhabiting, three stationers and printers or venders of books, as well aliens and born without as natives, and born within His said Majesty's obedience, having and holding as well hired houses, as houses of their own: which said stationers or printers in form aforesaid assigned, and any of them, might lawfully there print all manner of books approved, or which thereafter should be approved by the said chancellor, or vice-chancellor, and three doctors there: and as well those books as other books printed wheresoever, as well within His said Majesty's realm as without, so as aforesaid approved or to be approved, might put to sale, as well within this kingdom wheresoever they should please, &c. and that, without penalty.

The statute of 13 Eliz. c. 29, confirms all letters-patent, &c. granted to the said university.

By letters-patent dated 6th February, 3 Car. 1, reciting the said letters-patent of 26 H. 8 and the said Act of Parliament of 13 Eliz. And also reciting "that since



the said Act of Parliament, divers letters-patent had been made, by Queen Elizabeth, King James the First, and His then Majesty, granting authority to print divers and sundry books, and prohibiting generally all other persons to print the same;” and also reciting a decree in the Court of Star-Chamber, of the 23d June, 28 Eliz. and a proclamation of the 25th of September, 21 Jac. 1, enforcing the same: the King confirms the right granted by the said letters-patent of 26 H. 8, to the University of Cambridge, notwithstanding any grant or prohibition contained in the subsequent letters-patent or any of them.

[663] The questions upon this case are—

1st. Whether the plaintiffs are entitled to the sole right of printing Acts of Parliament and abridgments of Acts of Parliament, exclusive of all other persons, during the term granted by the said letters-patent dated the 13th of October, in the 12th year of the reign of Queen Ann.

2d. Whether the defendants, the Chancellor, Masters and Scholars of the University of Cambridge, by virtue of the grants and Acts of Parliament insisted on by the said defendants, or any of them, have the right or privilege of printing Acts of Parliament or abridgments of Acts of Parliament.

This case was first argued in Michaelmas term 1745, by Mr Comyns for the plaintiffs, and Mr. Noel for the defendants. It was argued a second time in Michaelmas term 1747, by Mr. Gundry for the plaintiffs, and Sir Richard Lloyd for the defendants. It was argued a third time in Hilary term 1749, by Mr. Hume for the plaintiffs, and Mr. Henley for the defendants. It then stood for the certificate of the Judges; which having been put off for several years during the life of the Lord Chief Justice Lee, the parties did not apply to have it argued again, whilst the Lord Chief Justice Ryder lived: but in Trinity term 1758, they applied to have it set down for further argument, in the next Michaelmas term.

Before it came on, the Court ordered copies of all the above-mentioned letters-patent, Acts of Parliament, and instruments to be left with them: they also ordered copies of the charter to the stationers of London, of the 4th of May, 3 & 4 Ph. & Mar. of the grant to the University of Oxford, “to print books,” dated the 13th of March, 8 Car. 1, and the grant “to print law books,” dated 12th of August, 9 G. 2, and the proclamation of the 25th of September, 21 Jac. 1, against the disorderly printing of books; and the several decrees of the Court of Star-Chamber relative thereto.

On the 17th of November 1751, it was argued by Mr. Comyns for the plaintiffs, and Mr. Solicitor General (Yorke) for the defendants.

And very soon after this last argument, the following certificate was made.

[664] “Having heard counsel on both sides, and considered of this case, we are of opinion that during the term granted by the letters-patent dated the 13th of October, in the 12th year of the reign of Queen Ann, the plaintiffs are intitled to the right of printing Acts of Parliament and abridgments of Acts of Parliament, exclusive of all other persons not authorized to print the same by prior grants, from the Crown.

“But we think, that by virtue of the letters-patent bearing date the 20th day of July, in the 26th year of the reign of King Henry the 8th, and the letters-patent bearing date the 6th of February, in the 3d year of the reign of King Charles the First, the Chancellor, Masters and Scholars of the University of Cambridge, are intrusted with a concurrent authority to print Acts of Parliament, and abridgments of Acts of Parliament, within the said university, upon the terms in the said letters-patent.”

“MANSFIELD.

T. DENISON.

M. FOSTER.

E. WILMOT.

“24th November, 1758.”

DR. BURTON *versus* THOMPSON. Friday, 17th November 1758. A verdict against evidence cannot be set aside, if it appear that the plaintiff has received no injury. [See Bull. 326. 1 Bosan. 339 n.]

On shewing cause against a rule for a new trial, which had been moved for by the plaintiff, upon an allegation “that the verdict (which was found for the defendant) was given contrary to evidence.”

Mr. Just. Foster (who tried the cause) now reported that it was an action for a libel; that the charge was proved by the plaintiff; but that the injury done to him



thereby, appeared upon the evidence to be so very inconsiderable, that if the jury had found for the plaintiff, he should have thought a half-crown, or even a much smaller sum, to have been sufficient damages : but that the jury had gone too far : and instead of giving the plaintiff very small damages, had found a verdict against him ; which was certainly a verdict against evidence.

[665] Lord Mansfield—It does not follow by necessary consequence, that there must always be a new trial granted, in all cases whatsoever, where the verdict is contrary to evidence ; for, it is possible, that the verdict may still be on the side of the real justice and equity of the case. And of this, there are several instances in the \* printed books ; particularly *The Duchess of Mazarine's case* in 2 Salk. 646. (*Deerly v. The Duchess of Mazarine* : which is directly in point.)

Here, the jury have found for the defendant. My brother Foster, who tried the cause (which the plaintiff has brought hither out of Yorkshire) says, that he thinks "half a crown or less would have been damages sufficient, if they had given their verdict for the plaintiff." He must pay the costs, before he can have a new trial. Therefore I do not think that we ought to interfere, merely to give the plaintiff an opportunity of harassing the defendant at a great expence to himself : where there has been no real damage, and where the injury is so trivial as not to deserve above a half crown compensation. Besides, the plaintiff has brought the action to be tried at a great distance from the proper county. The cause of action is in the nature of a crime ; the implied damages are, in some measure, by way of punishment. An indictment or information would lie. And in criminal cases, where the defendant is acquitted, a new trial cannot be granted.

Mr. Just. Denison, Mr. Just. Foster, and Mr. Just. Wilmot, all spoke in very explicit terms to the same effect.

Per Cur. unanimously,

The rule to shew cause why there should not be a new trial was discharged.

ASLIN *versus* PARKIN. Saturday, 18th November, 1758. An action for mesne profits (including costs) will lie after a judgment by default. [See Bull. 87, 88. 3 Wils. 119, 121. 3 Durn. 16. 7 Durn. 730. 6 Vez. 86. 4 Burr. 2448.

[See *Pearse v. Coaker*, 1869, L. R. 4 Ex. 97 ; *Harris v. Mulhern*, 1875, 1 Ex. D. 35.]

This was an action of trespass, for the mesne profits of a house in Sheffield in Yorkshire, brought in the name of the lessee or nominal plaintiff, in ejectment, against the tenant in possession, after judgment obtained against the casual ejector, by default. The costs of the ejectment were also included and inserted in the declaration, as consequential damages of the trespass therein complained of.

On the trial of this cause before Lord Mansfield, (a) at the Summer Assizes, 1758, at the City of York, the plaintiff gave in evidence, [666] the judgment in ejectment, the writ of possession with the return of execution upon it, the defendant's occupation of the premises, the value of them during that time (which was proved to be 20l.) and the costs of the ejectment (amounting to 12l. more).

On the part of the defendant, it was objected, that as the judgment in the eject-

\* See title Trial in 2 Salk. pl. 2, 3, 4, 5, 11, 18, 34. See before *Farewell, Esq. v. Chaffey et Al*, Pa. 54.

(a) It appears by the report of this case in Barnes's notes, p. 472, that the record of this case came out of C. B. ; and it appears by that report as well as by this in this, page 667, that the trial was at York Assizes, before Lord Mansfield ; and it is also mentioned in Barnes, 473, 474, that Lord Mansfield put it into this method, viz. he laid the question before "all the Judges, who were unanimously of opinion, that, &c." The same is also stated, post, 667, immediately after which it is there added, that he thought fit now publicly and particularly to declare that, &c. This appears to be extrajudicial, for as the record was in C. B. Lord Mansfield had nothing to do with it, unless he reserved it as mentioned in Barnes, for his chambers ; but then he could there only give his opinion, and that has been considered as given at York. If the record had been in B. R. then he might have said he chose to take the opinion of the Court, and the assistance of the other Judges ; but as it was in C. B. his making a public declaration of his opinion and of the other Judges in B. R. was quite novel.

ment was by default, against the casual ejector, this action could not be legally maintained in the name of the nominal plaintiff: but ought to have been brought by the plaintiff's lessor: and they ought to have proved the plaintiff to have been in possession when the defendant committed the trespass for which the action is brought. (a)

In support of this objection, it was argued, that though the law allows fictitious proceedings in ejectment, for the trying of titles; yet in actions for mesne profits, no such fiction prevails: but the suit, the injury, and the defendant are real; and the action in no respect differs from any other action of trespass.

That this was a possessory action; which could in no case be maintained, unless the plaintiff's possession was either proved or admitted: and as, in the present case, the plaintiff could not possibly prove an actual entry, there was no evidence of his possession, that could affect, or be received against the present defendant.

It was admitted, that an action of this kind might be brought in the name of the nominal plaintiff in ejectment, where the tenant had appeared and confessed lease, entry and ouster; because being thereby become a party to the record in ejectment, and having confessed the entry of the plaintiff, he is estopped by that confession and by the judgment against him, from controverting afterwards the plaintiff's possession: but where the judgment in ejectment was by default, against the casual ejector, there was no such confession of the tenant, no matter of record to estop him; but he was equally at liberty to deny the plaintiff's possession, and to put him upon proving it, as in any other action of trespass; and having never been a party to the judgment in ejectment, neither that judgment nor the writ of possession upon it, (as they were merely between the nominal plaintiff and a third person, the casual ejector,) could be any conclusion or evidence against the present defendant.

It was therefore insisted, that this action ought to have been brought by the lessor of the plaintiff, in his own [667] name; who might have proved an actual entry under the writ of possession: and by that entry, the possession he thereby obtained would relate back to the commencement of his title; but being brought in the name of the nominal plaintiff, and the defendant being a stranger to the judgment in ejectment, the plaintiff had failed of maintaining his action.

In support of this objection, the defendant's counsel urged that although the distinction was carried no farther, in the case of *Jefferies v. Dyson*, (2 Strange, 960, H. 7, G. 2, B. R.) than to admit the tenant in possession (where the judgment was against the casual ejector, by default,) to controvert the title of the plaintiff, upon an action for the mesne profits: yet both parts of that case had been since contradicted; and it had been since holden "that the defendant should not controvert the plaintiff's title;" but (where the tenant has not entered into the common rule) "the plaintiff must prove his own actual possession: and can only recover damages from that time." For this, they cited a case of *Stanynought v. Cosins*, H. 19, G. 2, C. B. (2 Barnes, 367,) and some circuit-traditions of nonsuits for want of the plaintiff's proving his possession, where the judgment was by default, against the casual ejector.

Lord Mansfield reserved the point, at the assizes; and afterwards proposed it to all the Judges, and had their opinion: which he thought fit now publicly and particularly to declare.

Upon principles, his Lordship said, he was clearly of opinion against the objection, on the trial, without hearing the counsel for the plaintiff. But, as authorities were then referred to, and as the point related to the effect of that proceeding which is now almost the only remedy, in practice, for recovering land wrongfully withheld; he thought it of great consequence, that the matter should be considered by all the Judges. He therefore reserved the case, declaring "he did it with that view; and that he would endeavour to get their opinion without any delay or expence to the parties."

Accordingly, his Lordship laid it before them upon the first day of term; and they took till last Thursday, the 16th of November, to look into the cases, so far as they

(a) What is here printed in italics is not in the report of this case in Barnes; but no doubt is properly inserted by Burrow; for at the conclusion of the opinion of the Judges delivered by Lord Mansfield, it appears in Barnes, 474, "that so long as the judgment stands, it proves the possession of the nominal plaintiff, during the term laid in the ejectment."



could, with any accuracy, be traced. And besides those that are in print, they had seen some in manuscript different ways; which are now, he said, totally immaterial to be mentioned.

Because all the Judges are unanimously of opinion, "that the nominal plaintiff, and the casual ejector, are [668] judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession; invented,\* under the control and power of the Court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side."

"That the lessor of the plaintiff, and the tenant in possession, are, substantially, and in truth, the parties, and the only parties to the suit. The tenant in possession must be duly served: and if he is not, he has a right to set aside the judgment. If, after he is duly served he does not appear, but lets judgment go by default: such judgment is carried into execution against him by a writ of possession."

"That there is no distinction between a judgment in ejectment upon a verdict; and a judgment by default. In the first case, the right of the plaintiff is tried and determined against the defendant; in the last case, it is confessed."

"An action for the mesne profits, is consequential to the recovery in ejectment. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee; and in either shape, it is equally his action."

"The tenant is concluded by the judgment, and cannot controvert the title. Consequently, he cannot controvert the plaintiff's possession: because his possession is part of his title: for, the plaintiff, to intitle himself to recover in an ejectment, must shew a possessory right not barred by the Statute of Limitations."

"This judgment, like all others, only concludes the parties, as to the subject-matter of it. Therefore, beyond the time laid in the demise, it proves nothing at all: because, beyond that time, the plaintiff has alledged no title, nor could be put to prove any."

"As to the length of time the tenant has occupied, the judgment proves nothing; nor as to the value. And therefore, it was proved in this case (and must be in all) how long the defendant enjoyed the premises; and what the value was: and it appeared, that the time of such occupation by the defendant was within the time laid in the demise."

This unanimous resolution of all the Judges, upon short plain principles, will not only be a certain and uniform rule, upon actions for mesne profits; but may tend to put this fictitious remedy by [669] ejectment, upon a true and liberal foundation: to attain speedily and effectually the complete ends of justice, according to the real merits of the case.

My brother Wilmot tells me, that he had the very same question made before him, upon the Oxford Circuit, the last assizes: but the cause went off upon another point.

I am therefore glad that the general rule is now settled; and that the settling it, has occasioned no expence or delay to the particular parties in this cause.

The rule consequently was, that the postea be delivered to the plaintiff, that he might have judgment.

HEYLYN AND OTHERS *versus* ADAMSON. Monday, 20th Nov. 1758. An indorsee of a bill of exchange on an action against the indorser, must shew that he has used all due diligence against the acceptor. [S. C. Law of Bills of Exchange, 66. Buller, 277. See also 5 Burr. 2672. Doug. 654. Hard. 322, 323, 295, and 5 Durn. 224.]

This was an action on the case, upon promises. And the first count in the declaration was upon an inland bill of exchange, drawn by Robert Carrick and directed to William Dods, dated the 13th day of March 1756: whereby the said Robert Carrick requires the said William Dods to pay to the defendant or his order 100l. at forty days after date, value received, as advised by the said Robert Carrick: which said bill was indorsed by the said defendant (Eleanor Adamson) to the said plaintiffs, and was accepted by the said Dods, but not paid by him.

\* V. post, pa. 1295.



Upon the trial of this cause, before Lord Mansfield, at the sittings after last Hilary term at Guildhall, it was proved on the part of the plaintiffs, that the said Robert Carrick made the bill; and that the defendant indorsed it to the plaintiffs; and that the said William Dods accepted it, but afterwards refused payment; and that the plaintiffs thereupon, on the day it became payable, carried it to be protested for the nonpayment; and soon afterwards brought their action thereon, against the defendant: but it did not appear, on the trial, that the drawer of the bill had any notice of such non-payment: or that any demand of the money was ever made on him before the commencement of the suit.

It was thereupon objected by the defendant's counsel, "that the action would not lie against the defendant (the indorser,) until a demand of payment had been made upon the drawer:" and as no such demand was proved to have been made on the drawer, the plaintiffs ought therefore to be nonsuited.

[670] Lord Mansfield directed a verdict to be given upon the said first count, for the plaintiffs, for 100*l.* damages and forty shillings costs; subject to the opinion of the Court, "whether, upon this case, the plaintiffs were entitled to recover."

A case was accordingly stated for the opinion of the Court, and signed by Sir Richard Lloyd for the plaintiffs, and by Mr. Norton for the defendant.

The only question was, whether, in an action brought upon an inland bill of exchange, by the indorsee against an indorser, this objection, "that no evidence was given at the trial of notice to the drawer of the bill, or even of making any inquiry after him," was a ground of nonsuit.

It was argued on Tuesday last, (the 14th instant), by Mr. Serjeant Davey for the plaintiff, and Mr. Rooke for the defendant.

Serjeant Davey made a distinction between inland bills of exchange, and notes of hand. In the latter, the drawer is to be the payer: in the former, the drawee, (the acceptor of the bill) is to pay it. So that upon a note of hand, the drawer of the note is the first person to be resorted to, for payment; but upon an inland bill of exchange the acceptor of the bill and not the drawer is the first person to be resorted to for payment (though the drawer shall indeed stand as a collateral security for his so doing). Therefore cases upon promissory notes are not applicable to cases on inland bills of exchange. The bill-holder cannot come upon the drawer of the bill, till the person upon whom it is drawn shall either refuse to accept it, or refuse payment after he has once accepted it.

Every indorsement of a bill of exchange is in the nature of a new bill of exchange: and if there are several indorsers, they all undertake "that the drawee (the acceptor of the bill,) shall pay it."

The indorsee is a stranger to the drawer of a bill of exchange: he is only concerned with the acceptor.

A bill of exchange may happen not to be dated from any certain place; or it may be dated from a place where the drawer does not reside; as where a traveller, calling at an inn, takes up money there, and gives a bill which is afterward indorsed by his landlord.

[671] And it would be vastly inconvenient to all the parties, if it should be holden necessary for the indorsee to find out or even search for the drawer of an inland bill of exchange, to give him notice "that the acceptor has refused payment." For, the security may be lost, in the interim, whilst such search is making: the indorser may break, before the indorsee may be able to find the drawer. But the indorser may know where to find him, or how to apply to him.

Six Chief Justices have been of different opinions on this point: three of them, of one opinion: three, of another.

The 9 & 10 W. 3, c. 17, was the first Act that gives protests for non-payment of inland bills of exchange: and the 3 & 4 Ann. c. 9, § 4, 5, extends the protest, to the case of non-acceptance. The words of both these Acts are remarkable; viz. "that the protest shall be notified to the party from whom the bill was received; who shall repay the same with interest and charges."

The inconvenience may be the same (as to this matter) upon an inland bill, as upon a foreign bill. Yet upon a foreign bill, it certainly is not necessary. In 1 Strange, 441, *Bromley v. Frazier*, Tr. 7 G. 1, on a foreign bill of exchange, the Court, on mature deliberation held, "that a demand upon the drawer is not necessary, to make a charge upon the indorser; but the indorsee has liberty to resort to either." It was a point

then unsettled. In 1 Salk. 131, 133, there are, as it is said in *Strange*, 441, contradictory opinions upon it; which are professedly settled by that case of *Bromley v. Frazier*, as the book declares: but those contradictory opinions are upon inland bills of exchange. Indeed the case of *Bromley v. Frazier* (then directly under consideration) was upon a foreign one: but the book goes on thus, (which is general, and equally applicable to both sorts,)—and as to the notion that had prevailed, “that the indorser warrants only in default of the drawer,” there is no colour of it: “for, every indorser is in the nature of a new drawer; and at Nisi Prius the indorsee is never put to prove the hand of the first drawer, where the action is against an indorser. The requiring a protest for non-acceptance, is not because a protest amounts to a demand: for it is no more than giving notice to the drawer, to get his effects out of the hands of the drawee; who, by the other’s drawing, is supposed to have sufficient wherewith to satisfy the bill.” So that this notion is here exploded, “that the indorser of a bill of exchange warrants only in default of the drawer.” But every indorser warrants against the default of the payer.

[672] In the case of † *Hamerton v. Mackrell*, M. 10 G. 2, B. R. (which was subsequent to the case in 1 *Strange*, 41,) an action by the indorsee of a promissory note against the indorser, the objection was, that it was not alledged in the declaration, “that a demand was made upon the drawer of the note.” And it was there holden not necessary to be alledged in the declaration. But Lord Hardwicke mentioned the opinions of Holt, Macclesfield, Pratt, Raymond, Eyre and King. Holt, Eyre, and \*Raymond held it to be necessary: Macclesfield, Pratt, and King were of a contrary opinion, viz. “that it was not necessary.”

These opinions seem to relate only to notes of hand: but upon a bill of exchange, the indorsers are all only promisers and undertakers for the payer, (the acceptor,) of the bill; and are not obliged to look after the original drawer. And fact and experience in business are agreeable to this position.

Mr. Rooke, for the defendant, insisted that upon an action brought by the indorsee against the indorser of an inland bill of exchange, the plaintiff ought, at the trial, to prove notice to and demand of payment from the drawer of the bill.

The indorser is only a conditional undertaker for the drawer of the bill, who is the first contractor: he stands as a surety only and can not be called upon, unless the drawer makes default. It is like the case of principal and accessory; where the accessory cannot be tried before the principal: so here, the indorser cannot be liable, till the original contractor has failed in performing his contract.

And great inconvenience might follow, if this was otherwise.

There are several authorities which fully prove that it is necessary. Cases in B. R. temp. W. 3, 244, *Lambert v. Oakes* at Guildhall; and 1 Ld. Raym. 443, *Lambert v. Oakes*, S. C. is directly in point. 1 Salk. 126, pl. 6, *Anon.* († probably S. C.) accordingly. 1 *Strange*, 649, M. 12 G. 1, *Sydebottom v. Smith*. Upon an action against the indorser of a promissory note, at Guildhall, C. B. Ld. Ch. Just. Eyre’s opinion was, accordingly, “that the plaintiff must prove diligence to get the money of the drawer; the indorser only warranting on his default.” And for want of such proof, he directed the jury to find for the defendant. 2 *Strange*, 1087, *Collins v. Butler*, at Guildhall. [673] Per Lee, Ch. Just. It was ruled accordingly; who cited a case determined on great debate, in C. B. in P. 4 G. 2.—Due diligence must be shewn to have been used in inquiring after the drawer of the bill of exchange, before the money can be recovered against the indorser.

And there is no difference between a note of hand, and a bill of exchange; other than that the drawer of the note is the express promiser, and (as it were) both drawer and drawee; whereas on a bill of exchange, he is only an implied promiser. Indeed on a foreign bill of exchange this notice and demand is not necessary; because the foreign drawer is not amenable to justice here.

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† The serjeant called it *Richardson v. Mackerel*: but I took it by the name of *Hamerton*.

\* Lord Raymond first held the opinion of Macclesfield and Pratt; but came over afterwards to that of Holt and Eyre; as Lord Hardwicke said he had been informed.

† *Lambert v. Pack*, 1 Salk. 127, pl. 9, seems clearly S. C. Indeed they are, all four, probably, the same case; though two of them are placed under M. 10, and the other two under P. 11 W. 3.



As to the words of the Statutes of 9, 10 W. 3, & 3, 4 Ann. they do not exclude the necessity of giving notice to the drawer: though they add an additional caution, "of giving notice to the person from whom the bill was received."

Mr. Serjeant's case, wherein mention is made of the six Chief Justices differing in opinion, seems to be taken from the third volume of the Abridgment of the Law.\*<sup>1</sup>

Serjeant Davey, in reply—I agree that the drawer of a bill of exchange is only a conditional undertaker for the drawee: and so also is the indorser of a bill of exchange a conditional undertaker for the drawee. But it does not follow, that the indorser of a bill of exchange is only a conditional undertaker for the drawer.

The case of *Lambert v. Oakes* was upon a note of hand (according to *Ld. Raymond*;) and *Ld. Ch. J. Holt*'s opinion upon a bill of exchange, was upon a case not before him.

In the case of *Hamerton v. Mackrell*, *Ld. Hardwicke* † held it not necessary.

The drawee's place of abode is always known, upon a bill of exchange; but not the drawer's.

The Court gave no opinion at the time of this argument; but postponed it, in order to settle the point with precision and certainty.

Lord Mansfield observed, that the confusion seemed to have arisen from its not being settled, "who is the original debtor."

[674] Mr. Just. Denison said, the case of *Hamerton v. Mackrell* was upon a writ of error; and the judgment was affirmed, upon the allegation contained in the declaration, of a promise made by the indorser, which (upon a writ of error,) they considered as an express promise: but Lord Hardwicke did not give his own opinion at all, upon what is now the present question.

Cur. advis'.

Lord Mansfield now delivered the resolution of the Court.

His Lordship said, he could not persuade himself that there had really been such a variety of opinions upon this question, at *Nisi Prius*, as had been mentioned at the Bar: but however that may be, it must now be determined upon the nature of the transaction, general convenience, and the authority of deliberate resolutions in Court.

A bill of exchange is an order, or command, to the drawee who has, or is supposed to have, effects of the drawer in his hands, to pay. When the drawee has accepted, he is the original debtor: and due diligence must be used in applying to him. The drawer is only liable in default of payment by him, due diligence having been used: and therefore if the acceptor is not called upon, within a reasonable time after the bill is payable, and happens to break, the drawer is not liable at all.

Every man therefore who takes a bill of exchange, must know where to call upon the drawee; and undertakes to demand the money of him.

When a bill of exchange is indorsed, by the person to whom it was made payable as between the indorser and indorsee, it is a new bill of exchange; and the indorser stands in the place of the drawer: the indorsee undertakes to demand the money of the drawee. If he neglects, and the drawee becomes insolvent, the loss falls upon himself. If the indorsee is diligent, and the drawee refuses payment; his immediate remedy is against the indorser: and it was very properly observed,\*<sup>2</sup> that the Act of 9, 10 W. 3, requires notice of the protest to be given "to the per-[675]-son from whom the bill was received." He may have another remedy against the first drawer; as assignee to, and standing in the place of the indorser.

The indorsee does not trust to the credit of the original drawer: he does not know whether such a person exists, or where he lives, or whether his name may have been forged. The indorser is his drawer; and the person to whom he originally trusted, in case the drawee should not pay the money. There is no difference in this respect, between foreign and inland bills of exchange, except as to the degree of inconvenience: all the arguments from law, and the nature of a transaction, are exactly the same in both cases.

As to foreign bills of exchange, the question was solemnly determined by this

\*<sup>1</sup> See New Abridgment vol. 3, title Merchant and Merchandise, pa. 608, note b. (which is undoubtedly the same case cited by the serjeant).

† The serjeant had been misinformed: for Lord Hardwicke (as appears by my note of that case) did not give or even intimate his own opinion upon that point.

\*<sup>2</sup> V. ante, pa. 671.



Court, upon very satisfactory grounds, in the case of <sup>\*1</sup>*Bromley v. Frazier*—that was “an action upon the case upon a foreign bill of exchange, by the indorsee against the indorser:” and on general demurrer, it was objected, “that they had not shewn a demand upon the drawer, in whose default only it is that the indorser warrants.” And because “this was a point unsettled, and on which there are contradictory opinions in *Salkeld*, 131 & 133, the Court took time to consider of it. And on the second argument, they delivered their opinions,” “that the declaration was well enough: for, the design of the law of merchants in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie. Now, to require a demand upon the drawer, will be laying such a clog upon these bills, as will deter every body from taking them. The drawer lives abroad perhaps in the Indies, where the indorsee has no correspondent to whom he can send the bill for a demand; or if he could, yet the delay would be so great that no body would meddle with them. Suppose it was the case of several indorsements, must the last indorsee travel round the world, before he can fix his action upon the man from whom he received the bill? In common experience, every body knows that the more indorsements a bill has, the greater credit it bears: whereas if those demands are all necessary to be made, it must naturally diminish the value, by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorser warrants only in default of the drawer, there is no colour for it: for, every indorser is in the nature of a new drawer; and at *Nisi Prius*, [676] the indorsee is never put to prove the hand of the first drawer, where the action is against an indorser. The requiring a protest for non-acceptance, is not because a protest amounts to a demand: for, it is no more than a giving notice to the drawer to get his effects out of the hands of the drawee, who, (by the others drawing,) is supposed to have sufficient wherewith to satisfy the bill.” Upon the whole, they declared themselves to be of opinion, “that in the case of a foreign bill of exchange, a demand upon the drawer is not necessary, to make a charge upon the indorser; but the indorsee has his liberty to resort to either, for the money: consequently, the plaintiff (they said,) must have judgment.”

Every inconvenience here suggested holds to a great degree, and every other argument holds equally, in the case of inland bills of exchange.

We are therefore all of opinion, “that, to entitle the indorsee of an inland bill of exchange to bring an action against the indorser, upon failure of payment by the drawee, it is not necessary to make any demand of, or inquiry after, the first drawer.”

The law is exactly the same, and fully settled, upon the analogy of promissory notes to bills of exchange; which is very clear, when the point of resemblance is once fixed.

While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed, the resemblance begins: for, then it is an order, by the indorser, upon the maker of the note, (his debtor, by the note,) to pay to the indorsee. This is the very definition of a bill of exchange.

Therefore as soon as a note is indorsed by the payee, the indorser is the drawer; the maker of the note is the acceptor; and the indorsee is the person to whom it is made payable. The indorser only undertakes, in case the maker of the note does not pay. The indorsee is bound to apply to the maker of the note: he takes it upon that condition; and therefore must, in all cases, know who he is, and where he lives; and if, after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money and cannot come upon the indorser at all.

Therefore, before the indorsee of a promissory note brings an action against the indorser, he must shew a demand, or due diligence to get the money from the maker of the [677] note;—just as the person to whom the bill of exchange is made payable must shew a demand, or due diligence to get the money from the acceptor, before he brings an action against the drawer. This was determined by the whole Court of Common Pleas, upon great consideration, in *Pasch. 4 G. 2*; as cited by my *Ld. Ch. J. Lee* in the case of <sup>\*2</sup>*Collins v. Butler*.

<sup>\*1</sup> 1 *Strange*, 441, *Tr. 7 G. 1, B. R.*

<sup>\*2</sup> 2 *Strange*, 1087, 11 *G. 2.*

So that the rule is exactly the same upon promissory notes, as it is upon bills of exchange; and the confusion has, in part, arisen from the maker of a promissory note being called the drawer: whereas, by comparison to bills of exchange, the indorser is the drawer.

All the authorities, and particularly *Ld. Hardwicke* in the case of *Hammerton v. Mackrel*,<sup>\*1</sup> *M. 10 G. 2*, (according to my brother Denison's state of what his Lordship said,) put promissory notes and inland bills of exchange just upon the <sup>\*2</sup> same footing: and the <sup>†1</sup> statute expressly refers to inland bills of exchange.

But the same law must be applied to the same reason; to the substantial resemblance between promissory notes, and bills of exchange; and not to the same sound, which is equally used to describe the makers of both.

My *Ld. Ch. J. Holt* is quoted as being of opinion, "that in actions upon bills of exchange, it is necessary to prove a demand upon the drawer." For proof of this, the principal case referred to, is that of *Lambert v. Oakes*, reported in three books: 1 *Ld. Raymond*, 1 *Salk.* and 12 *Mod.*

In 1 *Ld. Raym.* 443, it appears manifestly, that the question arose upon a promissory note. "R. signed a note under his hand, payable to Oakes, or his order; Oakes indorsed it to Lambert; upon which, Lambert brought the action for the money against Oakes. Per *Holt, Ch. J.* he ought to prove that he had demanded or done his endeavour to demand this money of R. before he can sue Oakes upon the indorsement. The same law, if the bill was drawn upon any other person, payable to Oakes or order." That is, "a demand must be made of the person upon whom the bill is drawn." And other parts of the case manifestly shew this to have been the meaning. For, my *Ld. Ch. J. Holt* is reported to have said, "The indorsement will subject the indorser to an action; because it makes a new contract, in case the person upon whom it was drawn does not pay it." § Again, "if the indorsee does not demand the money payable by the bill, of the person [678] upon whom it is drawn, in convenient time, and afterwards he fails, the indorser is not liable."

In <sup>\*3</sup> *Salkeld*, the case is confounded: it is stated to be a bill of exchange, and "that the demand must be made upon the drawer or him upon whom it was drawn." My *Ld. Ch. J. Holt* had said that a demand must be made of the maker of a promissory note, (calling him the drawer;) and in the case of a bill of exchange, of him upon whom the bill is drawn. The report jumbles both together, as applied only to a bill of exchange; misled, I dare say, by the equivocal sound of the term drawer, and by the Chief Justice's reasoning in the case of a promissory note, from the law upon bills of exchange.<sup>†2</sup>

In the 12th *Modern*, 244, the case is mistaken too; and stated as upon a bill of exchange, and as a determination "that there must be a demand upon the drawer of the bill of exchange." And yet the report itself shews demonstrably, that what was said by my *Lord Ch. J. Holt* was applied to the maker of a promissory note, (calling him the drawer,) for, the report makes him argue—"So, if the bill was drawn on any other person, payable to Oakes or order:" which shews that the case in judgment was not a bill drawn upon another person, but payable only to Oakes, by R. himself.

It seems to me, as if *Ld. Ch. J. Holt*, in that case, had considered the drawee of a bill of exchange in the same light as the maker of a promissory note: but loose and hasty notes, misled by identity of sound, have misapplied what was said to the drawer of a promissory note, to the drawer of a bill of exchange; and to such a degree misapplied it, that two reports out of the <sup>†3</sup> three have stated the question as arising upon a bill of exchange; which is manifestly otherwise.

<sup>\*1</sup> [*S. C. Hardw.* 322, by the name of *Hamilton v. Mackrell.*]

<sup>\*2</sup> My own note of that case is exactly agreeable, viz. "Promissory notes seem to me to be put upon the same foot as inland bills of exchange."

<sup>†1</sup> *V. 3, 4 Ann. c. 9.*

§ In *pa.* 444.

<sup>\*3</sup> 1 *Salk.* 127, (there called *Lambert v. Pack,*) *pl.* 9.

<sup>†2</sup> Note. The report in 1 *Salk.* 126, *pl.* 6, is much more strong and explicit; but it is short, anonymous, and a mere loose scrap, by the same reporter; who was manifestly unclear about the case, (being *S. C.* with *pl.* 9).

<sup>†3</sup> There seem to be four reports of *S. C.* or at least of *S. P.* (*V. note* on *pa.* 672, and on this *pa.* 678.)



But be this conjecture as it may, we are all of opinion "that in actions upon inland [as well as foreign] bills of exchange, by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the drawee (or acceptor); but need not prove any demand of the drawer: and that in actions upon promissory notes, by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the maker of the note." [The maker in this case being the same as the acceptor in the other.]

Accordingly, the rule was, that the postea be delivered to the plaintiff.

[679] REX *versus* MALLINSON. Wednesday, 22d November, 1758. A conviction on a penal statute must negative all the exceptions in the statute, whereby the defendant might be protected. [See 1 East, 282.]

This was a conviction for killing ten trouts.

The conviction sets forth, that one John Keep, of, &c. came before the justice of peace, and gave information that the defendant Thomas Mallinson, of, &c. taylor; not having any lands and tenements or other estate of inheritance in his own right nor in the right of his wife, of the clear yearly value of 100l. or for term of life; nor having any lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of 150l. nor being the son and heir apparent of an esquire or other person of higher degree; nor being owner or keeper of any forest, park, chase, or warren, being stocked with deer or conies, for his own necessary use, in respect of such forest, park, chase, or warren; nor being lord of any manor or royalty, nor game-keeper of any lord or lady of any lordship or manor, duly made, constituted, or appointed with power or authority to take, kill, or destroy the game in or upon any such lordship or manor; nor being a maker or seller of any nets, angles, leaps, piches, or other engines for the taking of fish: nor being owner of any river or fishery; nor being a fisherman lawfully authorized to fish with nets in navigable rivers or waters, nor an apprentice to any such fisherman; nor in any wise whatsoever impowered, authorized, or qualified by the laws of this realm, either to take, kill, or destroy any sort of fish, fowl, or other game whatsoever, either for himself or for any other person or persons whomsoever, nor to keep or use any greyhound, setting-dog, hays, lurchers, tunnels, nets, or any other engine to kill and destroy the game; on the 27th of June 31 G. 2, at Golcarr aforesaid within the said Riding, did, with a certain net, unlawfully take and kill ten fish, that is to say ten trouts, contrary to the form of the statute in such case made and provided. Whereupon the said Thomas Mallinson, afterwards, on the 27th day of June in the year aforesaid, had notice of the said information and of the offence therein charged upon him as aforesaid, and was then and there in due manner summoned to be and appear before the said justice at his dwelling-house in M. aforesaid in the West-Riding, immediately upon his receipt of that summons, to make his defence against the said charge contained in the said information: but the said Thomas Mallinson neglected to appear, and doth not appear before the said justice, nor make any defence against the said charge; but maketh default therein. Wherefore the said justice afterwards, that is to say on the 12th day of July 31 G. 2, at his above-mentioned dwelling house in M. aforesaid in the said West-Riding, (the said Thomas Mallinson hav-[680]-ing so been summoned, and having hitherto neglected to appear or make any defence against the said charge,) doth proceed to examine the truth of the charge aforesaid in the said information contained. And hereupon John Whitely of Golcarr aforesaid, cordwainer, being a credible witness, cometh before the said justice in his proper person, and before the said justice, upon his corporal oath upon the Holy Evangelists of God to him then and there administered by the said justice, deposeth, sweareth, and upon his said oath affirmeth and saith that the said Thomas Mallinson, not having any lands and tenements, or other estate of inheritance in his own right, nor in the right of his wife, of the clear yearly value of 100l. or for term of life; nor having any lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of 150l. nor being the son and heir apparent of an esquire or other person of higher degree; nor being owner or keeper of any forest, park, chase, or warren, being stocked with deer or conies for his own necessary use in respect of such forest, park, chase or warren; nor being lord of any manor or royalty, nor game-keeper of any lord or lady of any lordship or manor, duly made, constituted, or appointed with power or authority to take, kill, or destroy the



game in or upon any such lordship or manor; nor being a maker or seller of any nets, angles, leaps, piches or other engines for the taking of fish: nor being owner or occupier of any river or fishery; nor being a fisherman lawfully authorized to fish with nets and engines in navigable rivers or waters, nor an apprentice to any such fisherman; nor in any wise whatsoever impowered, authorized, or qualified by the law of this realm, either to take, kill, or destroy any sort of fish, fowl, or other game whatsoever, either for himself or for any other person or persons whatsoever, nor to keep or use any greyhound, setting-dog, hayes, lurchers, tunnels, nets, or any other engine to kill and destroy the game; on the 27th day of June in the 31st year aforesaid, in Golcarr aforesaid in the said Riding, did, with a certain net, unlawfully take and kill ten fish, that is to say, ten trouts, contrary to the form of the statute in such case made and provided. And thereupon the said Thomas Mallinson, on the 12th day of July aforesaid in the year aforesaid, is duly convicted before the said justice, of the offence aforesaid in the said information contained and therein charged upon him, by the oath of one credible witness, the aforesaid John Whiteley, according to the form of the statute in such case made and provided. It is therefore adjudged by the said justice, that the said Thomas Mallinson is guilty of the offence aforesaid in the said information contained; and is hereby convicted thereof, according to the form of the statute in such case made and provided; and that the said Thomas [681] Mallinson hath forfeited the sum of five pounds for his offences aforesaid; that is to say ten shillings a-piece for every and each of the above-mentioned fish so taken and killed by the said Thomas Mallinson as aforesaid, amounting together to the said sum of 5l. to be levied and distributed according to the form of the statute in such case made and provided. In witness, &c.

Mr. Norton, on behalf of the defendant, made several objections to this conviction.

1st. The summons is bad, as set out; (though indeed it was not necessary to have set it out at all). It is "to appear immediately;" which is not a reasonable summons. 1 Strange, 261, *Rex v. Johnson*. An objection of this sort was taken to a summons "to appear on the same day." It received indeed a satisfactory answer, from a fact; viz. the defendant's having there actually appeared to it, and made a defence: which appearance and defence cured all defects in the summons.

2d objection. Here is not a full negative adjudication of the defendant's want of qualification: for it is not stated "that the defendant had not the licence or consent of the owner." And as this essential circumstance is omitted, the general allegation of his "taking and killing the fish unlawfully and against the statute," is not sufficient. V. ante, pa. 154, 155, *Rex v. Jarvis*, H. 30 G. 2.

3d objection. It might be his own fish, and in his own pond, for aught that appears to the contrary: for, it is only alledged "that he killed ten trouts at such a place."

The conviction seems to be intended upon\* 4, 5 W. 3, c. 23, § 3.

Mr. Yates, contra, for the prosecutor.

1st. No precise time of appearance is requisite to be fixed by the summons: and this gives a larger latitude, than if a day and hour had been fixed; for, it means only, as soon as he can."

2dly. Though this omission of his "not having the consent of the owner," cannot be supported upon the statute of 22, 23 C. 2, c. 25, § 7; yet it may, upon that of 4, 5 W. & M. c. 23: which says only—"if any person not qualified by the laws of this land." (V. § 3.) And the Court will not presume a qualification. As in a conviction upon the Gin Act, in the case of *Rex v. Brian*, 2 Str. 1101. [682] The Court would not presume that the gin was sold to be used in medicine. *Rex v. Theed*, M. 11 G. 1, in 2 Lord Raym. 1375, and in 1 Strange, 608, the conviction was presumed to be right; as it did not appear to be wrong.

3dly. The same answer holds to this objection; viz. that the Court will not presume that the fish were the defendant's own," or, "that he killed them in his own pond."

Lord Mansfield—This conviction is clearly bad.

The offence provided against by the Act of 22, 23 C. 2, c. 25, is stealing fish:

\* It seems clearly to have been intended to be grounded on 22, 23 C. 2, c. 25, § 7, and not upon 4, 5 W. and M.

taking it\* without the licence or consent of the owner. The jurisdiction given to the justice of peace is over every such offender or offenders in stealing, taking or killing fish: (v. § 7). Taking and killing, in the intention of this statute, mean stealing.(a) But this man is not convicted of any offence. For, he is not charged with stealing, nor even with taking and killing the fish of another person, or in another person's pond. The offence specified in the statute is taking it "without the licence or consent of the lord or owner of the water." But it may be his own pond, and his own fish,(b) for any thing that appears to the contrary in the present case.

Therefore, if there was no other fault in it, it is essentially bad, for this reason alone.

Mr. Just. Denison—It is full of faults: but this alone would be fatal. It does not appear that the fish he killed, were not his own, or killed in his own ponds.

Mr. Just. Foster—The offence intended by the Act is the invading another man's property. But there is no such charge upon this man, as invading the property of another.

Mr. Just. Wilmot—This conviction is bad, for the faults that have been mentioned, and for a great many others: it is bad throughout.

Per Cur. unanimously,  
Conviction quashed.

[683] GOSS AND ANOTHER *versus* WITHERS. *IDEM versus* EUNDEM. 1758. Where a ship is taken the insured may demand as for a total loss and abandon to the insurers. [1 Durn. 189, 256, 220. 3 Bos. 391.]

[See *Rodocanachie v. Elliott*, 1873-74, L. R. 8 C. P. 666; L. R. 9 C. P. 518;  
*Anderson v. Marten* [1908], A. C. 340.]

This was a special case, from the sittings in London, upon two actions, on two distinct policies of insurance; one, upon a ship, and the other, upon the loading.

The former was an insurance upon the "David and Rebecca," at and from Newfoundland, to her port of discharge in Portugal or Spain, without the Streights, or England: to commence from the time of her beginning to load at Newfoundland, for

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\* *V. Rex v. Uriah Corden*, Hil. 1769, 9 G. 3, B. R. post, 2279.

(a) This is impossible; for the charge in the information (ante, 179), and in the conviction (ante, 180) is "that he did unlawfully take and kill, &c." yet exceptions like this have sometimes been allowed.

(b) The word stealing, is not used in the purview of the clause, in the stat. inflicting the penalty, against fishing, in the description of the offence; but afterwards there are these words "every such offender in stealing, &c." but it is only used in the preamble, which recites that divers "idle, disorderly and mean persons do betake themselves to the stealing, taking, and killing of fish, &c." And the purview of the Act extends to fishes taken in any river, and it never was either before or since that Act holden to be larceny, to take fish out of rivers; and even the severe Act of the 5 G. 3, c. 14, which uses the word stealing in the purview as well as the preamble, and makes it transportation for seven years "to take, kill, or destroy any fish bred, kept or preserved in any such river, &c." as therein mentioned, confines it to rivers, &c. "running in or through parks, paddocks, gardens, orchards or yards;" and it was never holden to be theft to take fish out of rivers: though out of ponds it has been doubted, as appears in Foster, 366, so that the part of the reasoning in this case from the word stealing seems to be a mistake, or at least, an inaccuracy. The words of the Act are these, viz. "Whereas divers idle, disorderly and mean persons do betake themselves to the stealing, taking, and killing of fish out of ponds, pools, motes, stews, and other several waters and rivers, to the great damage of the owners thereof. Be it therefore enacted, that if any person or persons shall use any casting-net, thief-net, drag-net, trammel-shove-net, or other net whatsoever, or any angle, hair, noose, troll or spear, or shall lay any wears, pots, nets, fish-hooks, or other engines, or shall take any fish by any means or device whatsoever, in any river, stew-pond, mote, or other water as aforesaid, or shall be aiding or assisting thereunto with the licence or consent of the lord or owner of the said water, and be thereof convicted, &c. every such offender in stealing, taking or carrying away, shall forfeit, &c."



either of the above named places : and it was upon the body, tackle, apparel, ordnance, &c. &c. of the ship ; beginning the adventure at Newfoundland ; and to continue during her abode there, and until the said ship, with all her ordnance, tackle, &c. should be arrived at her port of discharge as aforesaid, and until she should have been moored at anchor twenty-four hours in safety. It was to be lawful for the ship to touch at and stay in any port whatsoever, without prejudice to the insurance. The ship was, by agreement, to be valued at the sum subscribed, without further account. And in case of loss or misfortune, it was to be lawful for the assured, their servants, &c. to sue, labour and travel, for in or about the defence, safeguard and recovery of the ship, or any part thereof, without prejudice to the insurance ; to the charges whereof the insurers were to contribute, *pro rata*. The insurance was to be at ten guineas per cent. : and in case of loss, to abate 2l. per cent. And in case of average-loss not exceeding 5l. per cent. to allow nothing towards such loss. And if the vessel discharged without the Streights, excepting the Bay of Biscay, two guineas per cent. were to be returned : and if she sailed with convoy, and arrived, two guineas more per cent. were to be returned. The plaintiffs declared upon a total loss, by capture by the French.

The policy declared upon, in the other action, was an insurance upon any kind of lawful goods and merchandizes, loaden or to be loaden on board the aforesaid ship : which, for 7l. 7s. insured 70l. And the declaration alledged that divers quantities of fish, and other lawful merchandizes to the value of the money insured were put on board, to be carried from Newfoundland to her port of destination, and so continued, (except such as were thrown overboard as is after-mentioned,) till the loss of the ship and goods. The declaration then avers that a quarter of the said goods were necessarily thrown overboard, in a storm, to preserve the ship and the rest of the cargo : after which jetzon, the ship and the remainder of the goods were taken by the French.

[684] There was another count in this declaration, for money had and received to the use of the plaintiffs.

The case states that the ship departed from her proper port ; and was taken by the French on the 23d of December, 1756 ; and that the master, mates, and all the sailors, except an apprentice and landman, were taken out and carried to France. That the ship remained in the hands of the enemy eight days ; and was then retaken by a British privateer, and brought in on the 18th of January to Milford-Haven ; and that immediate notice was given by the assured to the assurers, with an offer to abandon the ship to their care. It was also proved at the trial, that before the taking by the enemy, a violent storm arose at sea ; which first separated the ship from her convoy, and afterwards disabled herself so far as to render her incapable of proceeding on her destined voyage, without going into port to refit.

It was also proved, that part of the cargo was thrown over-board, in the storm ; and the rest of it was spoiled whilst the ship lay at Milford-Haven, after the offer to abandon, and before the ship could be refitted. And the assured proved their interest in the ship and cargo, to the value insured.

Several questions arising upon the trial of the first of the said causes, it was agreed that the jury should bring in their verdict, in both causes, for the plaintiffs, as for a total loss ; subject, however, to the opinion of the Court on the following questions, viz.

1st. Whether this capture of the ship by the enemy, was or was not such a loss as that the insurers became liable thereby :

2dly. Whether under the several circumstances of this case, the assured had or had not a right to abandon the ship to the insurers, after she was carried into Milford-Haven.

This case was twice argued ; viz. first, on Tuesday, 6th June 1758, by Mr. Morton, *pro quer'*, and Mr. Serj. Davey, *pro def'* ; and again, on Friday, 10th November 1758, by Mr. Norton, *pro quer'*, and Sir Richard Lloyd *pro def'*.

Mr. Morton and Mr. Norton, on behalf of the plaintiffs, argued for the affirmative, in both questions.

They previously distinguished between cases disputed between insurers and insured, and those between owners and recaptors ; and observed that this is a mere contract between the parties.

[685] First point—This is such a total loss, as renders the insurers liable to answer for it.



They said they would consider (1st) what an insurance is; and (2dly) what a capture by an enemy is.

1st. The definition of an insurance is in Bynkershoek's *Questiones Publici Juris*, lib. 1, cap. 21.

2dly. A capture is, when there is no just ground of hope of recovering the ship: then it becomes the property of the captor. Grotius l. 3, c. 6, pa. 814, *De Jure Belli & Pacis*. "Tunc enim desperari incipit recuperatio, &c."

And the period of time of the detention is another rule; viz. being twenty-four hours in potestate hostium. Indeed subsequent writers do not fix it so precisely: but they are then treating only upon <sup>\*1</sup> salvage. Bynkershoek, indeed, differs in the premises, lib. 1, c. 4, *Quæstiones Juris Publici*: but both agree in the conclusion; for he also puts it upon the despair of the recovery of the ship. And this hope, or despair, must be a reasonable and just one; not a whimsical and arbitrary fancy or a mere wish.

This vessel was eight days in possession of the enemy; near a month, out of the power of the owners, (the insured;) and almost all the hands taken out. So that, by the terms and intent of the insurance (which must be taken favourably for the insured,) this voyage must be taken to have been totally defeated to the insurers; the adventure totally stopt; and consequently, the condition broken, as between the insurers and the insured.

And this is different from cases of salvage, where the property is not altered; but the marine law only determines what shall be paid by the owner, for the salvage.

This is a total loss: it was so long in possession of the enemy that the spes recuperandi was gone.

Though the ship was not carried into port, nor within the enemy's fleet, yet it was eight days in possession of the enemy; and it might have been as many months. And the spes recuperandi would be as absolutely gone, as if it had been carried into the enemy's fleet: out of which, it might, possibly, be immediately retaken.

Therefore the being carried *infra præsidia* of the enemy cannot be the true rule: but the true and cer-[686]-tain rule must, in reason, be, where the spes recuperandi is gone. Indeed the being carried *intra præsidia* may, in many cases, be an evidence of this.

Now upon the state of the present case, all hope of retaking was totally lost and gone.

However, the principle of this case is not new. For, by common law, the thing taken from the owner in war is gone, unless the owner makes fresh pursuit: and the property of the thing so taken in war, belongs to the captor. And the common-law rule is—that, in a war, the captor of a ship has a right to the ship and goods taken; unless the owner makes fresh pursuit *ante occasum solis*, 7 E. 4, 14. <sup>\*2</sup> Vavisoir said that it was adjudged in the time of that same King, "*q̄ un q̄ prist tiel meason (d) des enemies quel avoit prise devant dun Englishe, que il averoit ceo come chose gaigne en batel, &c. et nemy le roy, ne l' admiral, ne le partie a qui le property fuit devant, &c.; pur ceo q̄ le partie ne vient freshment, mesme le jour q̄ il fuit prise de luy, et ante occasum solis et claime ceo.*" And this determination has never been shaken by any common law resolution: it has rather been confirmed and recognised.

And the determinations of the Admiralty-Courts will not affect this case: for, they have determined either upon particular Acts of Parliament, or upon the principles of other laws than the common law.

But this Court will follow the determinations of the common law. And the three Acts of Parliament made in the present reign (which are all upon this head) are built upon the same principle. The <sup>\*3</sup> saving-clause in 29 G. 2, c. 34, supposes the right of the owner to be extinguished and gone; and that the captor had a right to the thing taken: otherwise, the Parliament had no right to impose upon the original owners

<sup>\*1</sup> V. 29 G. 2, c. 34, p. 572, § 24, (the Prize Act,) which directs, "that retaken ships shall be restored to the owners, they paying a salvage in proportion to the time they were in the possession of the enemy."

<sup>\*2</sup> Vavisoir was not then a Judge, nor even a serjeant. [Vin. title Property, (d) 3.]

(d) This is so in the last edit. of the Year-Books, but is a misprint, and in the Abr. of the case, Finch tit. Barr. pl. 90, it is *nief*.

<sup>\*3</sup> s. 24.

such terms of payment for salvage. The Act itself even calls them the former owners: and it is the bounty of the Act, to restore to them any part at all.

No mischief can arise from this construction: many inconveniencies will flow from a contrary one. And Courts of Law will put liberal constructions upon policies of insurance.

This principle was recognized by Ld. Ch. J. Lee, in the case reported in 2 Strange, 1250, *Denn v. Dicker*: where the being carried into the enemy's port and detained eight days, was esteemed a total loss of the voyage; and the property of the owners gone.

[687] This is a question only between the insurer and the insured; and the insurer had undertaken against all sorts of perils, for a premium received. And here the voyage was totally lost; and the cargo entirely perished. So that there can be no doubt as to the real justice of this case.

Second point—The insured had a right to abandon the ship to the insurers, after her coming into Milford Haven. For the property insured was irrecoverably destroyed. And here was immediate notice given to the insurers, of the abandoning of it to them.

Molloy, lib. 2, c. 7, pa. 278, and Maline's *Lex Mercatoria* 111, lay down the rules of abandoning. Maline's *Lex Mercatoria* 115, puts it "where there is no probability of putting to sea, with the thing insured."

Now here, the ship was freighted with a perishable commodity, (fish from Newfoundland) bound to hot countries, (Portugal or Spain:) was taken; and afterwards re-taken, and brought into Milford Haven, without sufficient hands of her own, and requiring so much refitment as was impossible to be finished before the cargo would and must be spoiled: and part of the cargo was thrown over-board too. To what purpose then should the insured be at the expence of refitting the ship, to carry a spoiled and useless cargo?

Little is to be found in our books, about abandoning. The rule laid down was, "that the insured has a right to abandon to the insurers, where there are no hopes of saving the perishable cargo: provided there be no fraud."

This ship was in port: the hands all in France, in prison. Besides, here was a total loss: for, the costs of salvage exceeded the value of the thing saved. Therefore they had a right to abandon.

Sir Richard Lloyd and Mr. Serjeant Davey, on behalf of the defendant, argued upon the same two points; but made very different deductions.

First—The insurers could not be liable as for a total loss; (though they agreed it was an average-loss).

The capture of the ship was not a total loss. The property was not divested out of the owners: a mere capture, [688] without being carried *infra præsidia*, or some other such circumstance, will not alter the property. The taking out the mariners, and putting in the enemy's crew, is not enough to do it. Nor is the detaining it eight days: for, it has been holden that nine days will not alter the property. In Lucas's Rep. 77, *Assievedo v. Cambridge*, the Court held this to be † very plain, "that the property was not there altered by the taking." Yet in that case there was nine days possession by the enemy. And Dr. Henchman, in arguing for the defendant, said that the question would not have borne a dispute in the Admiralty-Court: for that the law is clear, "that not length of time, but the bringing *infra præsidia*, is that which divests the property." And he even cited a case of four years possession not altering the property; and also a great many other authorities, to prove "that the property is not divested without bringing the ship *infra præsidia*." Bynkershoek's *Questiones Juris Publici*, lib. 1, c. 4, is contrary to Grotius's opinion; and says "that length of time alone is not sufficient to divest the property." Therefore this was only an average-loss; not a total loss, or a divesting of property: and if so, the insurer cannot be entitled to recover.

The statute of 29 G. 2, c. 34, § 24, directs ships taken and retaken to be restored to the owners, on paying salvage.

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† They did so. But there is no determination of the case itself, in Lucas: he reports it to be adjourned for further argument. N.B. Mr. Justice Foster said "that Lucas's report of that case (of which he himself had a note) was a pretty good one."

This was an insurance with benefit of salvage; so that the voyage was not insured: but only the ship and cargo.

The distinction is between such insurances as this (with benefit of salvage,) and insurances interest or no interest. In the former case, no prevention of the voyage can make the insurers liable.

There are three cases on this head.

*Pond v. King*, H. 21 G. 2, B. R., where the interruption and loss of the voyage was holden to be the thing insured against, by that policy; which was without benefit of salvage, and interest or no interest; and free of average: and this was holden not to be an average-loss; but a total loss, within the terms and extent of that policy.

*De Paiba v. Ludlow*, Tr. 5 G. 1, C. B. reported in Comyns 360, an assumpsit upon a policy whereby the defendant insured the plaintiff, interest or no interest; and merely a wager-policy: and the ship was taken by a pirate, detained nine days, and then re-taken. This was determined for the plaintiff; because he received a damage by the interruption of the voyage.

[689] *Fitzgerald v. Pole*, P. 23 G. 2, where the plaintiff's interest was by the policy settled at 1000l. and there was benefit of salvage. The crew mutinied: whereby the cruise was totally interrupted and lost. It was holden not to be a total loss; though the voyage was obstructed by a mutiny.

Here, neither the obstruction of the voyage, nor the loss of the mariners, makes it a total loss: and if not, the insurer is not liable.

Many things may be thrown out of the case, as to the first point, the loss of the ship; viz. the cargo being fish; the tempest: the saving part of the cargo.

They denied the \* principle laid down by their opponents as the rule of the common-law, to have been ever determined: on the contrary, there has been a vast variety of opinions about it. Nor indeed can any determination be made, on the principles of our municipal laws: for, the question concerns foreigners, as well as natives; and is a question of general law, not of any particular and local law.

The Acts of Parliament that have been mentioned, are not built upon the principle that has been assigned, (V. ante, 686:) but upon right reason, justice, and equity. "Whether this was a total loss, or not," must be determined by the laws of war, and by the law of nature, that is, of right reason.

The captor has, for a time, only the possessory right; not the absolute right. The right to take, is not the personal right of the taker: but the right of the subject of that nation of which he is a subject. So, the right of re-taking, is not personal to the re-taker; but national, to any subject of the re-taker's nation. At first, each is only possessory: neither taking nor re-taking give an absolute property.

The fresh pursuit must depend upon circumstances: it cannot be confined to any limited exact time; (as ante occasum solis). Burlamaqui's Principles of Natural Law, lib. 1, c. 6, lib. 2, c. 7, a fresh pursuit, carried on as soon as may be, will prevent the mere possessory property from becoming an absolute property. Our ships of war and privateers are in a constant state of pursuit: they cruise, in order to re-take, as well as to take.

Indeed there must be a fixed limit of the time of this possessory property becoming absolute. And this limit [690] is, when the right owner may be said to give up his claim, his spes recuperandi. It is agreed, that carrying infra præsidia, merely, will not be a sufficient limit: neither can the mere effluxion of time. This fixed limit has never been precisely settled by writers. Therefore the spes recuperandi is and must be the criterion.

The question indeed will not be so easily settled, "when this spes recuperandi is gone, and when it subsists." But in our seas, where our ships are in a constant state of pursuit, this hope of recovery can never be said to be gone so soon as within eight days; especially, when, in fact and reality, this ship was actually retaken at the end of eight days.

The Court or a jury are the proper judges of this probability or reasonable hope of recovery. Till that is gone, the absolute property is not vested in the captor.

The Acts of Parliament do not mean to consider the point of property.

Second point—The circumstances stated do not entitle the insured to abandon

\* V. ante, 686.



the ship to the insurers. This right to abandon supposes a total loss. This was only an average loss.

They disputed the position, "that the insured are to be favoured." The words of the policy are calculated to prevent their abandoning. This doctrine of abandoning, is a very inconvenient one to insurers.

As to Molloy and Malines—almost any thing may be proved by citations from them.\*1

The under-writer can never be supposed to insure against these accidental perils in distant ports; but only against the general perils of the existence of the cargo: the insurance is not upon the beneficial sale of the goods, upon the sanity of them; but only upon the safety of them.

There are several cases, where the ship was totally lost, and there was an end of all claim and right.

As to insurances upon a cruise, all those cases are cut up by the roots, by the case of *Fitzgerald v. Pole*: which "determined that the object of insurance, is the body of the ship, not the cruise."

[691] Bynkershoek's opinion is, "that there neither is nor can be any general rule laid down for a limit: but every case must depend upon its own circumstances."\*2

There is a common law case, in March, 110, pl. 188, "that the property is not altered, unless the ship be brought *infra præsidia* of the enemy."

The counsel for the plaintiff, in reply—as to the cases that have been cited—

1st. The only case which may seem against us, is the case abridged by Viner, in vol. 16, pa. 405, 406, title Policy of Insurance, letter A. pl. 13, *Assiavedo v. Cambridge*, reported in Lucas, 77, (called 10 Mod.) "that being nine days in possession of the enemy (without being carried *infra præsidia*) does not alter the property." But there was no determination upon that case. Besides, that was upon a policy interest or no interest; and the voyage was the thing there insured.

The three cases of *Pond v. King*, *De Paiba v. Ludlow*, and *Fitzgerald v. Pole*, are no proofs of their point.

*Pond v. King* was interest or no interest. And the Court gave no opinion about the property: they founded their judgment on the cruise being insured.

*De Paiba v. Ludlow* was an average-loss. There was no determination upon the property: for, there also, the voyage was interrupted.

*Fitzgerald v. Pole* was also an insurance of a four months cruise. So, that too was upon the voyage.\*3

The totality of capture depends upon the *spes recuperandi*: and here was none. The average-loss here stipulated for, is where the voyage is performed without interruption.

They do not dispute our principle "of the *spes recuperandi* being the true criterion." But they say, "our ships are in constant pursuit, in seas frequented by our men of war and privateers."

[692] Now it is hard to conceive a pursuit without an object or even a knowledge of any particular ship's being taken. Fresh pursuit means the going in quest of that particular individual ship, which is taken.

This rule would carry it much too far, and proves too much; for, if eight days be not sufficient, it might be carried to eight or ten months, or to any indefinite time: so that there would be no limit at all left. This is a question that our Courts must determine according to our laws. We only contend for the time of a reasonable hope of recovery: not for a wanton or groundless hope. Now no such reasonable hope can remain, after the ship's continuing eight days in possession of the enemy.

Grotius in lib. 3, c. 6, pa. 285, says—"sed recentiori jure gentium inter Europæos

\*1 Lord Mansfield spoke extremely well of Bynkershoek's writings (who was later than all the rest except Cocceius;) and recommended especially as well worth reading his book of Prizes (*Questiones Publici Juris*).

\*2 Lord Mansfield. He does not say so: and he combats the opinion of Grotius, (supported by many other writers,) "that twenty-four hours quiet possession is the fixed rule."

\*3 N.B. This judgment was for the plaintiff in *B. R.* who supposed this to be the same point with the case of *Pond v. King*; but the House of Lords reversed the judgment, because they thought it distinguishable from *Pond v. King*.

populos introductum videmus, ut talia capta censeantur, ubi per horas viginti quatuor in potestate hostium fuerint."

2dly. It has been urged, "that the insured can in no case abandon." On the contrary, all provincial laws allow the power of abandoning, in some cases.\*

This case falls within the reason of the cases that have been already cited: and the inconveniences that have been suggested, are altogether imaginary.

Lord Mansfield observed, in general, that a large field of argument had been entered into; and that it would be necessary to consider the law of nations, our own laws, and Acts of Parliament; and also the law and custom of merchants, which make a part of our laws.

Cur Advis'.

On Thursday, 23d of November 1758—

His lordship delivered the resolution of the Court, (after having first stated the case and questions, very particularly).

Lord Mansfield—It is not necessary to confine what shall be said, to the two distinct questions that are stated.

The general question is, whether the plaintiffs were, [693] on the 18th of January 1757, entitled to recover against the insurers, as upon a total loss; under an offer "to abandon the ship and cargo to the insurers, for them to make what advantage of salvage they could." (For an offer "to abandon" was then made: and nothing has happened since that time, to alter the case.)

There is one point which, we are all of opinion, is immaterial as between the insurers and the insured; viz. "whether by this capture, the property was or was not transferred to the enemy, by the law of nations." That question can happen but in two cases: namely, (1st) between the owner and a neutral person who has bought the capture from the enemy; (2d) between the owner and re-captor.

If the ship taken by an enemy escapes from the enemy, or is retaken; or if the owner redeems (ransoms) the capture; his property is thereby revested: which property in the ship taken was, by the law of nations, obtained by the captor.

The general proposition of writers upon this subject is, that "*quæ ab hostibus capiuntur, statim capientium fiunt*:" which is to be understood, "when the battle is over." Indeed, nothing can be said to be taken, till the battle is over: and the battle is not over, till all immediate pursuit has ceased, and all hope of recovery is gone. This is the definition of a capture, referred to by our Prize-Act 29 G. 2, c. 34, of a ship taken by the enemy. And accordingly, Voet, in his Commentary upon the Pandects, lib. 49, tit. 15, vol. 2d. 1155, and many authors he refers to, maintain, with great strength, "*per solam occupationem dominium prædæ hostibus acquiri*."

One argument used to prove it, is, "that the instant the captor has got possession, no friend, no fellow soldier, or ally, can take it from him; because it would be a violation of his property."

But other writers and states have drawn other lines, by arbitrary rules; and partly from policy, to prevent too easy dispositions to neutrals; and partly from equity, to extend the *jus postliminii* in favour of the owner. No wonder there is so great uncertainty and variety of notions amongst them (*f*) about fixing a positive boundary by the mere force of reason; where the subject matter is arbitrary, and not the object of reason alone. (*g*)

Some have said, from the Roman law (which was introduced in favour of the liberty and condition of a Roman citizen taken captive,) "that the prize must be

\* Lord Mansfield—It goes so far back as the Rhodian law and the laws of Oleron.

(*f*) All the opinions agreed with respect to the capture of ships, that the property did not vest till the ship taken was brought *intra præsidia*, as it seems on the authority cited in 10 Mod. 79, 80. But if there were others who held the length of time material, yet there was no third opinion; but the variety of opinions only were either what should be called *præsidium*, or what should be the particular time sufficient to vest the property.

(*g*) Possession is sufficient against all persons except him who hath right; and in this case no person hath a right, for the original owner being an enemy, is not to be considered as having any right.

brought intra præsidia." But, "what custody at sea should be equal to præsidia at land," is a new fund of dispute, and leaves the matter just where it was.

[694] The writers whom Grotius follows, and many more who follow him, and some \* nations, have made twenty-four hours quiet possession by the enemy, the criterion. But this,† Bynkershoek and other writers whom he follows, and several nations, absolutely deny. Some have said that the ship must be carried into the enemy's port, condemned there, sail out again, and arrive in a friend's port. All these circumstances are very arbitrary : and therefore this is generally exploded.

I have taken the trouble to inform myself of the practice of the Court of Admiralty in England, before any Act of Parliament commanded restitution, or fixed the rate of salvage : and I have talked with Sir George Lee, who has examined the books of the Court of Admiralty, and informs me that they held the property not changed, so as to bar the owner, in favour of a vendee or recaptor, till there had been a sentence of condemnation ; and that in the reign of King Charles the Second Sir Richard Floyd (father of the late Sir Nathaniel) gave a solemn judgment upon the point, and decreed restitution of a ship re-taken by a privateer, after she had been fourteen weeks in the enemy's possession, because she had not been condemned. Another case, upon the same principle, against a vendee, is cited at the end of *Assievedo v. Cambridge*, in 1695, (Lucas 79,) after a long possession, two sales, and several voyages.(h)

But whatever rule ought to be followed, in favour of the owner, against a recaptor or vendee, it can no way affect the case of an insurance, between the insurer and insured. (Upon an action against the hundred for a robbery, a question might as well be started, "whether the property of the goods, as against the owner, was changed by the sale.")

The ship is lost, by the capture ; though she be never condemned at all, nor carried into any port or fleet of the enemy ; and the insurer must pay the value. If, after condemnation, the owner recovers or retakes her, the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is plain from the nature of the contract. The insurer runs the risque of the insured, and undertakes to indemnify : he must therefore bear the loss actually sustained ; and can be liable to no more. So that if after condemnation, the owner recovers the ship in her complete condition ; but has paid salvage, or been at any expence in getting her back ; the insurer must bear the loss so actually sustained.

A capture by a pirate, (and in Spain, Venice, and England, the goods go to the captor of the pirate, against the [695] owner ; as there can be no condemnation, to intitle the pirate,) or a capture under a commission, where there is no war ; do not change the property. Yet, as between the insurer and insured, they are just upon the same foot as captures by an enemy.

This point never would have been started in policies upon real interest ; because it never could have varied the case : and in this cause, the question could not have been material, if the parties had not suffered the cargo to perish, while they squabbled who should take it). But wager-policies gave rise to it : it was necessary to set up a total loss as between third persons, for the purpose of their wager ; though in fact the ship was safe, and restored to the owner.

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\* V. the ordinances of Lewis 14th.

† Quæst. Jur. publ. l. 1, c. 4.

(h) In that case it is expressly stated, pa. 77, that before the ship was carried intra præsidia, it was retaken by an English man of war ; and it appears that the case was argued entirely on that ground for the defendant, and particularly in pa. 79, (the page here referred to) as may appear from the following extracts from that page, viz. "The law is clear that not the length of time, but the bringing intra præsidia into a place of safety is that which divests the property ;" and for that, the case of ——— and *Sands* in the late war was cited. The words of the judgment in the like cases are very remarkable : in præsentī pertinere is part of the sentence, so that the sentence does not give a new right, but confirms an old one. Lud. Molin. 118. Bello res per vim usurpantur quando ad locum totum, &c.

Petrinus Bellus, part 3, No. 11. Fieri potest, that property may be altered by possession of a shorter time, et forsan not altered, diuturniore possessione.

Consulat. del Mare, cap. 287, lays down the security of the place, into which deducuntur capta as that which causes the alteration of property.



In the case of *Assiavedo v. Cambridge*, the man of war which retook the ship, brought her into the port of London, and restored her to the owner upon reasonable redemption: (that appears from the special verdict; though not stated in *Lucas*). And then the owner not abandoning the ship, could only have come upon the insurers for the redemption, and no question could have arisen upon the change of property. But the policy being interest or no interest, without benefit of salvage, the question arose upon the terms and meaning of the wager. That case was not determined.

In the case of *Spencer v. Franco*, before Ld. Hardwicke at Guildhall 1735, the South-Sea ship, "Prince Frederick," had returned safe to the port of London, with her cargo: the wagers contended "she was totally lost at La Vera Cruz," from this notion of a change of property; but failed.

*De Paiba v. Ludlow* was also a wager-policy; and the property could not be changed, because there was then no war, nor even a declaration of war: but the Court held "that as the ship was once taken in fact, the event had happened, though she was afterwards recovered." So, in the case of *Pond v. King*; which was also a wager-policy.

But in the case of *Pole v. Fitzgerald*, the majority of the Judges and the House of Lords (in 1754, by the name of *Fitzgerald v. Pole*.) held, "that though the ship might be deemed, for a time, as lost: yet, as she was afterwards recovered, the event of a total loss had not finally happened according to the construction of the wager."

These are all the cases where this question has been debated. But this is a policy upon real interest.

[696] The single question therefore upon which this case turns, is, "whether the insured had under all the circumstances, upon the 18th of January 1757, an election to abandon."

The loss and disability was in its nature total, at the time it happened. During eight days, the plaintiff was certainly intitled to be paid by the insurer as for a total loss: and in the case of a recapture, the insurer would have stood in his place. The subsequent re-capture is, at best, a saving only of a small part: half the value must be paid for salvage. The disability to the voyage, still continued. The master and mariners were prisoners. The charter-party was dissolved. The freight, (except in proportion to the goods saved,) was lost. The ship was necessarily brought into an English port. What could be saved, might not be worth the expence attending it: (which is proved by the plaintiff's offer to abandon).

The subsequent title to restitution arising from the recapture, at a great expence, of the ship disabled to pursue her voyage, cannot take away a right, vested in the insured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved.

The better opinion of the books—"sufficit semel extitisse conditionem, ad beneficium assecurati, de amissione navis; etiam quod postea sequeretur recuperatio: nam per talem recuperationem non poterit præjudicari assecurato." I cannot find a single book, ancient or modern, which does not say, "that in case of the ship being taken, the insured may demand as for a total loss, and abandon." And what proves the proposition most strongly, is, that by the general law, he may abandon in the case merely of an arrest, on an embargo, by a prince not an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle.

Every argument holds stronger, in the case of the other policy with regard to the goods. The cargo was in its nature perishable; destined from Newfoundland to Spain or Portugal; and the voyage as absolutely defeated, as if the ship had been wrecked, and a third or fourth of the goods saved.

No capture by the enemy, though condemned, can be so total a loss as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be intitled: and, by the \*Act of Parliament, if an English ship [697] retakes at any time, (before condemnation or after,) the owner is intitled to restitution, upon stated salvage. This chance does not suspend the demand, for a total loss, upon the insurer: but justice is done, by putting him in the place of the insured in case of a recapture.

In questions upon policies, the nature of the contract, as an indemnity and nothing else, is always liberally considered. There might be circumstances, under which a

capture would be but a small temporary hindrance to the voyage; perhaps, none at all; as, if a ship was taken, and in a day or two, escaped entire, and pursued her voyage. There are circumstances, under which it would be deemed an average loss; if a ship taken is immediately ransomed by the master and pursues her voyage, there the money paid is an average loss. And in all cases the insured may chuse "not to abandon."

In the second part of the "Usage and Customs of the Sea" (a French book translated into English,) a treatise is inserted called a "Guidon:" where,\*<sup>1</sup> after mentioning the right to abandon upon a capture, he adds, "or any other such disturbance as defeats the voyage, or makes it not worth while, or worth the freight, to pursue it."

I know that in late times, the privilege of abandoning has been restrained for fear of letting in frauds: and the merchant cannot elect to turn what, at the time when it happened, was in its nature but an average loss, into a total one, by abandoning. But there is no danger of fraud, in the present case. The loss was total, at the time it happened. It continued total, as to the destruction of the voyage. A recovery of any thing could be had, only upon paying more than half the value (including the costs). What could be saved of the goods, might not be worth the freight for so much of the voyage as they had gone when they were taken. The cargo, from its nature, must have been sold where it was brought in. The loss, as to the ship, could not be estimated, nor the salvage of half be fixed, by a better measure, than a sale. In such a case, there is no colour to say, that the insured might not disentangle himself from unprofitable trouble and further expence, and leave the insurer to save what he could. It might as reasonably be argued, that if a ship sunk was weighed up again at a great expence, the crew having perished, the insured could not abandon, nor the insurer be liable, because the body of the ship was saved.

We are therefore of opinion, that the loss was total, by the capture; and the right which the owner had, after the voyage was defeated, "to obtain restitution of [698] the ship and cargo, paying great salvage to the recaptor," might be abandoned to the insurers, after she was brought into Milford Haven.

Let the postea be delivered to the plaintiff, in both causes.

HAWKS *versus* CROFTON. Friday, 24th Nov. 1758. Trespass vi et armis, for assault and battery, pleas not guilty, and son assault demesne. Replication de injuria suâ propriâ. Verdict guilty of the trespass within written, judgment affirmed. [See 5 East. 392. 1 Saund. 81. 5 Burr. 2661.]

Error upon a judgment of B. R. in Ireland, in an action of trespass, vi et armis, for an assault and battery, brought there above fifteen years ago, (in 16 G. 2.) charging special damages for a violent battery upon the plaintiff, whereby he lost an arm. The defendant pleaded "not guilty," as to vi et armis; and issue was joined thereon. As to the special damages, he pleaded, "son assault demesne." To which, the plaintiff replied "de injuria suâ propriâ, absque tali causâ:" on which, issue is joined likewise. Upon trial of these issues, the verdict finds the defendant, generally, "guilty of the trespass within written;" and gives the plaintiff 850l. damages. Judgment for the plaintiff. Mr. Nares, for the plaintiff in error, objected "that this verdict is incomplete: and the Court cannot give judgment upon it; it is no verdict at all, as to the material issue, which affects the true question between the parties or the merits of the cause." Whereas a verdict ought to be sufficient, both in point of matter and of form.

Here are two issues, (1) "Whether guilty, or not guilty." On which issue is joined: (2) "Whether the defendant beat the plaintiff, without the alledged cause." And the verdict is, "that the defendant is guilty of the trespass, generally:" which is no more than the mere fact which the defendant has acknowledged; but has insisted, at the same time, that he had a cause for it. Style, 150, *Jennings v. Lee*, Style, 210. S. C. 1 Siderf. 341. *Burton v. Chapman*, 2 Keble, 278, 280, S. C.

And this bad finding cannot be aided by any statute, or by any other method. Style 167, *Hobbs v. Blanchard*, is in point with the present case: where the defendant was clearly found guilty generally; (though he is there \*<sup>2</sup> said to have been found not guilty).

\*<sup>1</sup> G. 7, § 1.

\*<sup>2</sup> It is plainly an error of the press, the word "not" is put for the word "him."



An immaterial issue cannot be aided by any verdict: neither can an immaterial verdict be aided by any means whatever. This verdict ought to have been "guilty as to the first issue;" and as to the second issue—"that the defendant beat the plaintiff as in the declaration is alledged;" (as in Lilly's Entries, 516).

[699] Mr. Ashhurst contra, for the defendant in error.

The question is, "whether this verdict be decisive between the parties." The general rule is, "that verdicts shall be favourably construed." And "if a verdict can be concluded out of the finding, to the point in issue, the Court shall work it into form, and make it serve." Hob. 54 is so expressly. 47 E. 3, 19 a. there cited. Trials per Pais, 394 to 400.

These damages are no less than 850l. And the plaintiff is precluded in time, from bringing a new action: (for this is an action of near twenty years standing, by reason of the defendant's having absconded).

This trespass must be intended an assault without cause; else, it would not be a trespass. And the finding is, "that he is guilty of the trespass within written:" which is sufficient. Cro. Eliz. 854, *Burper v. Baker* proves it to be so.

It has been argued, "that this is finding nothing more than the defendant has already acknowledged."

But the defendant does not here acknowledge the trespass: he only acknowledges the mere fact of the assault.

Style, 150 & 210, is a very slight authority; and not to the point of a finding by verdict, so much as to the joining of the issue.

Mr. Nares, in reply—Cro. Eliz. 854 is right: for there the finding was right as to the essential part, and only defective in form. Here, it is essentially incomplete. Nor do Mr. Ashhurst's other cases affect this present case. The defendant admits the fact indeed: but he adds an excuse, sufficient to justify it.

Lord Mansfield—The question is, "whether this verdict is so uncertain, that the Court cannot give judgment upon it: but must award a venire facias de novo."

I think Mr. Ashhurst's principle is true, and just; namely, "that where the intention of the jury is manifest and beyond doubt, the Court will set right matters of form, and the mere act of the clerk."

And I think that the present case is such a clear case, that the Court may here give judgment upon the substantial finding; though the clerk may have been irregular [700] and faulty in point of form; it is very clear what the jury meant.

Mr. Just. Denison—Certainly, the Court ought not to award a venire facias de novo, where the verdict is only faulty in form. And this here is no more than an omission of the clerk in point of form, in not being more particular than it is. But the meaning of the finding is plain.

He mentioned a case temp. Lord Hardwicke \* *Adlam v. Toe*—a writ of error out of Stepney Court, P. 11 G. 2, B. R. where the issue was upon the cause of action arising within the jurisdiction of the Court; (the defendant having pleaded "that it arose without," and the plaintiff having replied "that it arose within it:") and the jury found "that the defendant promised in manner and form prout the plaintiff had alledged, &c." Which was objected "not to be ad idem." There, indeed, the judgment was reversed upon another objection; but in speaking to the objection which I have mentioned, the general principle was allowed, from the Bench, "that verdicts are not to be taken strictly, (like pleadings:) but that the Court will collect the meaning of the jury, if they gave such a verdict that the Court can understand them."

I am satisfied, upon the reason of the law, that this is sufficient.

Hobart 54 lays down a very just rule, "that though the verdict may not conclude formally or punctually in the words of the issue, yet if the point in issue can be concluded out of the finding, the Court shall work the verdict into form, and make it serve."

Mr. Just. Foster—I think this is sufficient. The jury could not have found thus, unless the defendant had failed in proving his justification.

Mr. Just. Wilmot held accordingly—Every body knows that this sort of trial, turns upon the proof of the justification; and if the defendant had, in this case, proved his justification, the verdict could not have been found as it is.

Hob. 54 lays down a very right and just rule—"that if a verdict can be con-

\* *Toe, qui tam, &c. v. Adlam*, was the name of the cause in this Court.



cluded out of the finding the point in issue, the Court shall work and mould it into form, according to the real justice of the case:" and what is the real justice of the case? That the defendant has not proved his justification; and therefore that there ought to be judgment against him, notwithstanding [701]-standing any irregularity or want of form in wording the verdict.

Therefore I am very well satisfied that the judgment is right.

Per Cur. unanimously,  
Judgment affirmed.

LUCAS, EX DIMISS. DR. MARKHAM ET AL' *versus* DR. WILSON. 1758. [See 9 Ves. jun. 453.] Act for determining differences by arbitration was made to put submissions, where no cause was depending, upon the same foot as where there was. [Vin. Arbitr. p. 132, 133, pl. 8. Str. 301, acc. 2 Durn. 781. 1 Barnes, 701. Pr. in Ch. 223, 204. 2 Vern. 705. 2 Vern. 251.]

Upon shewing cause why an attachment should not issue against Dr. Wilson, for refusing to perform an award, made pursuant to a submission entered into by rule of this Court, in the abovementioned cause then there depending, it became part of the question, "whether this was within the Act of 9, 10 W. 3, c. 15, for determining differences by arbitration."

And the Court thought that it was not: but that it stood upon the common law, independent of the Act; which was made to put submissions to arbitrations in cases where there was no cause depending, upon the same foot as those where there was a cause depending. But here was a cause depending at the time of the submission; and therefore the case was not within the provision of this Act.(a)

And Lord Mansfield—held this Act to be only declaratory of what the law was before, in cases where there was a cause depending in the Court.

He added, that the Court will not enter at all into the merits of the matter referred to arbitration; but only take into consideration such legal objections as appear upon the face of the award, and such objections as go to the misbehaviour of the arbitrators.(b)

[702] In the present case, the rule for the attachment was made absolute.

REX *versus* INHABITANTS OF SHENSTON. Tuesday, 8th Nov. 1758.

See this case, at large, in my quarto-edition of Settlement-Cases, page 468, No. 149.

[703] REX *versus* EARL FERRERS. 1758. Recognizance discharged.

On Mr. Aston's motion for the earl, and on reading the Act of Parliament made last sessions for the separation of the earl and countess; and on the consent of Mr. Campbell, on behalf of the countess:

The earl's \* recognizance was discharged.

The end of Michaelmas term, 1758.

(a) Qu. If this be not inconsistent? for it is said, that the Act is made to put submissions to arbitrations, in cases where there was no cause depending upon the same foot, as those where there was a cause depending, and this determination has put them on different footings: the syllogism is false, for the conclusion is not contained in the premises. If instead of the first proposition, this be substituted, viz. the Act of Parliament relates only to such submissions as are made by agreement or bond and rule of Court, when there is no cause in Court; then the syllogism would be right, and the first proposition will be warranted by Str. 301, a case cited to have been adjudged, and by what seems to have been taken for granted by the Court in 1 Barnes, 41; but query, whether, to make the Act consistent, it must not be supposed that the Court in exercising their jurisdiction before the Act, did not limit motions for setting aside awards made on submission by rule where a cause was depending, for otherwise the first and second sections of the Act are not consistent.

(b) Qu. As to misbehaviour in the party in whose favour the award is made; such as preventing witnesses on the other side attending, or fraud not discovered until after the award, see 9 & 10 W. 3, c. 15, s. 2. Vin. (Arbitr.) p. 139, 140, pl. 38, 39.

\* V. ante, 636.

## [704] HILARY TERM, 32 GEO. II. B. R. 1759.

DOE, EX DIMISS. ODIARNE, *versus* WHITEHEAD. Friday, 26th January, 1759. [See Buller, 99. Post, 4 Burr. 1957. 16 Vin. 140.] Fine by tenant in tail in possession will divest the reversion in fee, as well as discontinue the remainder in tail.

H. 30 G. 2, Rot'lo. 988.

This was a special case, from Warwick Lent Assizes 1757.

In ejectment, on the demise of Wentworth Odiarne Esquire, for divers messuages and lands in Allesley in that county.

It appeared in evidence, at the trial, as follows: viz.

That Timothy Stoughton gent. being seised in fee of the premises in question, by indentures of lease and release, (the release being dated the 1st of March in the first year of Queen Anne,) in consideration of the marriage of Antony Stoughton his eldest son, with Frances his wife, and other the considerations in the said release mentioned, did convey to Basil St. Nicholas and Thomas Skeffington Esquires, the premises in question; to hold to them their heirs and assigns, to the several uses following, that is to say, to the use of the said Timothy Stoughton for life, with remainder to trustees during the life of the said Timothy Stoughton, to preserve contingent remainders; remainder to the said Antony Stoughton for ninety-nine years if he should so long live, with remainder to trustees during the life of the said Antony Stoughton, to preserve contingent remainders; remainder to the use of the first and other sons of the body of the said Antony, on the body of the said Frances lawfully begotten or to be begotten, in tail-male; remainder to the use of Mary Odiarne, wife of Charles Odiarne, sole daughter of the said Timothy Stoughton, for ninety-nine years if she should so long live, with remainder to trustees and their heirs during the life of the [705] said Mary Odiarne, to preserve contingent remainders; and from and immediately after the death of the said Mary Odiarne, to the use of the first and eldest son of the body of the said Mary Odiarne lawfully begotten or to be begotten, and of the heirs male of the body of such first and eldest son issuing; with divers remainders over, and with a remainder or reversion to the right heirs of the said Timothy Stoughton.

The said Timothy Stoughton died, (many years ago,) in the life-time of his son Antony. Antony Stoughton, his son, had by the said Frances his wife only one son, named Timothy.

Antony died in July 1734, leaving by the said Frances (who died in his life-time) the said Timothy his only son and heir.

Timothy Stoughton, the son of Antony, died in June 1753, without issue.

The said Mary Odiarne died in January 1735, leaving issue (by Charles Odiarne her husband) Wentworth Odiarne, her first and eldest son; who is the lessor of the plaintiff.

It appeared also, that the said Timothy Stoughton, the grandson in his life-time, being in possession of the said premises under the before-mentioned indentures of lease and release, by indentures of lease and release dated the 26th and 27th of January 1735, previous to his marriage with Anne Samwell, spinster, and in consideration of the same marriage and of a marriage portion, granted and released, (amongst other lands and tenements) the premises in question, to Sir Thomas Samwell and Thomas Samwell Esq. and their heirs, to hold to the uses following; to wit, to the use of the said Timothy Stoughton the grandson and his heirs, until the intended marriage between him and the said Anne Samwell; and then to the use of trustees for five hundred years; remainder to the said Timothy Stoughton for life; remainder to trustees, to preserve contingent remainders; remainder to the said Ann Samwell for life as part of her jointure; remainder to the use of the first and other sons of the said Timothy Stoughton on the body of the said Ann Samwell, in tail male; with remainder to the said Timothy Stoughton in fee.

In which indenture of release, is a covenant by the said Timothy Stoughton, "to levy a fine sur conusance de droit come ceo, &c. with proclamations, (inter al') of the premises in question, to the said Sir Thomas Samwell and Thomas Samwell and the heirs of the said Sir Thomas."

And it is declared by the said indenture of release, "that the said fine should

enure to the several intents and pur[706]poses and for the several estates in the said indenture of release contained ;" (and which are hereinbefore mentioned).

It appeared, that the said marriage took effect ; and that afterwards, the said Timothy Stoughton being in possession, did in Hilary term 1735, levy a fine according to his said covenant, with a general warranty in the said fine, by the said Timothy Stoughton, for him and his heirs, "that they would warrant to the aforesaid Sir Thomas and Thomas, and the heirs of the said Sir Thomas, the said premises in question, against him the said Timothy and his heirs, for ever." And it appeared that the said Anne his wife, after his death, entered upon and possessed herself of the premises in question.

It also appeared that the said Wentworth Odiarne, the lessor of the plaintiff, before the time of bringing this ejectment, and of making the demise by him in his declaration mentioned, duly made an actual entry into and upon all the premises in question, to avoid the said fine.

It appeared also that the said Wentworth Odiarne, the lessor of the plaintiff, was heir at law to the said Timothy Stoughton the grandson, at the time of his death ; that is to say, only son of Mary Odiarne, who was the only sister and heir of Antony Stoughton the father of the said last mentioned Timothy.

On the trial, a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench upon this question—"whether the said Wentworth Odiarne Esq. the lessor of the plaintiff, is intitled to the premises in question, and ought to recover the same in this cause ; notwithstanding the said fine so levied, by the said Timothy Stoughton the grandson, and the warranty therein."

This case was first argued in Trinity term 1758 ; by Mr. Knowler, for the plaintiff ; and Mr. Caldecott, for the defendant.

The arguments on the part of the plaintiff were founded on *Seymour's case*, 10 Rep. 95. The sum of them was, "that the lessor of the plaintiff might maintain an ejectment, (as an actual entry had been made to avoid the fine,) unless a discontinuance could be proved, or that the warranty stood in his way as a bar to his title."

In order to shew "that there had been no discontinuance ;" and consequently, "that the remainder of the [707] lessor was not divested ;" Mr. Knowler said it would be necessary to consider the operation of the lease and release, and of the fine : which were, in the present case, quite distinct conveyances.

A lease and release made by a tenant in tail has the same sort of operation, as if tenant in tail conveys by bargain and sale inrolled : no greater estate passes, by either, than the tenant in tail can lawfully convey. Litt. § 606. And if it be the property of the conveyance made use of by the tenant in tail, to pass no greater estate than the tenant in tail can lawfully convey, such conveyance does not discontinue the estate tail, nor divest the remainder. Now, when tenant in tail conveys by bargain and sale, or by lease and release, (which has the same operation,) that conveyance makes no discontinuance of the estate tail ; neither doth it divest the remainders ; because no greater estate passes by it, than a base fee determinable upon the death of the tenant in tail ; which is all the estate he can lawfully convey.

It is true, that a feoffment, or a fine, or a common recovery, will make a discontinuance ; because a fee-simple passes by them ; which is a greater estate than the tenant in tail can lawfully convey.

It cannot therefore be denied or disputed, "that a fine, which passes a freehold, will discontinue an estate tail." But in this case, the fine passed no freehold ; the freehold having been before the levying of the fine, conveyed by the lease and release. This fine, levied after the marriage, being a distinct conveyance, executed subsequent to the lease and release, all that it did or could do was to confirm and corroborate the base fee which passed by the lease and release, and make it more durable. The estate which passed by the lease and release, was determinable on the death of the tenant in tail : but the fine made it more durable, namely, not to be determinable till the death of the tenant in tail without issue male. Which event being now come to pass, and the estate tail being now spent by the death of Timothy Stoughton without issue, the lessor of the plaintiff, as the next remainder-man, is intitled to the estate, unless the warranty stands in his way, as a bar to his title.

But the warranty has no effect to bar or prejudice the lessor of the plaintiff's title ; because it never extended to his remainder, and is now itself determined. A warranty never bars a vested estate, in possession, reversion, or remainder : before the descent of the warranty can operate, the estate must be divested and turned to a right ; and



this must be the case before, or at the time when the warranty falls, Co. Litt. 388 b. And a remainder expectant on an estate tail can never be divested, unless the estate on which [708] it is expectant, be discontinued. But the estate tail which was in Timothy Stoughton was not discontinued, for the reason already mentioned. Therefore the warranty did not extend to the lessor's remainder: but the remainder continued undisturbed in him, to the time of the death of Timothy Stoughton without issue male. This having happened, the warranty which depended solely on the estate created by the lease and release, hath lost its support, and is therefore now determined, and no longer exists. Consequently, it had no operation on the estate of the lessor, nor can be any bar to his title.

Mr. Knowler relied on the before-mentioned case in 10 Co. 95, as in point to prove all these positions, upon which he had founded his argument.

It came into judgment, upon a special verdict in an ejectment on the demise of Edward Seymor: and the case was \* this—

Sir Thomas Cheney devised the premises in question to his son Henry Cheney and the heirs of his body; remainder to John Cheney and the heirs male of his body; remainder to his own right heirs. Sir Thomas died. And after his death, Henry entered; and (being seised in tail, remainder in tail, remainder to himself in fee,) conveyed by bargain and sale inrolled, to William Higham and his heirs; who entered and became seised accordingly. Henry Cheney afterwards levied a fine with proclamations, to William Higham and his heirs; with general warranty. William Higham conveyed to Henry Lord Seymor in fee. John Cheney, the remainder-man in tail, had issue Thomas Cheney. And then Henry Cheney died without issue; Thomas, the issue of John the remainder-man, being his heir at law. Upon the death of Henry, Thomas entered, claiming the premises by force of the remainder limited to his father: upon which, Edward Seymor, who claimed under Henry Lord Seymor, entered and made the lease to the plaintiff: who being ejected by Thomas Cheney, brought the ejectment. And the point submitted by the jury to the judgment of the Court, was, "if the entry of Thomas was lawful or not." And the case having been argued at the Bench as well as at the Bar, the Court were unanimously of opinion—

"That the fine levied by Henry Cheney to William Higham the bargainee, did not divest the remainder limited to John Cheney:

"That no estate of freehold passed by the fine; but that the fine, being with proclamations, corroborated the estate of the bargainee, and made it more durable, by making it determinable on the death of Henry Cheney [709] without issue male, where before it was determinable on his death;

"That if the fine had been levied before the bargain and sale, it would have made a discontinuance: but being levied after it, it operated on the estate which passed by the bargain and sale, and was guided by it;

"That the warranty created by the fine did not extend to the estate of John Cheney in remainder; because it was not displaced, but continued in him;

"That when the estate to which the warranty was annexed, determined by the death of Henry Cheney without issue male, the warranty was determined for want of an estate to support it:"

He urged that this authority concurs, in every point, with the case now before the Court; and there is no material difference between them. *Seymor's case* arose indeed upon a bargain and sale inrolled: the present case arises upon a lease and release. But their operation is the same, as to the estate and interest which pass by them: for they pass no greater estate than the party who executes them, can lawfully convey. And in that respect, they both differ from a feoffment and from a fine. And Lord Ch. J. Holt, in the case of *Machil v. Clark*, 2 Salkeld, 619, ranks them together, as conveyances which have the same operation, as to the quantity of estate passing by them, when made by tenant in tail. And *Seymor's case* was there holden for law, by him: which adds greatly to its weight and authority.

Mr. Caldecott's argument tended to answer these positions; and to prove that at the time of the fine levied, there was a discontinuance of the estate tail.

He insisted, that even supposing these to be distinct conveyances, yet Timothy Stoughton, the grandson was tenant in tail in possession, with remainder over in fee:

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\* V. 1 Bulstr. 162, S. C. (there called *Heywood v. Smith*).

for he had an estate for life in him, and also the old entail; and they must be consolidated.

However, this lease and release, and fine are not distinct conveyances; but all one entire conveyance; all done at the same time, upon the same occasion, and to the same purpose, and under the same deed: whereas in *Seymour's case*, the bargain and sale were completed; and the fine was a twelve-month after; and the person who levied it, [710] had no freehold in him. And to prove that all this was only one entire conveyance, he cited 5 Co. 26, *Countess of Rutland's case*, 2 Co. 72 b. *Lord Cromwell's case*, the 2d resolution, 3 Bulstr. 256, *Haverhill v. Hare*, (what was said by Ch. Just. Montague).

Mr. Knowler conceded "that the fine would discontinue the estate tail and divest the remainder (i.e. drive the party in remainder to his formedon,) if the person who levied the fine was at that time tenant in tail in possession."

Lord Mansfield put Mr. Knowler upon shewing that this was not one conveyance or assurance; and that it was not the intention and agreement of the parties "that all the uses should arise at one and the same time, and be directed by the same deed."

Mr. Knowler—After the marriage and before the executing the fine, Timothy Stoughton had only an estate for life in him; (for the lease and release had no other operation;) therefore, being only tenant for life, he could not discontinue the estate.

There are but four discontinuances of estates tail.

The state of the case shews the order in which the deeds were executed.

It is said "that the lease, release and the fine are but one conveyance." I say, they are three distinct conveyances. And after the lease and release had taken their effect, then comes the fine. Now what operation could that have? Not to pass the freehold: for that was done before. And without that, it could never work a discontinuance of the estate-tail.

Lord Mansfield—I take it to be an exceeding plain case, upon Mr. Caldecott's second point.

If you could distinguish these conveyances, and suppose Timothy Stoughton to have been only tenant for life, at the time of his levying the fine, it would be the forfeiture of his estate for life. So that you see the consequence of this position.

But undoubtedly these are all but one assurance, and shall operate as such: and the fine is part of it. This has been so holden in former cases; *Stapylton v. Stapylton*, and the case of *The Mansel Family*: it was, in both these cases, considered and taken that they were all but in the nature of one conveyance or assurance (if you had rather call it so) and shall operate as such. But the [711] fine shall never operate contrary to the intention of the parties, and so as to defeat it. And this is agreeable to the doctrine laid down in *Lord Cromwell's case*, 2 Co. 72 b. and in *The Countess of Rutland's case*, 5 Co. 26, and in many modern cases.

If one was to argue on fictions, the fine would, by relation, precede the other conveyance; and the lease and release might be considered but as a declaration of the uses of the fine.

But this construction that is now attempted, would confound every settlement made upon marriage or other events in families; and would be of exceedingly inconvenient consequence. As to its being one conveyance, or one assurance, there is no great matter of difference between them, except merely in the name.

I do not meddle with the warranty: for that is out of the case. I look upon all this as one assurance. If they were distinct conveyances or assurances, this fine would be a forfeiture of his estate for life under the new settlement. Which plainly shews, that they were never understood or intended as distinct, but as one and the same.

Mr. Serjeant Hewitt would have had a second argument: he was on Mr. Knowler's side; and had taken notes for a second argument on behalf of the plaintiff.

But Lord Mansfield did not care to delay it, merely for asking. And both he and Mr. Just. Wilmot asked the serjeant if he had any doubt "whether a fine with proclamations, levied by tenant in tail in possession, will not discontinue the reversion in fee, as well as divest the remainder in tail, so as to put the remainder-man to his formedon."

Mr. Just. Foster expressed himself to the same effect with his Lordship and Mr. Just. Wilmot. And I suppose that Mr. Just. Denison communicated to his brethren "that he also concurred:" for



Lord Mansfield said "We are all satisfied that the postea be delivered to the defendant."

But on the day following, (Saturday 10th of June, 1758,) Mr. Serjeant Hewitt, on behalf of the defendant, moved that this case might be argued again: for that he thought he should be able to maintain "that the fine did not work a discontinuance."

[712] This Court having offered this yesterday, provided the serjeant, upon considering of it would say "that he really thought he could maintain this position:" and he now declaring "that he was \*<sup>1</sup> really of this opinion."

The postea was ordered to be stayed; and that it should be set down again in the paper, in the following term, for further argument.

And after such further argument by Mr. Serjeant Hewitt—

Mr. Norton for the defendant rested it upon the serjeant's own argument; which both he and the Court agreed to have been fair and candid, by reason of his having stated all the \*<sup>2</sup> cases which were against him, as well as for him, fully and at large.

Lord Mansfield—The strict legal regular form that should have been pursued, would certainly have been a common recovery: but though a different form has been pursued, yet it was plainly meant by Timothy Stoughton (the grandson,) that the uses of the marriage-settlement should be supported by this fine.

And all was executory at the time of making the lease and release, which were executed previous to the marriage; and the covenant contained in the release, was, "to levy a fine thereupon, in order to carry them into effect." All these are to be considered as but one conveyance; and they operate as a declaration of uses; which uses all arise out of the fine.

It would be a very strange thing, that the form of the conveyance should destroy the very intent of it; and that the fine itself should destroy the estate of the tenant for life, by occasioning a forfeiture of it. Instead of this, all the preceding transaction is only executory: and the operation is only as a declaration of the uses of the fine. It is like a case of a tenant to the præcipe: who is considered merely as an instrument, and not as the strict real owner of the land. This release is but a deed to lead the uses of the fine.

[713] *Seymour's case* goes upon quite different grounds from the present. There, Henry Cheney upon the 18th of December 22 Eliz. by indenture of bargain and sale inrolled, sold to Higham and his heirs: by force of which, Higham entered and was seised accordingly. And afterwards in Michaelmas term 22 Eliz. almost a year after the bargain and sale, Henry Cheney levied a fine with proclamations, to the said Higham and his heirs, with general warranty. So that the bargain and sale in that case was totally unconnected with the fine: and Higham is expressly found to have entered and been seised by force of the indenture of bargain and sale. Whereas in the present case, the whole is one assurance.

As to the objections—This lease and release was not a complete agreement; but executory. The intent was, to make good by a fine, as far as they could be made good by a fine, the uses of the family-settlement which Timothy Stoughton the grandson was making, upon his marriage with Anne Samwell: and the intent was certainly lawful, though there is a blunder in the manner of doing it.

It would be an occasion of the utmost confusion in families, all over the kingdom, if, in every settlement or conveyance, the several deeds were to be divided in point of time; and the strict legal operation of each was to be considered distinctly and separately from all the rest, and from the general view and intention of the whole transaction. It would be just as reasonable, to take the separate clauses in one and the same deed; and to hunt after such different constructions as the words of them might bear, if they stood unconnected with the rest of the clauses of the deed, or in deeds of quite another import; whereas in point of law and reason, the whole transaction and its general intention ought to be taken together in one view.

(\*<sup>1</sup> So also was Mr. Knowler. As the release conveyed an estate; and therefore differed (as he apprehended) from a covenant to levy a fine, which conveys no estate.)

\*<sup>2</sup> 1 Mod. 109. *Benson v. Hodson*, Littlet. § 614. 1 Inst. 327 a. b. Cro. Car. 109, 110. *Isham v. Morrice*, Lit. § 618. Co. Lit. 332, *Seymour's case*. *Lord Cromwell's case*, 2 R. Rep. 245. 2 Lev. 52. 4 Mod. 266. 3 Bulstr. 250. 5 Co. 26. Cro. Car. 320. 1 Ventr. 280, and *Herring v. Brown*, in Skinner, 35, 52, 71, 184, and Carth. 24. 1 Inst. 42 a. b. 10 Co. 39, 42 a. Hob. 261. Noy, 66.



Mr. Just. Denison was of the same opinion.

Here are two questions upon the operations of this conveyance ; which was by lease and release, and a fine : (1st.) "Whether it made a discontinuance of the estate-tail : " (2d.) "Whether it divested the remainder or reversion." And both these questions seem to me so very clear, that I think there could be no doubt but this which has been endeavoured to be raised upon [714] *Seymor's case*, 10 Co. 95 b. 96 : which case has been urged and relied upon as an authority "that the estate-tail is not discontinued, nor the remainder divested." Yet it seems to me otherwise, notwithstanding what has been argued from that case ; which is very distinguishable from the present.

The estate passes by the fine, whether the uses be declared prior, or subsequent to the fine. The deeds must be considered as executory, till the fine is levied : and then the estate passes by the fine.

The comparison of this case to *Seymor's case* is founded upon a mistake. For there the bargainee was found "to have entered by force of the indenture of bargain and sale, and to have been seised according to it," before Henry Cheney levied the fine to him : and the Judges were obliged to take the fact to be as it was found by the verdict ; they were not at liberty to look upon it as one and the same conveyance or assurance, (whatever they might really think it to be, in its nature or intention ; ) they were bound down by the express and particular finding. He was found to be seised according to the indenture of bargain and sale : and therefore the fine could, in that case, only confirm and corroborate it. But if that fine had been levied to the bargainee within the six months, I think the estate would, in that case, have passed by the fine. That case therefore turns merely upon the finding of the fact by the special verdict. But even there, if it had been found that "the fine was levied to the uses of the bargain and sale," I believe the Court would have looked upon the whole, as one and the same assurance ; and would consequently have been of a different opinion. Therefore that case of *Seymor* is nothing to the purpose of the present : for here, all the deeds and the fine are to be taken together ; and all of them, so taken together, make but one assurance.

There can be no sort of doubt but that a fine with proclamations will work a discontinuance, and consequently divest a remainder, as well as a fine without proclamations.

Mr. Just. Foster—It is admitted "that the deeds and fine shall operate as one conveyance or assurance, if the intention of the parties be clear and lawful : " now it was clearly the intention of Timothy Stoughton, the grandson, to work a discontinuance : and this intention was certainly lawful. I wish that gentlemen of learning and ingenuity would rather turn their thoughts towards endeavouring to support lawful estates, than to search out such nice distinctions as would overturn all the settlements in the kingdom.

Mr. Just. Wilmot was of the same opinion.

He considered these deeds, as a covenant to levy a fine : and therefore the fine and they ought to be considered as one and the same assurance.

[715] This was most undoubtedly a lawful intention ; though the mode of accomplishing it is indeed mistaken. The previous agreement was what the tenant in tail had a right to do ; namely, to make this family-settlement of the estate : and the parties concerned covenant to levy a fine, for that purpose. The fine is the principal act : and the deeds operate to lead the uses of it.

*Seymor's case* materially differs from this case : for it does not appear there, that any fine was intended to be levied, at the time of making the indenture of bargain and sale. But all these transactions in the case now before us are to be considered as one and the same conveyance or assurance : and the deeds and the fine shall all be taken together ; and the deeds shall be considered as leading the uses of the fine.

Per Cur. (unanimously and most clearly)

. Let the postea be delivered to the defendant.

LAMEGO versus GOULD. 1759. A bona fide wager not meant as a loan is not usurious.

Tr. 30 & 31 G. 2, Rot'lo. 932.

This was an action on the case upon a special promise "to pay the plaintiff twenty guineas on the death of the defendant's wife ;" in consideration of two guineas in hand paid by the plaintiff to the defendant. The note was in these words,—

"Memorandum—In consideration of two guineas received of Aaron Lamego, Esquire, &c. I promise to pay him (a) twenty guineas, upon the decease of my present wife, Anne Gould."

The only question now made was "whether this contract was usurious;" (the woman, at the time of making it, being then seventy years of age).

Mr. Gascoigne, for the plaintiff, argued that it was not so.

The statute of 12 Ann. c. 16 only says "no person shall take above the value of five pounds, for the forbearance of one hundred pounds for a year; and so, after that rate, for a greater or lesser sum, or for a shorter or longer time;" in pain that all bonds and contracts shall be void.

[716] Now here is no forbearance: nor any certainty of receiving either principal or interest: it is a mere contingency; and is like the case put in Cro. Eliz. 643, in the case of *Button v. Downham*, of a "wager betwixt two, to have 40l. for 20l. if one be alive at such a day:" which, as there holden, is not usury.

Lord Mansfield stopt him, under a doubt how it is possible to come at this question about usury. For here is nothing at all stated about the loan of money; it might, for aught that appears to the contrary, be a voluntary gift, to be made to him upon this event. The matter of usury was never thought of at the trial.

Mr. Gascoigne—The truth of the fact was, really, running the life of the plaintiff's horse, against that of the defendant's wife; and nothing more.

Mr. Just. Denison—We can not intend this to be an usurious contract, (which is a crime). For which, he cited 1 Lutw. 273, *Yeoman v. Barstow*. It is a foolish bargain; but not usurious. Here are no facts stated, upon which we can say it is usurious.

Mr. Just. Foster and Mr. Just. Wilmot—ad idem.

And Mr. Just. Wilmot added that the true distinction was laid down in that case in Cro. Eliz. 623, between a real bona fide wager, not at all <sup>\*1</sup> intended as a loan; and a transaction which is really an usurious loan, but disguised as a wager, with intent to have a shift.

Per Cur. unanimously.

Let the postea be delivered to the plaintiff.

TUDWAY *versus* BOURN. 1759. Bankrupt's certificate does not over-reach a legacy left bankrupt after the signing, but before the allowance thereof.

This was a case from the Court of Chancery.

Elizabeth Collins, by her will, gave a legacy of 200l. to one Coward, then a bankrupt; whose certificate had, at the time of her death, been signed by four-fifths of his creditors in number and value, and also by the commissioners; but the testatrix's death happened before its being confirmed and allowed by the Lord Keeper.

The commissioners, soon after her death, and after Coward's death, and before the allowance of the certificate, [717] assigned this legacy to the defendant Bourn, for the use of the creditors: after which, the certificate was confirmed and allowed by the Lord Keeper, without opposition. <sup>\*2</sup> Before the allowance of the certificate by the Lord Keeper, the bankrupt himself died; having made Tudway, the now plaintiff, his executor.

Tudway, the bankrupt's executor, brought his bill in equity against the executor of the testatrix and against Bourn the assignee of the commissioners; claiming this 200l. legacy, as belonging to the bankrupt, by reason of his certificate's having been signed before the death of the testatrix, and afterwards allowed and confirmed by the Lord Keeper.

But the creditors insisted that it belonged to them; as it was assigned to their use and benefit, by the commissioners, before the allowance and confirmation of the certificate by the Lord Keeper.

(a) Though not added his executors or administrators, yet if he died before, it seems clear they would be entitled to the twenty guineas.

<sup>\*1</sup> V. 1 Lutw. 464, 465, 466, *Geang v. Swaine*.

[<sup>\*2</sup> This which was the second assignment, was after the bankrupt's death.]

The question referred to this Court, was "whether it belonged to the bankrupt's executor, or to his creditors."

Mr. Gould argued for the plaintiff, (the bankrupt's executor). Bankrupts, he said, were originally considered as criminals. The statute of 4, 5 Ann. c. 15 was the first Act of Parliament which was made for their benefit: and by this Act, the \*<sup>1</sup> commissioners only (without the creditors) were to sign the certificate: which was to be allowed by the Lord Chancellor or Keeper unless, &c. Then the 5 Ann. c. 22 added the creditors: viz. four-fifths in number and value. And 5 G. 1, c. 24, continued it upon the same foot. But 5 G. 2, c. 30, directs that the commissioners shall not sign it, till † after the creditors have signed, and affidavit be made thereof, &c.

No objection, but for fraud, or for unfairly obtaining it, will lie against it before the Lord Chancellor or Lord Keeper: and if no such objection is then made, the allowance and confirmation will relate to the original date of it, and will operate as a release from the creditors.

It is like the inrolment of deeds of bargain and sale: which has such relation. 2 Inst. 674. Hob. 165. And consequently, the allowance over-reaches the assignment made to Bourn, by the commissioners.

It is also like the surrender of copyholds into the hands of a tenant of the manor who dies before presentment. He cited a case in Mich. 17 G. 2, in Chancery, *Bromley v. Child*. A commission of bankruptcy had issued against [718] Sir Stephen Evans, in 1711. The whole debts were received, with interest to the time of the commission. The certificate was not allowed till after the death of Sir Stephen Evans; when there was a surplus of 35,000*l.* in the assignee's hands. The question was concerning the interest which accrued subsequent to the date of the commission: to which time, the certificate discharged him. Lord Hardwicke held that it was well allowed, though after the bankrupt's death: and he said the end of requiring the Chancellor's allowance of the certificate was to prevent surprise; and that it takes its effect, (when allowed) from the signing of it by the creditors.

Mr. Norton, contra, argued that the bankrupt can not be entitled to subsequent effects, come to him after his bankruptcy and after the signing of his certificate by the creditors and commissioners, but prior to its allowance by the Lord Chancellor or Lord Keeper.

Till the Statute of 4, 5 Ann. the bankrupt's person and goods continued always liable to his creditors. And the bankrupt ought to be holden strictly to the bringing himself within the later Acts that have been mentioned; by shewing that he has performed all the requisites of them.

Now the allowance of the certificate by the Lord Chancellor or Keeper is the most essential part of those requisites. The creditors are not confined to the particular objections mentioned by Mr. Gould; but are at liberty to make any sort of objections to such allowance: and as well creditors who have signed, as those who have not signed, may be heard against the allowance. For the Act says "any creditors" may "object to it:" and they are not confined by any restrictive words whatsoever; to matters of fraud and unfairness; but left quite \*<sup>2</sup> at large.

Lord Mansfield—Certainly they are not so confined, either by law, or by practice: and any creditor whatsoever may then object to the allowance. And the allowance has been sometimes refused, and sometimes adjourned, even where there has been no opposition. Many years may intervene between the signing, and the allowance of the certificate; and large effects may, in the mean time, come to the bankrupt: and the future allowance ought not to over-reach them.

Here, the commissioners had actually assigned this legacy: and for that reason, the creditors might not perhaps think it worth their while to object to the certificate.

[719] It is not like the relation of a bargain and sale, or the surrender of a copyhold; to which it has been compared. Possibly in this case, the money may have been actually divided out: and it would be very unreasonable, that all the creditors should refund their dividends.

Mr. Just. Foster was of the same opinion; but he did not proceed to declare it at large, neither did the other two Judges declare theirs: because, it being a case out of

\*<sup>1</sup> V. sect. penult. of that Act.

† § 10.

\*<sup>2</sup> V. 5 G. 2, c. 30, § 10.



Chancery, the Judges of this Court were to give a certificate. And immediately after this argument,

The Court certified, as follows—

Having heard counsel on both sides, upon this case, (which the parties did not apply to be set down in the paper, to be argued, sooner than this term,) we are of opinion that the said two hundred pounds vested in the assignee of the bankrupt, and now belongs to him, for the benefit of the bankrupt's creditors.

REX *versus* FIELDING, ESQ. Monday, 29th Jan. 1759. A justice of the peace cannot be criminally proceeded against for a mere irregularity. [See 4 Bosanq. 191.]

Upon shewing cause against an information which had been moved for by one Mr. Barnard, against the defendant for a misdemeanor committed by him in his office of a justice of the peace; relating to the committing and detaining William Barnard (the son) in prison, &c. on a verbal charge by the Duke of Marlborough, "that this young man had sent him threatening letters, &c."—

Mr. Serj. Davey, on behalf of the defendant, objected to the prosecutor's proceeding any further in this criminal application, till he had previously made his election "whether to proceed in this criminal method, or in a civil action which he had actually commenced."

Mr. Norton for Mr. Barnard the prosecutor, answered, that this case was quite different from common ordinary cases; because it was absolutely necessary here, as the defendant was a justice of peace, to give notice of, and even actually to commence the civil action against the justice of peace, within six months after the time when the cause of action arose: which particular circumstance, he said, was the only reason of their acting thus. And he [720] alleged that they had no intention to proceed both ways; and offered to relinquish the civil action, in case the Court should grant the information.

But the whole Court were of opinion that he ought to make this election directly, and before they entered into the criminal complaint: for that this was the constant rule: and the particular circumstance of the civil action being confined to be brought within six months, made no sort of difference.

The justice of the thing equally required, they said, in this case as well as in the common case, that the defendant should not be called upon in a criminal way, by this discretionary method, of an information, which would oblige him to discover the matter of his defence and his evidence; unless the prosecutor would give up the right which he might otherwise have to make use of this very discovery of the defendant's evidence, against the defendant, in his civil action: which would be giving him a most unfair and unreasonable advantage over the defendant.

They added, that if the prosecutor had proceeded in the method which he had a strict and undeniable right to proceed in, namely, by way of indictment; and if such indictment had been actually found; yet the Attorney General would (upon application made to him) have granted a *nolle prosequi* upon such indictment, in case it appeared to him that the prosecutor was determined to carry on a civil action at the same time. And if this be so, where the party is proceeding in a method which he had a strict legal right to proceed in; surely it is much more reasonable for this Court to refuse to give him this extraordinary assistance (which they ought to dispense with caution and discretion), unless he would first consent to wave the civil action which he had commenced for the very same matter.

Mr. Norton, nevertheless, struggled extremely hard, to distinguish this case (of being thus fixed to six months for bringing the civil action,) from the common case, where the prosecutor was not at all restrained in time: and he remonstrated (with great vehemence) against laying down this as a general rule; as it might be a great prejudice to parties injured by justices of peace, who oftentimes might not be able completely to obtain any remedy by way of information, within the six months.

He was answered—"That the present application for an information was not made near so early as it might have been: which was the prosecutor's own laches."

[721] Mr. Norton acknowledged that if this was really the case, it would materially weaken his argument as to this particular case: and, in fine, he desired time to advise whether they should insist upon their civil action, or not. Where-

upon it was adjourned from Wednesday the 22d of November, to the Saturday following.

And then the prosecutor's counsel agreed to discontinue their civil action, and proceed upon the criminal rule; which they accordingly did, till it grew so late in the day that the Court was obliged to adjourn it to the Monday following.

The case then proceeded: but ended in an adjournment to the present Hilary term, in order to get further elucidation of facts, by procuring the affidavits of the Earl of Litchfield and Mr. Pierce, who (though both present) had not made any affidavits at all hitherto.

On Thursday the first day of this term, this matter came again before the Court: the Earl of Litchfield's and Mr. Pierce's affidavits being then obtained: and being then read, the counsel confined themselves to observations upon them; all other circumstances having been fully discussed before. Cur' advis.

The Court now delivered their opinion, by the mouth of the Chief Justice. In which opinion, Lord Mansfield declared himself and his brothers Foster and Wilmot to be unanimous; but he said, that his brother Denison, not happening to be present at the time of the motion and defence, had a delicacy in forming an opinion from the mere reading of the affidavits, without having heard the observations which the counsel on both sides had made upon them: and for that reason, declined interfering in the matter.

His Lordship went through the several parts of the charge (which consisted of no less than seven particulars) and also of the defence, and the several affidavits, in support of both, with the utmost accuracy and exactness; and examined them most minutely, in order to discover whether Mr. Fielding had acted with a bad and oppressive intention: and whether the persons complaining of his behaviour had been sufferers, or received any injury or inconvenience, in consequence of it: for it was agreed that it was not, in two or three of its parts, such as could be strictly justified.

Upon the whole, they were unanimous in opinion, that the main and principal charge which was the ground and foundation of the rest, and indeed the key to the whole nature and complexion of Mr. Fielding's behaviour, [722] appeared to be false in fact and quite misrepresented to the Court by Barnard the father and Barnard the son; and that the justice of peace appeared to have acted in this affair, without any bad or oppressive or injurious intention, though (in some respects) irregularly: and therefore, though the present complaint appeared to be so ill grounded, that the complainants deserved to be punished in costs for making it; yet as the justice had made the commitment without previously taking the Duke of Marlborough's oath, and had also neglected to take his Grace's recognizance to prosecute, (both which parts of his conduct were irregular,) he had no right to receive costs.

The rule therefore was expressly directed to be taken thus—It is ordered that the rule made "that John Fielding, Esq. and George Box should shew cause why an information should not be exhibited against them for certain misdemeanours," be discharged: but, in regard to the warrants of commitment and detainer of the said William Barnard, made by the said John Fielding, Esq. this Court doth not think fit to discharge the said rule, with costs to be paid to the said Mr. Fielding.

DOUGLASS, Widow and Administratrix, *versus* YALLOP, ESQ. 1759. A neglect of entering judgment, and a loss of the roll shewn, the clerk of the judgments was directed to supply the defect.

A neglect of entering judgment, and a loss of the roll, having been sufficiently shewn to the Court;

A rule was made, "that the clerk of the judgments shall sign a new roll, whereon is entered the judgment signed in this cause, in Michaelmas term 1729; and that the same be numbered as roll 256, and filed amongst the rolls of that term; a special entry being first made, expressing the day of docketting the same:" and it is further ordered, "that this judgment shall not be made use of against the administrator of the defendant."

Note. Lord Mansfield intimated, that it very much concerned the chief clerk, to take care that judgment be actually entered up upon the roll in due time, and docketted: for that after he has received his fees for making such entry, he would



be liable to an action upon the case, to be brought by a purchaser who should have become liable to it, and had searched the roll without finding it entered up. And he said that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk: but still, the chief clerk would be liable to the purchaser who had suffered by this neglect.

[723] N.B. The present course is, for the attorney for the plaintiff to undertake to make this entry upon the roll: for doing which, the chief clerk (who is intitled to 8d. per sheet) allows him 5d. per sheet. So that the attorney in this case, acts as one of the clerks of the chief clerk: which would render the chief clerk liable to the party's action; though the attorney would be answerable over to him. In fact, the attorneys are very apt to be negligent in bringing these entry rolls.

(The chief clerk, perceiving the inconvenience to which this practice renders him liable, determines to put the matter upon a safer foot, for the future.)

REX versus MAYOR, BAILIFFS AND COMMON COUNCIL OF THE TOWN OF LIVERPOOL.  
Wednesday, 31st January, 1759. The particular facts must be precisely stated on a return to a mandamus.

[Referred to, *J. C. v. Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow* [1908], A. C. 192.]

This came on, in the Crown-paper, upon the return to a mandamus to restore Joseph Clegg into the place and office of one of the common council of the said town.

Return—That the town of Liverpool is and from time immemorial has been an ancient town and borough, &c. consisting of a mayor and two bailiffs and a common council, &c. That they were incorporated by letters patent dated 4th July 2 Car. 1: which letters patent they accepted and agreed to. Then they set forth other letters patent, of 26th September 7 W. 3, confirming their former franchises, and further constituting, granting and declaring that thence-forward and for ever there might and should be, within the said town, the officers and ministers following; to wit, 41 honest and discreet men, of the burgesses of the town aforesaid, who should be and be called the common council of the said town, &c. And the same King, by the said letters patent, named the first and then modern common council of the said town, to continue in the office of common council of the said town so long as they should behave themselves well, unless some or any of them should happen, for a reasonable cause, to be removed, by the mayor, bailiffs and common council of the said town or the greater part of them for the time being. Which same letters patent of King William the 3d, the then mayor, bailiffs and burgesses of the said town in due manner accepted and agreed to: and ever since the granting of the same letters patent, the common council of the said town have of right consisted, and have used and of right ought to consist of 41 persons and no more.

[724] Then they admit Joseph Clegg's election and admission into the said office of one of the said common council, as by the writ is suggested.

But they alledge, that from time whereof the memory of man is not to the contrary, the mayor, bailiffs and common council of the said town for the time being, or the greater part of them in common council assembled within the same town, have of right removed, and during all the time aforesaid have used and been accustomed and of right ought to remove any one or more of the common council of the said town, from the place and office of one of the common council of the said town, for any reasonable and lawful cause; and that the person or persons so removed therefrom, have accordingly been and continued absolutely and effectually discharged and removed from the said place and office.

They further certify and return, that the mayor, bailiffs and burgesses of the said town are and time immemorially have been seised in their demesne as of fee, in their corporate right and capacity, of divers messuages, lands, rents and hereditaments, and lawfully intitled for themselves and their successors to many large and valuable tolls, duties and customary payments; and also now are, and for fifty years and upwards now last past have been lawfully possessed, in their corporate right as aforesaid, of divers other lands and tenements for certain long terms of years yet to come and unexpired; and that the several estates, hereditaments, duties, rents, revenues, and



possessions of and belonging to the mayor, bailiffs, and burgesses of the said town, in their corporate right and capacity as aforesaid, now are and at the time of the removal of the said Joseph Clegg therein after mentioned were, and for a great number of years now last past have been of great yearly value, to wit, of the yearly value, (together) of 2000l. and upwards: and that the office of one of the common council of the said town now is and during all the time aforesaid hath been an office of great trust and power, with respect to the management, receipt, control, and application of the issues, rents, and profits of the estates, hereditaments, duties, revenues, tenements, and possessions of and belonging to the mayor, bailiffs, and burgesses of the same town, and in the appointing of proper officers to collect the same.

Then the return proceeds to alledge, that before the removal of the said Joseph Clegg in the return after mentioned, the said Joseph Clegg sought his trade of living, by buying and selling; and became and was a bankrupt within the meaning and intent of some or one of the statutes made and in force concerning bankrupts; and that afterwards, and before the said removal of the same Joseph Clegg in the return after mentioned, to wit, on the 27th day of July in the year of our Lord 1756, a certain commission of bankruptcy in due manner issued against the said Joseph Clegg, under His Majesty's Great Seal of Great Britain, bearing date at Westminster the said 27th day of July in the 30th year of his reign, directed to R. T. &c. (the commissioners in that commission named,) authorizing them, &c. (as therein mentioned;) and that afterwards, and before the removal of the said Joseph Clegg in the return after specified, that is to say, on the 5th day of August in the year last mentioned, the said R. M. R. E. and R. R. being the greater part of the commissioners in the commission named, did duly put the same commission in execution, and by virtue thereof in due manner found and declared the said Joseph Clegg to be a bankrupt within the true intent and meaning of some or one of the statutes made and in force concerning bankrupts; and that he the said Joseph Clegg afterwards, and before his removal in the return after mentioned, did (pursuant to public notice for that purpose given in the *London Gazette*,) submit himself to the aforesaid commission so issued against him as aforesaid; and that the said Joseph Clegg at the time of his removal in the return after mentioned had not nor hath yet obtained from the above mentioned commissioners in the said commission named, or from the greater part of them, a certificate of his having conformed himself to the directions of the statutes or any of them made and in force concerning bankrupts: whereby the said Joseph Clegg then became and was and from thenceforth hitherto hath been and still is unfit for the said place and office of one of the common council of the said town, so being an office of great trust and power with respect to the management, receipt, control, and application of the issues, rents, and profits of the estates, hereditaments, duties, revenues, tenements, and possessions of and belonging to the mayor, bailiffs and burgesses of the said town as aforesaid.

The return proceeds—That afterwards and before the removal of the said Joseph Clegg in the return aftermentioned, (that is to say) on the 1st day of February in the year of our Lord 1758, the then mayor and bailiffs and the then greatest part of the then common council of the said town, that is to say, twenty-six of the same common council, to wit, W. G. &c. being all of them then of the common council of the said town, whereof the then mayor and bailiffs were three, at Liverpool in due manner met and assembled in common council within the said town of Liverpool, in the council-chamber of the said town, and then and there duly held a common council of the said town, concerning divers matters and businesses relating to the said town and the good regulation and government thereof; and that the said Joseph Clegg was then and [726] there present at that assembly: and that in the same assembly so held and met in common council as aforesaid, an information and charge were in due manner exhibited to that assembly, against the said Joseph Clegg, “of his aforesaid bankruptcy, and of the issuing of the said commission of bankrupt against him, and of his not having then obtained his certificate as aforesaid;” as a reasonable and lawful cause for the removal of the said Joseph Clegg from his aforesaid office of one of the common council of the said town, so being an office of great trust and power as aforesaid. And that the said Joseph Clegg had, then and there, personal notice of the said information and charge against him; and heard the same made against him; and was then and there asked by that assembly so met in common council as aforesaid, “whether he the same Joseph Clegg was the person against whom the said commission

of bankrupt had so issued as aforesaid ;” and “ whether he the said Joseph Clegg was then a bankrupt, and had obtained a certificate in that behalf, or not :” and thereupon, the said Joseph Clegg then and there confessed and acknowledged to the same assembly so met in common council as aforesaid, “ that he the said Joseph Clegg was the person against whom the said commission of bankrupt had so issued as aforesaid : and that he was then a bankrupt, and had not then obtained his certificate in that behalf.”

Then the return says, that the said Joseph Clegg having so confessed the truth of the above mentioned charge against him, as aforesaid, he the said Joseph Clegg was then and there further asked by the said assembly of the mayor, bailiffs and the greater part of the common council of the said town, “ what he the said Joseph Clegg had to say in his defence, why he should not be removed from the said office of one of the common council of the said town for the cause aforesaid ;” and the said Joseph Clegg did not then, or at any other time before his removal in the return after mentioned, desire any further time to be allowed him, to make his defence to the information and the charge aforesaid : and the said Joseph Clegg did not, either then or at any time before his removal in the return after mentioned, alledge or offer to that assembly any cause whatsoever why he should not be discharged and removed from his said place or office of one of the common council of the said town as aforesaid. And being rendered and become, by his aforesaid bankruptcy and by his not having obtained his certificate in that behalf, unfit for the said place or office of one of the common council of the said town, being an office of great trust and power as aforesaid, it was then and there moved in the said assembly, in the presence and hearing of the said Joseph Clegg by one of the common council so assembled as aforesaid, that is to say, by F. G. &c. “ that the said Joseph Clegg should be removed from his said place or office of one of the common [727] council of the same town, for the cause aforesaid :” whereof the said Joseph Clegg had then, and before his removal from the said office in the return aftermentioned, due notice. And the said Joseph Clegg did not, then or at any time before his said removal therefrom in the return after specified, alledge or offer to the same assembly any cause whatsoever why he should not be removed and discharged from the said place or office. Wherefore the said assembly so met in common council as aforesaid, and consisting of the said then and now mayor and bailiffs and the greater part of the then common council of the said town as aforesaid, having heard and duly weighed and considered the information and charge aforesaid, and what was alledged and admitted by the said Joseph Clegg, did then and there duly discharge and remove the said Joseph Clegg from the said place and office of one of the common council of the said town, for the cause aforesaid : and by reason thereof, he hath ever since remained and still is and continues removed and discharged therefrom. And therefore they cannot restore him or cause him to be restored, as by the said writ they are commanded.

Mr. Winn on behalf of Clegg, the prosecutor of the mandamus, objected to this return : to which he took two exceptions ; or in effect, three, as the former was divided into two distinct parts.

1st. The assembly who amoved him was not legally convened, for want of notice, either to the rest of the common council, or to Mr. Clegg himself ; who ought to have had notice of it, both as one of the members composing that body, and also as the member to be amoved.

2d objection. The cause of amotion is insufficient.

First—Notice ought to have been given to all the members ; and consequently Mr. Clegg ought to have had notice, as he was one of the constituent members of this corporate body. For every individual member of the body ought to be specially summoned, previous to the amotion of any member ; a general summons being always insufficient, wherever any extraordinary business is to be done.—Whereas this return does not shew any summons at all, to any of the constituent members : and it is incumbent upon them to shew their own jurisdiction ; as it is a summary one, founded upon charter, and not upon the common law.

The words “ in due manner met and assembled, &c.” are only a conclusion of law : but the Court can not intend any facts not alledged ; for returns must be taken strictly. [728] “ Nothing is to be intended in a return to a mandamus,” is the declaration of Ld. Ch. J. Holt, in 1 Shower, 282, *Rex v. Evans* : where the Court would not make even a very obvious intendment. And so it is, in all summary jurisdictions : as upon the game-laws, and such like cases. So, upon indictments also :



as in 5 Mod. 96, *Rex v. Harper* : which was an indictment for not taking upon him the office of constable, being qualified, and having been debito modo elected thereto ; and the objection was that the indictment ought to have set out particularly how he was chosen, and that he had notice ; or else, the indictment ought to be quashed.

The next objection is, "that Mr. Clegg himself, as the member to be amoved, was not summoned to answer to the particular charge upon which he was to be amoved." 4 Mod. 337, *The City of Exeter v. Glide*, is express "that he must and ought to have a particular summons for a particular charge : and it is not sufficient to summon him generally : and then to alledge particular crimes against him, which he may not be prepared to answer." And if a previous particular summons "to Mr. Clegg, to answer the particular charge," was necessary ; his appearance in the ordinary course of his duty will not cure this defect.

And the very nature of this charge (of bankruptcy) more especially requires a particular summons "to answer to it," because it depends upon a great number of complicated facts. Here, he is not charged with any particular act of bankruptcy ; nor is it alledged, that the commission even subsisted long enough for him to have obtained a certificate under it.

Second point—The cause of amotion is insufficient.

It imports nothing of infamy or offence, for which he was indictable ; nor any the least neglect of or offence against the duty of his office as a corporator. Every trader is liable to bankruptcy ; which may happen to him by accident and misfortune, and without any fault of his own. Becoming bankrupt is a misfortune ; not a crime : it does not even necessarily import insolvency ; nor, if it did, would that disqualify him from remaining a corporator.

There is only one case to be met with, of an amotion for bankruptcy : which was in M. 8 G. 2, B. R. *Rex v. Mayor and Aldermen of King's Lynn*, on a mandamus to restore one Stephen Allen to the office of common council-man ; and was in the time of Ld. Hardwicke. But indeed, this particular point did not come to be determined ; because the return was held clearly insufficient on another foot, viz. for want of summons, or even an attempt to summon.

[729] Here, it appears that Mr. Clegg was neither an object of their jurisdiction ; nor was the cause of his amotion sufficient.

Therefore this return being insufficient, he prayed a peremptory mandamus to restore him to the office.

Mr. Clayton, contra—Three objections are made to this return : viz.

1st. That it is not said, that all the members of this select corporate body were summoned :

2d. That Clegg himself had not previous particular notice of the charge, which was to be made upon him ;

3d. That the cause of amotion is insufficient.

Answer. 1st. The corporate body who had the right to amove, is alledged to be "in due manner met and assembled." Now this assembly possibly might be upon a charter day ; and then no special summons was necessary.

Or if in fact it was not duly holden, they might have traversed it : as was done in the case of *Green v. Mayor of Durham*, H. 1757, 30 G. 2. (V. ante, pa. 127.) There was a case similar to the present, P. 8 G. 2, B. R. *Kynaston v. Mayor and Aldermen of Shrewsbury*,\* where the facts were traversed and tried. So here, if they were not duly summoned, or the assembly not duly holden, they might have traversed these allegations of the facts, and taken issue.

The general summons is sufficient. I cannot find any return which avers "that all the constituent members were summoned, or had notice of the assembly." And it is unnecessary to aver it ; because since the Mandamus† Act, they may traverse it, and before the Act they might have had an action for a false return.

To the second objection—(of want of notice to Clegg himself,) the answer is, that his appearance cured the defect, if there was one. 2 Salk. 428, *Rex v. Mayor and Burgesses of Wilton*, on a mandamus to restore Elias Chalk to the place of burgess, is in point, "that where the person amoved has been heard, the want of summons is no objection." So it was, in convictions upon the game laws. And here, Mr. Clegg was heard, and admitted all the facts ; and desired no further time.

\* V. 2 Strange, 1051.

† 9 Ann. c. 20.



[730] As to the third objection—Here is a reasonable cause of amotion. This is not an amotion from his freedom of the corporation; but only from being one of the common council: in which character, he had the management of very great revenues of the corporation, viz. 2000*l.* per annum.

In *Rex v. Mayor of King's Lynn*, M. 8 G. 2, this point about the bankruptcy being a sufficient cause of amotion, or not, was not<sup>\*1</sup> entered into: it went off upon the want of Stephen Allen's being summoned, or even of any endeavour to summon him.

It is objected, "that the particular acts of bankruptcy are not stated."

Answer—This defect also (if it be any) is cured by his appearance and confession "that he was a bankrupt, and had not obtained his certificate."

Mr. Winn, in reply—

1st. We are not obliged to take issue upon the being "duly assembled." They ought to shew their own jurisdiction: and therefore, as the assembly does not appear to have been holden upon a charter-day, they ought to have shewn either a special, or at least a general summons to the several constituent members of it.

2dly. Mr. Clegg could not be prepared to defend himself against this complicated charge, without previous notice; although he happened to be casually present, in the discharge of his general duty to the corporation.

3dly. It does not appear that Mr. Clegg was not intitled to his certificate, though he had not had time to obtain it.

And as to any personal trust or power as to the revenue of the corporation—he was not, as common council man, personally to receive and disburse the estate of the corporation, or to finger any of their cash.

The commission does not at all affect him in his corporate capacity.

Lord Mansfield said he had no doubt at present: though he would not preclude a further argument, if the parties should not agree to his reasons.

[731] It is certainly true, he said, that where an amotion is returned, the return must set out all the necessary facts, precisely; to shew that the person is removed in a legal and proper manner, and for a legal cause. It is not sufficient to set out conclusions only: they must set the facts themselves out, precisely; that the Court may be able to judge of the matter. And so it is also, as to the cause of amotion: this must be set out in the same manner, that the Court may judge of it.

Here, three objections have been made.

1st. That supposing this select body of the corporation to have authority to remove, (and to which, no exception is taken,) and abstractedly from the particular cause of the present amotion, yet it does not appear that the constituent members of the body who made the amotion were summoned at all, to this meeting: whereas it not appearing to be a meeting directed by the charter, there ought to have been a special, or at least a general notice given to each individual member of it, "that there was to be such a meeting."

2dly. That it is also absolutely necessary, that Mr. Clegg, the person intended to be removed, should have had particular summons, "to answer to the particular charge." To which it is answered, "that this is cured, by his<sup>\*2</sup> appearance and<sup>\*2</sup> confession, and not desiring further time." I will say nothing at all about this matter; the first and third objections being clear, full, and fatal.

3dly. That the cause of amotion is insufficient.

Now as to the first. It is certain, that no summons of any of the members is alledged in the return: whereas, if a select number of a corporation have power to remove, and do amove at a meeting holden upon a day not directed by charter, &c. all that are within summons, must be summoned. And so was *Mr. Kynaston's case* determined in Tr. 8, 9 G. 2, in this Court.

And it is not sufficient to alledge, "that they were duly or in due manner, met and assembled;" it ought to be expressly alledged, "that they were all summoned."

The traverse, therefore, which it is said might have been here taken, would not go to the fact itself, but only the legal consequence: and therefore they could not be obliged to traverse, in the present case.

<sup>\*1</sup> It was objected to by Allen's counsel; but not further discussed; the Court having put it upon the counsel who endeavoured to support the amotion of Allen, to answer, in the first place, to the want of summons.

<sup>\*2</sup> Vide post.

[732] Therefore this is a flat objection.

As to the second I will say nothing.

But as to the third objection—This point has never yet been determined.

The case of *King's Lynn* turned upon the want of summons.

No cause is reasonable, unless it be just and legal: a just, a legal, a sufficient, a reasonable cause, all mean the same thing; the only difference is in the different epithets.

The <sup>\*1</sup> three causes of amotion of a corporator, are (1st.) Offences against the duty of his office, as a corporator; (2dly.) Crimes in their own nature heinous and atrocious, and against the offender's general duty, as a subject; yet not particularly relating to his corporate office or duty; and (3dly.) Such as are of a mixed nature.

Let us therefore consider the present cause alledged for the amotion, in these three views.

1st. His mere being a bankrupt is no objection to his continuing a corporator: it is no offence against the duty of his office. He may become bankrupt, without his own fault. And there is no census requisite as a qualification to be a corporator. Indeed some one or more of the consequences of bankruptcy may eventually become a cause of amotion: but the bankruptcy itself is not so. A man may be able to pay above twenty shillings in the pound, notwithstanding his being in strictness a bankrupt; or he may very soon obtain a certificate, after the commission has issued.

2dly. It is no offence against the law of the land. Bankrupts are not now considered as criminals; whatever the <sup>\*2</sup> old acts may intimate of this kind. A man may certainly be a bankrupt, without being guilty of any crime whatsoever; and may really be worth a large surplus on a balance: Sir Stephen Evans and the Woodwardes, and many others have been instances of this.

And this dis-franchising for becoming bankrupt might be made a very bad use of, by jundos in corporations, or under particular circumstances, and with particular views. A run upon a man of great fortune and credit may be artfully managed, so as to reduce him to bankruptcy. And there is no difference between a common-councilman's becoming a bankrupt, and an ordinary freeman's becoming so.

[733] As to the trust and power over the revenues of the corporation—This man is only one member of the number of one and forty, who have amongst them a power of voting corporate acts: but he has nothing to do with the receipt, or trust, or management, or fingering of the money; nor can have any thing to do with it, unless the rest should, by a corporate act of their own, trust him with it.

Therefore the having become a bankrupt, and not having obtained his certificate under the commission awarded against him, is not, of itself, alone, sufficient to disqualify him from being a member of the common-council of this town; whatever might have been the case, if certain eventual consequences had happened to follow therefrom.

Therefore the first and third objections are fatal: which renders it unnecessary to enter at all into the discussion of the second objection, and of the answer that has been given to it.

Mr. Just. Denison concurred with his Lordship in opinion.

This return is by no means a sufficient return. Bankruptcy alone is no sufficient cause of removal. There must have been, in fact, many instances of such bankruptcies of corporators. I suppose the question was never determined, because the fact of it was <sup>\*3</sup> never made a question.

In the case of *Lynn*, they had never even endeavoured to summon him: and not a word was said about the bankruptcy, by the Court, on determining the case.

As to the first objection in the present case—They should have shewn, in their return, which were their general days of meeting, fixed by the charter. But here it is an amotion by a meeting of a select number; who ought every one of them to have notice, when they are to proceed on particular business; whereas it is not here

<sup>\*1</sup> V. ante, 538, S. P. (rather more at large) *Rex v. Richardson*, P. 1758, 31 G. 2, B. R.

<sup>\*2</sup> V. ante, pa. 716.

<sup>\*3</sup> In the case of *King's Lynn*, there were other causes of amoving Allen, besides his being a bankrupt; namely, non-residence, absence, and neglect of duty. [Vide ante, 731.] [See Lucas 108, & post, 735.]

pretended by any direct allegation, that they had any notice at all. It is said indeed, "that they were in due manner met and assembled." But a return ought to be certain; and it ought as much to be so, since the Act of Parliament, as before.

They were not obliged to traverse this allegation of the meeting being "duly assembled:" and indeed it would have been a traverse of consequences, not of facts.

All the members of the select body ought to have had particular notice.

[734] As to the second objection—I think the † party himself ought to have had previous notice. But, however, there are many other objections to the return: and therefore I will not meddle with that.

3dly. The cause of this amotion is certainly insufficient. For surely a man may become a bankrupt, without being guilty of any offence at all, either against his private office and duty of a common-council-man, or against the law of the land. I have no notion that being a bankrupt will disqualify a man from being a common-council-man or a corporator. And the not obtaining his certificate is an immaterial circumstance: it was not in his power; or he might not have had time to do it.

And he had not the management of the revenues of the corporation, so as to have any concern in the collecting them. It does not appear that he had any thing to do with fingering the cash of the corporation; or that their pecuniary interests could at all suffer by his having become a bankrupt.

Upon the whole therefore, it seems very clear that this is a bad return, and ought to be quashed; and that a peremptory mandamus ought to issue.

Mr. Just. Foster declared himself of the same opinion. They ought, he said, either to have set out an assembly upon a charter-day, or a general summons to the component members of this select body who amoved. He added,—I cannot go so far as to say that a special summons was necessary, setting forth the particular business upon which they were to treat: but I think a general summons, to every member, was necessary.

As to the second objection—I shall not say much upon it. But a man ought not to be dispossessed of his freehold, without having a proper opportunity of making a defence to the charge upon which he is removed from it. He could not be prepared in the present case, to defend himself against this particular charge: he ought to have been apprised what it was to be. There might be an opportunity taken, when there was a thin meeting, and when all his friends were absent, who would perhaps have been present, if he had any notice of this or even of any charge against him.

As to the third objection—The cause of amotion is not sufficient. Bankruptcy alone is not so. And the not having obtained his certificate is not at all material: he might not have had time or opportunity to obtain it; or it might have been opposed, on purpose.

[735] Bankruptcy does not necessarily import insolvency. But insolvency itself is no cause of amotion, where the corporator is not intrusted with the receipt of the corporation's money. And here he is not intrusted with a penny of their money: it is not alleged that he had any thing to do with their cash.

Therefore, upon the whole, this return is bad, and ought to be quashed; and a peremptory mandamus ought to go.

Mr. Just. Wilmot was of the same opinion.

He confined himself, (as Lord Mansfield had done,) to the first and third objections only.

1st. If the assembly is not holden upon a charter-day, or a general day of meeting, there must be a previous summons to every member; either general or special: I rather think, it ought to be special; that every member may come prepared, and have an opportunity to give his reasons to his brethren: which may perhaps alter their opinion. But clearly there ought to be a previous summons, either general or special; and this, to every individual member.

The allegation of their being "duly met and assembled," is a complication of fact and law; and therefore not properly traversable: the particular facts ought to be alleged upon the record. The Act of 9 Ann. c. 20, makes no difference at all: it is just the same since, as it was before this Act.

As to the third objection—Bankruptcy alone is no sufficient cause of amotion, he had nothing to do with the money of the corporation. Indeed no insolvency at all

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† V. post, 738, *Rex v. Mayor, &c. of Doncaster*.



appears; nor, if it did, is it an offence. Bankruptcy alone is no offence either against the duty of his office as a corporator, nor any offence or crime rendering him infamous at common law.

Therefore this return is insufficient, and ought to be quashed; and there ought to be a peremptory mandamus.

Per Cur. unanimously,

Let there be a peremptory mandamus.

Rule to quash the return; and that a peremptory mandamus do issue.

[736] BAILEY *versus* DILLON. Thursday 1st. Feb. 1759. [See Cowp. 549.] Certified bankrupt, who had subsequently promised to a creditor who had not proved, to pay when able, discharged on common bail.

Mr. Williams shewed cause why the defendant should not be discharged upon common bail.

The case was this—The defendant, being indebted to the plaintiff, became a bankrupt. The commission issued on the 7th of May, 1754. The bankrupt obtained his certificate, which was signed on the 30th of August, 1754, and allowed in the September following. In September or November 1755, the now plaintiff, who was one of this bankrupt's creditors as aforesaid, and did not appear to have come in under the commission, produced to the defendant an account between them (prior to the commission); upon which account there was a balance due to the plaintiff from the defendant, of 74l. and upwards, remaining due at the time of the bankruptcy. The defendant desired time to examine it: and then acknowledged that this balance was due to the plaintiff, and promised "to pay it to the plaintiff when he should be able."

So that the general question arising upon this case, will hereafter be "whether a person indebted to another, and afterwards becoming a bankrupt, and then being regularly discharged, by having duly conformed himself to the Bankrupt-Acts, and having obtained his certificate; but afterwards making a new acknowledgment of the same debt being due, and also a new promise to pay it, shall or shall not be liable to the payment of it:" but

The particular question now before the Court was singly, "whether he ought to be discharged upon common bail, or holden to special bail." For this alone was the motion which Mr. Norton had made, and against which Mr. Williams now shewed cause.

Mr. Williams argued, on behalf of the plaintiff, that this is a new debt founded upon a promise made on a good and sufficient consideration, viz. on a conscientious obligation.

He compared it to cases of new promises made after the expiration of the six years; which shall revive debts barred by the Statute of Limitations: as that of *Dean v. Crane* in 6 Mod. 309; and *Andrews v. Brown et Ux*, in Precedents in Chancery, 385. And so, the Bankrupt Acts must be taken favourably for creditors.

A much stronger instance, is the case of an infant, who after full age, ratifies a contract for goods, not being necessaries, by his promise to pay for them. For which, he cited *Southerton v. Whitlock*, in 1 Strange, 690, where Ld. Raymond at Guildhall, held, "that the infant was bound in such a case." Yet the infant was full as much discharged of the contract, in that case, as this bankrupt was, in the present case.

But \* this Act which gives the discharge by certificate, was made for the benefit of the bankrupt; and therefore he may waive this benefit: which here he has done. Consequently, it is not at all within the Act of Parliament.

As to the case of *Turner v. Schomberg*, in 2 Strange, 1233, there was no good consideration to found the promise. The defendant had there given his note for 36l. and was afterwards discharged on the Insolvent Debtors Act: afterwards, he promised to pay the debt at two guineas per month; part whereof, he paid; and was arrested for the remainder. There, he was discharged indeed on common bail: and it was holden to be no new consideration, but the old debt. And so it was.

Mr. Norton was stopt by the Court from proceeding to argue on behalf of the defendant, in answer to what Mr. Williams had urged. For

The Court held it quite unnecessary to enter into the general and principal question, or to enter at all in to all the merits of the case, upon this present motion : since it would be very improper to determine such a point in this method upon a question about special or common bail. Therefore they said they would not meddle with the merits, nor give any opinion at all upon the general question. But

As to the particular question which was the subject of the present motion, they were unanimous "that he ought to be discharged upon common bail." For

Lord Mansfield observed, that the present question is no more than "whether this promise made by the defendant under the circumstances stated, and founded only upon a conscientious obligation shall entitle the plaintiff to keep him in prison." This would be taking advantage of his conscientiousness, to use it against conscience.

Mr. Just. Foster added, that the case in 2 Strange, 1233, determines directly in point, the question as to bail. And

[738] Mr. Just. Wilmut thought that case to be even stronger than this.

Per Cur. unanimously,

Rule made absolute, to discharge the defendant upon common bail.

REX *versus* MAYOR, ALDERMEN AND BURGESSES OF DONCASTER. Saturday, 3d Feb. 1759. To amove a member on a new charter or prescription day all the members should be summoned. [Bull. 205.]

A mandamus to restore Theosebius James Buckley Wilsford to the office of one of the capital burgesses of the Corporation of Doncaster.

The mayor, aldermen and burgesses return, that they were a borough by prescription, and were incorporated by charter on the 2d of May 16 C. 2, with power to make bye-laws, &c. and to inforce them by fines, &c. which charter fixed the Thursday next after Bartholomew-Day, yearly, for the mayor, aldermen, and capital burgesses, to meet together, for the election of a mayor ; who should take his oath of office on the Thursday next before Michaelmas ; and made provision for a new election, in case of death or amotion, and also for filling up the vacant places of deceased or amoved aldermen and burgess. Then it alledges the acceptance of these letters patent. Then it shews that the said Theosebius James Buckley Wilsford, on the 6th of September 1737, was elected, chosen, sworn and admitted a capital burgess. Then it alledges, that after the making and acceptance of the letters patent, and before the issuing of this writ of mandamus by indenture made the 21st of July 1745, between the Mayor, Aldermen, and Burgesses of Doncaster of the one part, and one Thomas Smith of the other part, for the considerations therein mentioned, the said mayor, aldermen, and burgesses did demise and to farm let to the said Thomas Smith divers lands and tenements, of the said mayor, aldermen, and burgesses, situate and being, or being mentioned to be situate and being, at Balby, in the said county of York : to hold to the said Thomas Smith his executors, administrators, and assigns, from the 29th day of September then last past before the date thereof, for and during the full term of ten years from thenceforth next ensuing, at and under the yearly rent of 26l. 10s. payable half yearly at Lady-Day and Michaelmas by even and equal portions.

Then they return, that the said mayor, aldermen, and burgesses, for a great number of years last past, have had and kept, and now have and keep a public book for the use of the said mayor, aldermen, and burgesses, as a corpo-[739]-ration or body politic : in which book, the orders and resolutions of the mayor, aldermen, and burgesses, of the said borough, for the time being, as a body politic, relating to the said borough, and the orders and resolutions of the common council of the said borough for the time being, and also the accounts of the estates of the said mayor, aldermen, and burgesses, as a body politic, from time to time have been written and entered, for the use of the said body corporate : and to which public book, each capital burgess of the said borough, as a member of the common council of the said borough, has, from time to time, at all reasonable times, had access.

They further certify and return, that after the making and acceptance of the said letters patent, and before the issuing of the mandamus, to wit, on the 5th of March 1747, at a common council of and for the said borough duly assembled and held in the said borough, it was resolved and ordered by the said common council then and there so assembled, amongst other things, "that at the expiration of the then present

lease made by the said corporation to the said Thomas Smith, the lands thereby demised should be let to some other person:" and which resolution and order was afterwards, to wit, on the 6th day of March in the said year 1747, duly written and entered in the said public book of the said mayor, aldermen and burgesses, of the said borough.

And they further certify and return, that after the making and acceptance of the said letters patent, and before the issuing of the writ, to wit, on the 10th day of February, 1756, at the said borough of Doncaster, he the said Theosebius James Buckley Wilsford, then and there being one of the capital burgesses of the said borough, and also a member of the common council of the same borough, and then and there well knowing that the last mentioned resolution and order was then written and entered in the said public book: he the said Theosebius James Buckley Wilsford did unlawfully, knowingly and wilfully, and contrary to the duty of his said office of one of the capital burgesses of the said borough, and without the consent of the then mayor, aldermen, and burgesses, of the said borough, and also without the consent of the then common council of the said borough, deface and obliterate the entry of the last mentioned resolution and order so written, made, and entered in the said public book as aforesaid; to the great damage of the mayor, aldermen, and burgesses, of the said borough.

They further return, that afterwards, at an assembly of the mayor, aldermen, and burgesses, of the said borough, held in and for the said borough of Doncaster in the Guildhall of the same borough, on the 7th day of March [740] in the year of our Lord 1757, they being so † duly assembled for the good rule and government of the said borough; and George Waterer, Esq. the then mayor of the same borough, and also the said Theosebius James Buckley Wilsford, then one of the capital burgesses of the said borough, being then and there present; he the said Theosebius James Buckley Wilsford was then and there, at and in the same assembly, charged and accused "that he had defaced and obliterated the said entry of the last mentioned resolution and order so written, made and entered in the said public book as aforesaid:" and the said charge and accusation was thereupon read to the said T. J. B. W. then and there, at and in the same assembly; and he was asked, by Richard Sheppard, Gent. then the common clerk of the Mayor, Aldermen, and Burgesses, of the said Borough of Doncaster then and there present, and then and there the proper officer on that behalf, and by the command of the said George Waterer then the mayor of the same borough, "if he knew or had any thing to say for himself, in his defence against the charge aforesaid." And the said T. J. B. W. thereupon, at and in the same assembly then and there did confess and acknowledge "that he did deface and obliterate the said entry of the said resolution and order so written, made and entered in the said public book as aforesaid, and with which he was then and there charged as aforesaid:" and he did not then or there shew any sufficient cause why he should not therefore be removed and displaced from his said office of one of the capital burgesses of the said borough of Doncaster, nor did then or there require or desire to have any further day or time to be allowed him to make a defence to the said charge, or to shew cause why he should not be removed and discharged from his place and office of one of the capital burgesses of the borough, for the said offence. Whereupon the said assembly of the mayor, aldermen, and burgesses, of the said borough, having taken the case of the said T. J. B. W. into consideration, and having fully and deliberately weighed the same, did then and there order that the said T. J. B. W. for his said offence should be removed and discharged from his said place and office of one of the capital burgesses of the said borough: and the said T. J. B. W. was then and there accordingly, by the said mayor, aldermen, and burgesses of the same borough so assembled as aforesaid, then and there removed and discharged from his said place and office of one of the capital burgesses of the said borough of Doncaster.

They also further return, that the said T. J. B. W. at any time since his being so removed as aforesaid, hath not been nominated, elected, sworn, admitted or restored to or into the place and office of one of the capital burgesses of the said borough of Doncaster.

[741] And for these reasons, they cannot restore or cause to be restored the said T. J. B. W. into the aforesaid place and office of one of the capital burgesses of the

† Vide ante, 731, 733, 734, 735, *Rev v. Mayor, &c. of Liverpool*, (*Clegg's case*).



borough aforesaid, with all the liberties and franchises to the said place and office belonging and appertaining, as by the said writ they are commanded to do.

N.B. Mr. Wilsford had at first traversed the several facts alledged in the return; and seven issues were joined thereupon; but he afterwards deserted his traverses, and set the return down in the paper, to be argued upon its validity in law.

Qu. concerning the regularity of this, if it had been objected to.

Mr. Gould, on behalf of the prosecutor, objected to this return.—

1st. That the assembly which made this amotion does not appear to have been legally holden: for want of its being stated that particular notice was given previously, to the members of the corporation, “that this particular business, of the amotion of this capital burgess, was intended to be thereat proceeded upon.”

2dly. That no sufficient cause of amotion is properly set out: for the sole foundation of the amotion is rested upon his confession of a charge which is itself defective: as the charge itself, after giving a narrative of the fact, only in general alleges it “to have been done to the great damage of the corporation,” but does not specify any particular damage that they suffered in consequence of it.

3dly. That the corporation had no power to amove him for an offence such as this is, without a previous conviction, at common law.

But before he entered particularly into these objections, he first premised in general, that returns to mandamus ought to be certain; and that every thing ought to be intended against such return. To prove which he cited 6 Mod. 309, *Queen v. Mayor of Hereford*. 2 Salk. 432, *Rex v. Mayor of Abingdon*, (the 2d point of it). 1 Shower, 364, *Glyde's case*; *Rex v. Mayor and Aldermen of Exeter*. And this precision is equally necessary,\*<sup>1</sup> since the 9 Ann. c. 20, as before that Act.

[742] He then enlarged upon his three objections.

First—This amotion was made by the whole body politic, not by a select party of it; on a\*<sup>2</sup> bye-day, not upon the charter-day; and upon a general summons to meet to transact the business of the corporation, not upon a particular notice to meet upon this particular affair.

Every corporation has an interest in each of its members: which is proved by the case of *The Borough of Wigan*, Tr. 27 G. 2, B. R.

And a resignation of a corporate interest cannot be made to a select body. *Rex v. Powell*, B. R. five or six terms ago.

In the case of *Kynaston v. Mayor and Aldermen of Shrewsbury*, it was settled that upon an amotion on a day “which is not the general charter-day, every member must be summoned.”

Second objection—The lease mentioned in the return was made by the whole corporation. He observed also that the expression was “amongst other things:” and cited 2 Salk. 417, *Rex v. Bear*. This is not an offence sufficient to ground an amotion from his freehold upon; there being no particular damage to the corporation specified or even alledged. 11 Co. 99, *James Bagg's case*. Carthew, 176, *Sir Thomas Earl's case*.

Third objection—Admitting (for argument's sake) the cause of amotion to be in its own name sufficient, yet nevertheless there ought to have been a previous conviction at common law: as this offence is both an offence against the duty of his office as a corporator, and also indictable at common law.

He cited *Rex v. Mayor of Derby*, Tr. 8, 9 G. 2, B. R. Where Lord Hardwicke fully explained this subject, and cited the case of *Rex v. Mayor of Wilton*, (which case is imperfectly reported in Comberb. 396, by the name of *Rex v. Chalk*; and is the same case with *Rex v. Mayor and Burgesses of Wilton* in 5 Mod. 257, and in 2 Salk. 428, pl. 2) where the offence was striking out one name and putting in another; and his Lordship also cited *Parrot's case*, *Queen v. Mayor of Newcastle*, M. 8 Ann. B. R. and M. 8 G. 1, B. R. the case of *Carlisle*, “for corrupting a member of the corporation to give a vote:” where the Court were equally divided: which cases, Mr. Gould said, were cited by Lord Hardwicke, to shew the uncertain state wherein this matter then stood; and which his Lordship and the Court left to be determined and settled, when a proper case should come directly in judgment to require it.

[743] Mr. Gould therefore urged that if the present offence be of such a magnitude as to amount to a sufficient cause of amotion, there ought to have been a previous

\*<sup>1</sup> V. ante, pa. 733, 734.

\*<sup>2</sup> V. ante, pa. 731 to 736.

conviction at common law : because it might otherwise happen, that he might afterwards (subsequently to his amotion) be indicted and acquitted, in which case there would be contrary judgments upon the same fact.

And this objection is not answered by comparing such contrary judgments to cases where the Temporal and Spiritual Courts are both permitted to proceed upon the same fact ; because they proceed diverso intuitu. For in this case, the corporation would be obliged to look upon the temporal verdict as evidence : whereas the Spiritual Court do not receive a verdict as evidence, at least not as conclusive.

Mr. Luke Robinson contra, for the return.

As to what Mr. Gould had in general premised, he observed that the reason of requiring such precise certainty in a return to a mandamus is at an end,\*<sup>1</sup> since the statute of 9 Ann. c. 20 : since which Act, the law may be ascertained by a demurrer ; or the fact tried by traverses.

The reason given by the Ch. J. in 2 Salk. 432, is now a reason against requiring such precision : and Mr. Just. Eyre goes too far in *Glyde's case*, in saying "that every thing shall be intended against a return."

The three objections are (first,) to the want of previous notice of the particular business to be transacted at the corporate assembly ; (2dly,) to the cause of amotion ; which is urged to be insufficient ; (3dly,) to the want of a previous conviction.

First—No such special notice is at all necessary : and besides, this Mr. Wilsford was † present, and confessed the charge. And neither the case of *Wigan*, nor that of *Shrewsbury*, are applicable to the present case.

Secondly—The offence charged is a sufficient cause of amotion : and it is not necessary to specify how, in particular, the corporation has been damnified by it : it being alledged to be "to the damage of the corporation," which is enough. And neither *Bagg's case*, nor Carthew, 176, will support Mr. Gould's objection.

Thirdly—It would not have been easy to describe this offence so as to get the party convicted of it at [744] common law. However, a previous conviction is not necessary in this case ; which is that of a misdemeanour contrary to his oath and to the duty of his office, but is not an infamous offence.

As to the cases of *Derby*, of *Wilton*, and of *Newcastle*, they are no authorities : for Mr. Gould admits the point to have been uncertain, and to have been left so by Ld. Hardwicke. But

In 1 Keb. 597, *The Town of Wigan v. Pilkington, an Alderman of that Borough*, the amotion was holden good, on a mandamus, without any previous conviction : "for that, contrary to his oath, he spoliavit et dilaceravit quædam recorda of such a Court."

Mr. Gould in reply—As to the general positions premised by him—

Mr. Robinson allows that precision was necessary in a return to a mandamus, before the 9 Ann. c. 20, but that Act does not excuse the necessity of such a precision in the return ; though it gives a traverse to the material facts alledged in it.

1st objection. If notice had been given of this intended amotion, some member or other who had thereupon attended, might perhaps have given such reasons to the assembly, as might have altered their opinions. And this argument holds equally strong, as in the case of a corporate assembly of the whole body, upon a day which is not a charter or prescription day, as it does in the case of a \*<sup>2</sup> select body.

2d objection. It ought to be such an offence as tends to the destruction, or injury at least, of the corporation. And *Bagg's case*, and Carthew, 176, prove this.

3dly. Ld. Hardwicke considered this point of a previous conviction as unsettled, in Tr. 8, 9 G. 2.

Lord Mansfield observed, that corporation-law ought to be well settled : and therefore he was willing to hear it argued again.

Uterius concilium.

This former argument, just now recited, was on Saturday the 25th of November last : and it now stood in the paper for further argument. But

Mr. Yates, who was to have argued for the corporation, gave up the return : the first objection taken to it, being the same point as was determined on Wednesday

\*<sup>1</sup> Sed v. ante, 733, 734.

† V. ante, 731, 734.

\*<sup>2</sup> Vide ante, 731, 733, 734, 735, *Rex v. Mayor, &c. of Liverpool*.

[745] last, in the case of <sup>†1</sup> *Rex v. Mayor, Bailiffs, and Common Council of Liverpool*, (*Clegg's case*) ante, pa. 723, to 736.

Whereupon, the like rule was taken, as was made in that case; viz. that the return be quashed, and that a peremptory mandamus do issue.

REX *versus* HARTSHORN ET AL'. 1759. Order for surveyor of the highways to pass his accounts cannot be made originally at sessions.

Mr. Caldecot moved, in Trinity term last, (Wednesday 31st of May 1758,) to quash an order made (originally) at the General Quarter Sessions, upon the surveyors of the highways of Roston, for the years 1751, 2, 3, 4, 5, and 6, "to pass their accounts respectively, and pay over the money assessed and collected, &c. to the present overseer, &c."

He took two exceptions: viz.

1st. The original application ought to have been to a special sessions; for the General Quarter Sessions have no authority originally, but only upon appeal. To prove which, he alledged, 3, 4 W. & M.c. 12, § 9. 1 Hawk. P. C. 218, § 80.

2d exception—This order "for overseers so long out of office, as 1751, 2, 3, &c. to pay over to the present overseers," is not right: for, each ought to pay over to his immediate successor.

A rule having been afterwards obtained by the other side, to shew cause "why the certiorari should not be quashed."

Mr. Caldecot, on Monday 27th of November last, shewed cause against the \* certiorari being quashed; which cause was "that the prosecutors had enlarged the rule for shewing cause why the order should not be quashed." Which

The Court held to be a sufficient cause; and that it was too late, after having themselves enlarged that rule, to object to the issuing of the certiorari.

Which being determined against the prosecutors, the former rule (to shew cause why the order should not be quashed,) was enlarged to the present term.

Now, Mr. Lee, who shewed cause against quashing the order, first cited <sup>†2</sup> *Rex v. Wakefield, et AL*, H. 1758, 31 G. 2, B. R. to shew that the certiorari and return [476] would not stand in his way: and then proceeded to answer the objections that had been made to the order.

He began with the first; namely, to the jurisdiction of the General Quarter-Sessions, as there had been no previous application to a special sessions. His answer to this objection was, that this was by consent.

Mr. Just. Foster observed, that consent cannot give jurisdiction to a Court that has none: and here the objection is, "that this Court of General Quarter Sessions had no original jurisdiction."

Per Cur. Order of the Quarter Sessions quashed.

CHAUVET AND ANOTHER *versus* ALFRAY. 1759. Bail in error must be given upon a judgment in debt upon a bond given by a third person as a security for another. [7 Durn. 450.]

Mr. Baynham, on behalf of the defendant in error, shewed cause, why the fieri facias should not be set aside, and the goods levied be restored.

This was an action of debt upon a bond, given to the plaintiff and another, being creditors of one Sutton, by a third person, as security for a partial payment of the debt of the said Sutton, (which was thereby liquidated and ascertained,) to his several creditors, viz. 15s. in the pound, by instalments: which bond was to be forfeited, if Sutton should make default in the said payment. The plaintiffs having obtained judgment against the defendant, he brought a writ of error, but gave no bail upon it. Whereupon, the plaintiffs took out execution: which the plaintiff in error complained of, as being irregular. So that the question was, whether this bond, given

<sup>†1</sup> See the first point of that case.

\* V. § 23 of 3, 4 W. & M. c. 12, "that no order made by virtue of that Act, shall be removed by certiorari." Yet if the Quarter Sessions make an original order, a certiorari will lie; per Hawkins, lib. 1, c. 76, § 80.

<sup>†2</sup> V. ante, 485.



by a third person, and made to third persons for payment of a sum certain, by instalments, (the last whereof was still future,) be an obligation conditioned for the payment of money only, within 3 J. 1, c. 8, (made to avoid unnecessary delays of execution).

Mr. Norton and Mr. Field, for the plaintiff in error, urged that a counter-bond, or a collateral security for the debt of another person, is not a bond for payment of money only; nor within the meaning of the Act of 3 J. 1, c. 8. And they cited *Yelv. 227, Gilling v. Baker. 2 Bulstr. 53, S. C. Carthew, 28, Gerrard v. Danby, 1 Shower, 14, S. C. Comberb. 105, S. C. 2 Strange, 1190, Thrale v. Vaughan. Lucas, 281, Hammond v. Webb.*

[747] Lord Mansfield—The Court will not contract the construction of that beneficial Act, beyond any precedent. And this bond is clearly for the payment of money only; and liquidated as to the sum too: all the debts are liquidated. The money is only to be paid by another person.

Mr. Just. Denison concurred—And the being payable by instalments makes no difference.

Mr. Just. Foster and Mr. Just. Wilmot declared their concurrence in this opinion.

Per Cur'—The rule upon the plaintiffs to shew cause "why the writ of scire facias should not be set aside for irregularity, and the goods levied be restored," (which rule had been obtained upon Mr. Field's motion,) was now discharged.

WILLIAMS *versus* ROUGHEEDGE, (a Prisoner in Execution). Monday, 5th Feb. 1759.  
Construction put on certain Insolvent Acts. [Vide post, 799, 901. Barnes, 394.]

The question was "whether the prisoner, in execution under process out of this Court, was within time to lodge a petition for his being brought up to the assizes for the County Palatine of Lancaster."

The case was this—A prisoner in execution under process issuing out of this Court, had (for want of rightly understanding the proper jurisdiction to which he ought to have applied) totally omitted to petition this Court within due time, "that he might be brought up to the assizes, &c. in order to his being discharged upon the Insolvent Debtors Acts;" although he had presented a petition to another (improper) jurisdiction, within time; viz. to the Judges of Assize for the County Palatine.

The doubt was "whether he was now precluded from making his application to this Court: and whether the explanatory Acts of 3 G. 2, c. 27, and 8 G. 2, c. 24, and 14 G. 2, c. 34, and 21 G. 2, c. 33, are revived by 29 G. 2, c. 28:" or "whether the Act of 2 G. 2, c. 22, be alone revived: and the explanatory ones, of that very Act, remain unexpired."

The Court (having looked into all these several Acts of Parliament,) declared that all these Acts explaining and amending that of 2 G. 2 are revived by [748] 29 G. 2, as well as the Act of 2 G. 2 itself; and particularly, that that of 8 G. 2, c. 24 (upon which the present question depends,) is now in force: consequently, that in order to give this Court jurisdiction, the prisoner must come and apply to this Court by petition, before the end of the next term after his being charged in execution: otherwise, this Court has no jurisdiction vested or attached in it: as was determined in a case (remembered by Mr. Just. Denison) of \* *Smallwood v. Grant*, H. 21 G. 2, B. R. Which case was distinguishable from that of *Sir William Pool v. Lane*, in Tr. 16 G. 2, B. R. where the petition was lodged in due time, and all was regular, except that twenty-eight days notice only had been given instead of thirty days. There indeed the defendant was suffered to give a new notice; but the reason was, because the jurisdiction was in that case attached, by the original petition's having been lodged within due time: whereas, in the present case the Court have no jurisdiction at all.

As to the revival of the explanatory Acts, as well as the principal one, which had been at different times explained and amended by these several temporary Acts—the Court held that these, being all attendant upon it, were in effect revived along with it: for that it would be absurd (as Mr. Just. Foster observed) to revive unamended, an Act which wanted so many amendments as this Act had received.

Mr. Just. Foster observed also the particular course of these explanations and amendments; viz. that the Acts of 2 & 3 G. 2 are continued by 8 G. 2. Then the 14th continues the 8th with the amendments. Then the 21st continues 2 G. 2

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\* I believe, the proper name of it was *Good v. Clarke*.

only, without expressly naming the explanatory ones. And the 29th implicitly follows the precedent of the 21st. Which Act of 29th will itself expire the next sessions: when, he hoped, he said, that more † accuracy would be observed.

Mr. Just. Denison said that notwithstanding the inaccuracy of the penning, all the former Acts were revived by the 29 G. 1.

And this matter was taken equitably, in petitions offered to the Court after the expiration of these Acts: for, upon the revival of them, the Court equitably held, "that the [749] prisoners should have another term after the then first term allowed them to lodge their petitions."

REX *versus* GWYNNE ET AL'. Thursday, 8th Feb. 1759. A procedendo will be directed if the certiorari issues after a confession of the offence below.

Lord Mansfield being absent in the Duchy-Court,

The three other Judges (on a defended motion) granted a \*<sup>1</sup> procedendo, at the instance of the defendant, to the Quarter Sessions of \*<sup>1</sup> Brecon upon an indictment for an assault removed up hither; because the certiorari had not issued till after the defendants had confessed the assault below: though the conviction was not after a trial, and though several of the justices were sworn to be near relations of Mr. Gwynne, one of the defendants; namely, his father, two brothers, and an uncle.

REX *versus* INHABITANTS OF WESTBURY. Friday, 9th Feb. 1759.

See this case, at large, in my quarto-edition of Settlement-Cases, page 470, No. 150.

[753] COOKE *versus* PETER SAYER. 1759. Costs where defendant pleads double, and there is a verdict for the plaintiff on one, and for the defendant on the other. [S. C. Sayer's Law of C. 188. 2 Wils. 85. 3 Wils. 332. Buller, 28. See also 2 Durn. 393. 3 Durn. 655. 2 Bosanq. 50.]

On the Master's report (made two days ago)—The question was, "what costs should be allowed; and to whom:" upon the following facts stated; (in consequence of a motion for a direction to the Master, how to tax them).

In an action of trespass and assault for a criminal conversation with the plaintiff's wife (a) the defendant, by leave (pursuant to the Statute for Amendment of the Law, 4, 5 Ann. c. 16,) pleaded two pleas; (1st.) Not guilty; (2dly.) Not guilty within six years. On the former plea of "not guilty," issue was joined: to the latter plea, there was a demurrer put in by the plaintiff. It so happened, that the issue on the plea of "not guilty" was tried first, and found for the plaintiff, with 50l. damages; then the demurrer was afterwards argued, and over-ruled, and determined for the defendant: and each party had judgment; viz. the plaintiff, on his verdict; and the defendant, on the demurrer. The plaintiff taxed his costs upon the postea; then the defendant came to tax his costs of his judgment upon the demurrer.

N.B. By 8, 9 W. 3, c. 11, (for the Better Preventing Frivolous and Vexatious Suits,) § 2, defendants shall have costs against plaintiffs, on judgments given for them, upon any demurrer put in by either side. And,

By 4, 5 Ann. c. 16 (for the Amendment of the Law,) which \*<sup>2</sup> enables defendants to plead several matters, it is provided, "(§ 5.) That if any such matter (pleaded by a defendant,) shall, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court." But there is no particular direction in this Act, in case of its being judged sufficient; (which was the present case;) so that this stands, I suppose, upon the former Act of 8, 9 W. 3, c. 11.

Master Clarke said he never had known an instance of this kind.

[754] Lord Mansfield—Perhaps the particular circumstances of this case may be

† V. post, p. 799. Tr. 1759, 32, 33 G. 2, B. R., *The Prisoner's case*.

\*<sup>1</sup> V. *Rex v. Inhabitants of Clase in Com' Glamorgan*, Trin. 1769, B. R. [See 4 Burr. 2456. 5 Durn. 628.]

(a) 3 Wils. 332. Bull. 335.

\*<sup>2</sup> V. § 4.

considered, so as to determine it upon them, without entering into the general question. But, however, lest the general question should be involved, more or less, in this particular one, I would take a little time to consider of it.

Cur<sup>y</sup> advis.

Lord Mansfield now delivered the resolution of the Court.

The two pleas pleaded by the defendant have received different determinations: one, is found against the defendant; the other has been adjudged for him. So that the plaintiff, upon the whole, has no cause of action.

I said, at the time when this matter was before us, "that the particular circumstances of this case, might appear to be such, when considered, as might be a sufficient foundation for our determining the matter now in dispute, upon those particular circumstances, without entering into the general question." But the general question is a point that might require a good deal of consideration.

Upon looking into the circumstances here, we are all of opinion, "that the particular circumstances of this present case are such as may very well suffice for our determining it upon these circumstances alone, without going into the general question."

Now, upon the present circumstances, it is clear, that the defendant must certainly have the costs of the demurrer, which has been adjudged for him.

But as to the costs of the trial—We think that the plaintiff ought not to have them, though he has obtained a verdict upon this issue: for, upon the whole, he had no cause of action. The demurrer is decisive, as to that. And he has acted unadvisedly, in carrying this issue down to trial, before the determination of the demurrer.

We cannot say, "that the defendant did wrong, in pleading not guilty, as well as not guilty within six years:" we cannot determine that he had no pretence for so doing.

[755] It has been objected, "that this was unnecessary, and that it was implied in the plea of not guilty within six years."

But it may be necessary: and it is not implied in the other "plea of not guilty within six years;" as that plea might have been managed in the course of pleading. For the plaintiff might have replied "that he sued out an original writ within the six years;" and put the defendant to answer to that allegation; and so carried it off from the merits, to a collateral point: in which case it could never have come to be tried, upon this second issue, "whether he was or was not guilty of the fact."

Consequently, it is not true, "that upon this second issue, the former was necessarily included and implied."

Therefore we cannot say that the defendant was so in the wrong in pleading not guilty, generally, that he ought to pay costs for so doing. And yet, on the other hand, that plea being found false he ought not to receive costs for the plaintiff, upon the trial of that issue which has been found against him.

But nevertheless, though it is found against the defendant; yet the plaintiff cannot have damages upon it; because, upon the whole, judgment must be against him: and therefore, neither can he have costs upon it. So that the judgment must be for the defendant, clearly; and he also must have costs of the demurrer: but upon the trial, there are to be no costs on either side; but each party is to sit down by his own costs.

N.B. There was no rule drawn up in form; this declaration of the Court being only by way of direction to the Master, in what manner to tax these costs.

ALDER *versus* CHIP. Saturday, 10th Feb. 1759. Replication withdrawn after six terms. [16 Vin. 391.]

Mr. Hussey shewed cause against a rule of Mr. Gould's, "why the plaintiff should not be at liberty to withdraw his replication, and reply *de novo*."

The case was, that the plaintiff had (by the mistake of his former attorney) traversed a lease under which he himself claimed.

The Court made the rule absolute.

[756] Lord Mansfield said he considered this as an amendment; and that the proposing it in this method, of withdrawing the replication and replying *de novo*, was only to prevent the defacing and obliterating the roll. He observed, that the



Court had not used the same strictness of late years, with regard to amendments, as they formerly did: and he said, much it was better for the parties that they should not. However, the Court would always take care that if one party obtained leave to amend, the other party would not be prejudiced nor delayed thereby.

And he observed that the case of the <sup>\*1</sup> *Bank of England v. Morrice* turned upon its own particular circumstances, and was the case of an executrix too.

Note—The length of time in the present case, had been objected; viz. six terms. But it was answered, “that in many cases, amendments had been made after a much longer time.”

Rule made absolute.

V. post, *Hutchinson, Executrix, v. Brice*, 24th January 1771.

GEORGE, EX DIMISS. BRADLEY ET AL', *versus* WISDOM. Monday, 12th Feb. 1759.

Cause for setting aside execution in ejectment must be shewn in time.

Mr. Norton shewed cause against, and

The Court, (consisting, at present, of Ld. Mansfield and Mr. Just. Denison,) discharged a rule which had been made on Mr. Serj. Nares's motion, “to shew cause why a writ of habere facias possessionem. should not be set aside, as being irregularly issued and executed, with costs; and why possession of the premises in question should not be restored to the defendant.”

This was an ejectment, in which, Wisdom (the landlord) had (upon the tenant's refusing to appear) made himself defendant, in the place of the casual ejector; (against whom judgment was signed, for want of appearance). And the plaintiff, having obtained judgment against Wisdom the landlord, had afterwards moved for leave to take out execution against the casual ejector: from doing which without leave, he stood restrained by the conditional rule “for a stay of execution against the casual ejector till further order,” always made in consequence of a clause in the Act of 11 G. 2, c. 19, which <sup>\*2</sup> clause gives leave for making the landlord defendant in the room of the non-appearing casual ejector, upon these terms.

[757] But a writ of error had in fact been regularly sued out by the new defendant Wisdom the landlord, before the plaintiff had made this motion “for leave to take out execution against the casual ejector.” Yet nothing of this matter of the writ of error was shewn for cause, by the new defendant Wisdom the landlord, against the plaintiff's said motion “for leave to take out execution against the casual ejector;” but that rule was made absolute, without any cause whatever being shewn against him.

The Court, upon the whole state of this affair, were of opinion, that the day of shewing cause against that rule was the proper time for the landlord to have made his stand against the plaintiff's taking out execution and getting into possession; and that he should have then shewn his writ of error as cause why the plaintiff ought not to have had leave to take out execution; and why it ought still to have been further stayed; but that, as he had omitted to do so, when he had this <sup>\*3</sup> proper opportunity, the execution was regular, and consequently ought not now to be set aside.

Rule discharged.

Note—It was agreed on all hands, that a writ of error could not have been taken out in the name of the casual ejector.

REX *versus* RODGER PHILIPPS. 1759. Costs of amending plea with liberty to the adverse party to reply de novo how taxed. [S. C. 2 Str. 1241. Buller, 211, 327. 1 Wils. 261.] [See 2 Barnes, 159.]

On a motion made on the part of the prosecutor, for my reviewing a taxation of costs, the case was, that the defendant had had leave to amend his plea †, on payment of costs: but the amendments made in it were not essential to the real merits, nor

<sup>\*1</sup> V. 2 Strange, 1002.

<sup>\*2</sup> § 31.

<sup>\*3</sup> In the case of *Jones ex dimiss. Edwards v. Edwards*, M. 1745, B. R., it was so shewn for cause, and allowed to be a good one.

† Vide ante, 346.

such as defaced the record (there being much more struck out than put in). The allowance made to the prosecutor upon the amendments of the plea itself, and of the subsequent pleadings dependant upon it, had been only made, in proportion to the actual amendments made therein; and not as for a quite new plea: which was agreed on all hands, to be the right method.

But the dispute originally before me, and now brought before the Court, was "whether the replication and its dependencies ought to be fully and wholly allowed to the prosecutor, as an absolute replication *de novo*; or only partially, in proportion to the real and necessary alterations which were fairly and unavoidably occasioned to him, by the defendant's amendment of his plea:" which latter method I had pursued, in taxing the costs.

[758] Lord Mansfield—The principle is certainly right, that where the defendant has leave to amend his plea, the prosecutor ought, in justice, to have liberty to reply quite *de novo*, if he judges proper; and also, that in all events, he ought to be allowed the expence of attending and consulting and seeing counsel, in order to advise whether it be prudent or proper to reply *de novo*, or not.

But where he does not judge proper to depart from his former replication and reply *de novo*; but only makes such alterations in it as merely pursue and are the natural and necessary consequences of the alterations made in the plea by the defendant, and which alterations in the replication do not deface the record, (which, he took notice, was the present case;) nothing more ought to be allowed, than in proportion for such necessary alterations and amendments in the replication and its several dependencies: for it must not be left in the prosecutor's power to load the defendant unnecessarily: either out of spite or vexation, or for any other reason exceeding the bare necessity of the thing.

Mr. Just. Denison (the only other Judge in Court) was of the same opinion.

Consequently, as I had acted agreeably to this reasoning, the prosecutor's counsel took nothing by their motion.

COX *versus* HART. 1759. *Procedendo* denied though *certiorari* not delivered till after notice of inquiry.

Mr. Serj. Nares, on behalf of the defendant below, who had removed the cause hither by a *habeas corpus cum causa*, shewed cause why a *procedendo* should not go, to the Sheriff's Court in London.

Mr. Norton, who was for the plaintiff below, had moved for and obtained, this rule, "to shew cause why a *procedendo* should not issue:" and had founded his motion upon this fact, "that the *habeas corpus cum causa* was not delivered till after an interlocutory judgment had been signed in the Court below, and notice given of executing a writ of inquiry;" and therefore, as he alledged, came too late, and ought not to have been received or allowed. And in support of his objection, he urged and relied on the spirit and intention of 21 Jac. 1, c. 23, § 1, 2, which intention he insisted to be clear and beyond doubt, against the reception and allowance of the writ; though he acknowledged that the present case was not within the words of that Act.

[759] The serjeant's answer to this objection was, that the words of the Act are, "that the *habeas corpus, certiorari, &c.* shall not be received or allowed, but that the inferior Judge may proceed: except the writ be delivered to such inferior Judge, &c. before issue or demurrer joined in the cause: (so as it be not joined within six weeks after the arrest or appearance of the defendant)."

And he produced affidavits from some of the officers of the Sheriff's Court, (which were likewise confirmed by Master Clarke,) attesting that the \* practice is, "to allow the *habeas corpus*, provided it be delivered at any time before the † jury is sworn."

Lord Mansfield—The present case is not within the words of the Act: that is

\* This practice must have taken its rise from the Act of 43 Eliz. c. 5, which fixes this criterion, and so have been continued on, without attending to the alteration made by 21 Jac. 1, c. 23.

† But that is directly contrary to the express words of the preamble, which reprecifies "suits ready for trials," as what ought not to be removed.

plain. And it appears that the practice has gone much further than the words of the Act: for that has been, to allow it at any time before the jury be sworn.

Therefore let the rule be discharged.

The end of Hilary term, 1759.

EASTER TERM, 32 GEO. II. B. R. 1759.

REX *versus* INHABITANTS OF SHENSTON. Wednesday, 9th May 1759.

This case may be seen at large, in the quarto-edition of my *Settlement-Cases*, page 474, No. 151.

[765] REX *versus* BARNARD SCHIEVER, a Swede. 1759. Hab. corp. for a prisoner of war taken on board an enemy's prize ship denied.

Mr. Stowe moved for a habeas corpus to be directed to Richard Rigby, keeper of the town-gaol of Liverpool, to bring up the body of Barnard Schiever, a subject of a neutral power, taken on board of an enemy's ship; but forced, as it was alledged, into the enemy's service.

The substance of the affidavit upon which he grounded his motion, was, that this Barnard Schiever was born in the dominions of the King of Sweden: and his father was now in that King's service. That this Barnard Schiever, being bred to the sea, and understanding navigation, was desirous of entering into the service of the merchants of England; and for that purpose and for no other design or intent whatsoever, shipped himself as a passenger from Gottenburg to Elsinour, in order there to enter on board some English merchant's ship. That when he arrived at Elsinour, he applied to the English consul there, who shipped him, as a mariner, on board an English merchant's vessel bound on a voyage from Hull to Dublin: with which ship he set sail. That in prosecuting the said voyage, in the said ship, he was taken by a French privateer, and carried into Norway; where there was another privateer. That he, together with all the prisoners taken on board the English vessel, were put on board the latter privateer, called the "Mareschal de Bellisle," Captain Thurot commander. That the day after he was removed into the "Bellisle," the English prisoners were, by the command of Captain Thurot, set ashore at their liberty: but all the persons belonging to the said English vessel, who were subjects of neutral powers, were detained to serve on board the said privateer, (the "Bellisle"). Upon which this Schiever applied to Captain Thurot to set him ashore likewise; alledging "he was intitled to his liberty as being a neutral person." But Thurot told him "that for that reason he should not go on shore: for that he might as well serve him, as serve the English; and that he would make him serve him;" or words to that effect. And accordingly Thurot detained him, against his will and inclination on board of the said "Mareschal de Bellisle," privateer, and treated him with so much severity, that he would not suffer him to go on shore when in port, [766] upon his necessary occasions; but closely confined him to duty, on board the said privateer. That the said privateer commanded by Thurot, being on a cruise, took two little brigs: on board of one of which, this Schiever, with some others, were put, with orders from Thurot "to navigate the said brig into any harbour in Nerway." That the said last mentioned brig was, in going to Nerway, re-taken by the "Fame" letter-of-mark ship, and carried into Liverpool: where this Barnard Schiever was sent to the town-gaol of Liverpool, as a prisoner of war, under the custody of the said Richard Rigby keeper of the said gaol; and is now, and ever since has been detained there for no other cause than the cause aforesaid. Schiever swears that his intention still is (could he obtain his liberty) to enter as a mariner into the English merchants service: and that he would not nor should have served on board the said privateer, had he not been forced thereto and detained as aforesaid by the said Captain Thurot.

One Oluf Grundell, who was on board the "Bellisle" privateer when Schiever was put on board of it, swears that Schiever was forced against his inclination, by the said Captain Thurot, to serve on board of it, in the manner Schiever has above deposed; and that all the persons taken in the said vessel, belonging to neutral powers, were forced by Thurot, in the like manner, to serve on board the said privateer.



Mr. Stowe urged that it would be very hard upon this man, to be kept in prison here, till exchanged by cartel; and then sent back to France, where he would be forced into their service again.

But the Court thought this man, upon his own shewing, clearly a prisoner of war, and lawfully detained as such.<sup>(a)</sup> Therefore they  
Denied the motion.

REX *versus* PIGRAM. Tuesday, 15th May 1759. The mayor of a corporation cannot be compelled in a summary way to replace in their usual place the corporate books, under particular circumstances.

On shewing cause against a rule, ordering the defendant, mayor of the ancient town of Rye, to shew cause "why he does not replace and put all the records and books of the said town, in the proper and usual place of keeping the said books and records;"

The Court, without entering into the general question "how far an officer who has the custody of public corporation-books, has power to take them from their proper and usual place, for certain particular times and uses, or upon particular occasions or acci-[767]-dents; or how far he might be compellable in this summary way, to replace them;" were clear and unanimous, that in the particular instance now before them, as it stood circumstanced by reason of disputes, which had in this case arisen between the mayor and the town-clerk, the mayor had given a satisfactory excuse for a temporary securing them from falling into his adversary's hands, who had already made an improper use of one of them: and therefore they held it improper for them, in this case so circumstanced, to interfere in this summary way, to oblige him to replace them. In consequence of which opinion, they ordered the present rule to be

Discharged.

STRONG, *EX DIMISS.* CUMMIN *versus* CUMMIN AND ANOTHER. Friday, 18th May 1759.  
No particular form of words necessary to convey testator's meaning.

Hil. 30 G. 2, Rot'lo. 374.

This was a special case reserved for the opinion of this Court, at Winchester Assizes.

It was an ejectment brought by William Cummin, against his eldest brother Robert, for lands called smart and picked lands; being copyhold lands, of which the devisor was (amongst divers other copyhold lands) seised in fee. He devised the chief part of all his copyhold lands to his said eldest son Robert and his heirs, after the decease of his (the testator's) wife: and these, to his second son John, and eventually to the plaintiff.

The words of the will are as follows—Whereas by the power and authority in me vested according to the custom of the manor of East Woodhay aforesaid, by several surrenders by me made of my copyhold land in the said manor, I can dispose of them to the use of my last will; I do hereby give and bequeath singular my copyhold lands and tenements in East Woodhay, aforesaid, should by seven copies of court roll, be the same more or less, to my eldest son Robert and his heirs, according to the custom after his mother's decease. Item, I give to my son John, all that belong to smart and picked lands, and to his heirs, after his mother's decease; and also that my son Robert shall pay to my eldest daughter Mary the sum of one hundred pounds of lawful money, when she shall attain the age of twenty-one years: as also the like sum of one hundred pounds, to my daughter Esther, as soon as she shall attain the age of twenty-one years: and the like sum of one hundred pounds to my daughter Ann, when she shall attain the age of twenty-one years: and also to my son Willem the sum of one hundred pounds, to be payd unto hem when he shall at-[768]-tain the age of twenty-one years; provided alway that if my said daughter Mary or any of my other children dye before he, she or they are one-and-twenty years old, that

(a) Qu. For as he was the subject of a neutral prince and was in the French service by compulsion against his own will? Qu. Whether when he was taken the last time by the English, he was to be considered not as an enemy, but as the subject of a neutral prince, and therefore not as a lawful prisoner of war?

in that case he shall divide amongst the surviving younger children the sum of one hundred pounds. And in case that your son Robert or John dy, then your son Willem is to have all that belong to smart and picked lands, and to his heirs. And in case that your son Willem ingoye smart and picked lands, then to pay to his sister, the sum of one hundred pounds. Item, as to my worldly goods I give, and stock, I give to the use of my wife, during her natural life, and liberty to dispose of them at her death as she shall think fit; provided it be amongst my children and their issue. And his wife to have the freehold during her life. Item, I do hereby make and appoint my dear wife Mary, and my son Robert, to be executors of this my last will and testament.

The testator afterwards died seised in fee, &c. At the time of his death, the personal estate amounted to 200*l.* and no more: and at that time, all his children were under age; viz. Robert, the eldest son, fifteen years old; John, the second son, three; William, the third son, (the lessor of the plaintiff,) one year old: and all the daughters, under twenty-one.

The widow was admitted, as devisee under the will: and it is stated to be the custom, "for the widow to enjoy during widowhood." John died in the life-time of his mother, viz. on the 21st of April 1756, without issue, and intestate: being then upwards of twenty-one years of age.

The widow died very soon after her son John, viz. on the 25th of April 1756, without having ever married again.

Mr. Serj. Davy for the plaintiff (viz. William the third son).

The general question is, whether upon the event of John the second son's dying without issue, in the lifetime of his mother, the testator's third son William became entitled to the premises in question, by force of these words in the will, "in case that your son Robert or John dy, then your son Willem is to have all that belong to smart and picked lands:" or whether the eldest son Robert is upon John's death, to take the same, as heir at law to the testator.

He insisted on the testator's meaning "that his son William should have this estate upon some event or other." But this could not be, in case of John's leaving issue. Therefore it was in case John should die without issue.

[769] The estate was first given to "John and his heirs, after his mother's death:" which the testator meant for an estate tail: intending "heirs of his body."

[N.B. There had been an offer from the defendant to divide these premises in question with his brother: which offer the plaintiff rejected. But

Lord Mansfield having inquired "what this offer had been, and how it was received; and seeming to think that it had been much more prudent to have accepted it;"

Serj. Davy said he had already, but in vain, advised his client to accept it: and very strongly hinted how small hopes he himself had of his client's success, upon a legal determination. After which he proceeded to make the best of his case that he could. And he said that the whole clause could not be rejected; however difficult it was to be understood.]

Mr. Gould contra, for the defendant Robert, (the heir at law of the testator, and also heir at law to his deceased brother John).

The intention of the testator is totally obscure, dark, and uncertain in the present case. Therefore, the heir shall have it. In 2 Bulstr. 179, 180, *Mirrill v. Nicholls*—it is laid down by *Ld. Coke*, "that intentio cæca is not to be taken; nec intentio mutila, nec manca: in all such cases, we are to give judgment for the heir." Which *Lord Coke* confirms by several cases which he there cites.

The devise "to John and his heirs" cannot be meant for an estate-tail. For he devises to his eldest son Robert, in the same words: which plainly, in that devise, mean the absolute ownership to be given to Robert. Neither can it be an executory devise; there being no mention of dying without issue at all: nor any restriction to the doing so within the life-time of his mother.

Mr. Serj. Davy in reply, chiefly urged that the testator must have meant an estate-tail to John.

*Lord Mansfield* thought it better, as it was a family affair, to stand over, for the chance of a compromise.

It therefore stood over, by the direction of the Court, till the Friday seven-night.

[770] On which day, the cause standing in the paper; and the lessor of the

plaintiff, (viz. William, the third brother,) absolutely refusing any compromise with the defendant (Robert his eldest brother:)

Lord Mansfield delivered the resolution of the Court, having first very minutely stated the case.

It is very plain, from the spelling and phraseology of this will, that it is a rough draught, of the testator's own making or dictating, without assistance from any person capable of advising him.

It appears that he was seised, and died seised in fee, of these copyhold lands; and it appears that the whole amount of his personal estate was at the time of his death 200l. and no more: so that the legacies given by his will must be charges upon his real estate. And it likewise appears, that all his children were under age at the time of his death.

I thought that no argument could make this case plainer than it was upon the will itself. But I readily listened to a compromise; that the elder brother might have an opportunity (as he seemed disposed so to do) of making some provision for his younger brother, in conformity to his father's intention, out of that full provision which he himself now had. The elder brother offered him half of the premises now in question: the younger refused it. The elder still adheres to his former proposal: and the younger, to his rejection of it. Therefore we must now determine the case according to law.

The rule of construction of wills is, "that no technical form is necessary, to convey the testator's meaning."

The words and form of the will are plainly the testator's own, without any proper advice or assistance.(b)

The testator's meaning must be collected from the will itself; by attending to the several parts of it, and comparing and considering them together.

In the case of \* *Coriton v. Hellier*, where there was a slip in penning the will, Lord Hardwicke did not conduct himself by making an arbitrary construction of it; but was induced, by a strong and violent presumption arising from the several parts of it compared and taken together with the whole, to determine "that the first limitation to the ancestor meant to be for ninety-nine years, if he should so long live."

[771] In the present case, it is not difficult to discover what the testator intended. He certainly did not mean mere estates for lives, to his two eldest sons; and if he did not mean to give them mere estates for their lives, it necessarily follows, "that he must mean a dying upon some contingency." The only question is, "what contingency?" For he has not expressed it. He only expresses himself, "that in case Robert or John die, then Willem is to have all that belong to smart and picked lands, and to his heirs." One part of the contingency plainly is "that if they die without issue."

He provides for his eldest son, by his best copyhold estate; for his second son, by his next best copyhold estate; and for the rest of his children, by pecuniary portions: all which children were under age. Now if Robert had died under age, he could not have disposed of his estate: but it must have gone to John, if Robert had left no issue. So also if John had died under age, his share must have gone to Robert, if John had left no issue. In either case, that son which remained the eldest, would be very well provided for. Therefore the testator meant that in either event, smart and picked lands should go to William his third son, who would then have become the second.

But he could not mean that John's provision should otherwise go over to William. He could never mean it to do so, if John himself left issue, or if Robert left issue: for he certainly never intended to provide for the surviving brother, and leave the issue of the deceased one quite unprovided for. Nor did he mean to tie down his two eldest sons, so as to preclude them from disposing of their respective estates, after they should attain twenty-one years of age: it is clear that he meant their "dying under the age of twenty-one, to be another part of the contingency." And the context of the will shews that this was his meaning: for the other provisions (for the younger children) expressly relate to their living to twenty-one, or dying under

(b) Lord Mansfield takes notice of circumstances de hors the will; and such as relate to the family or estate are constantly taken notice of if material, in *Salk.* 234.

\* *V. post*, pa. 1631, *S. C.* cited.



that age. But this contingency happens, *currente calamo*, to be slipped, in this part of the will. If John had died before twenty-one, then this part of the contingency would have taken effect: but as that has not happened, his brother William can have no pretence to claim.

Therefore we can only be sorry that the plaintiff has stood in his own light, in rejecting the fair offer made to him by his brother.

We are all clear for the defendant: and therefore the *postea* must be delivered to him.

Rule for the *postea* to be delivered to the defendant.

[772] *CORNWALLIS versus SAVERY*. 1759. In debt upon a bond for a penalty where there are alternative parts of the condition, the defendant must confine himself to a particular breach. [See 8 Durn. 462. 1 Bosanq. 643.]

This was an action of debt upon a bond, brought for the penalty, which was 1500l.

The defendant prayed oyer of the bond and condition. Which condition appears to be, that, whereas one William Wilkinson was appointed (by Earl Cornwallis) to be agent to Colonel Edward Cornwallis's regiment; if the said William Wilkinson should well and duly pay to the said colonel, and to all the commissioned and non-commissioned officers and soldiers of the regiment, all such sum and sums of money as he should receive from the paymaster-general for the use of the regiment: and faithfully account either to the earl or to Colonel Cornwallis, &c. and indemnify the colonel, &c. then the bond to be void, &c. otherwise, &c.

Then the defendant pleaded, that the said William Wilkinson continued agent of the regiment, from, &c. to, &c. and that he did well and truly pay, &c. (in the words of the condition;) and that he faithfully accounted, &c. during all the time that he continued agent; and that the colonel was not at all damnified.

The replication assigned a breach; viz. that during the time that the said William Wilkinson continued agent of the said regiment, he received from the paymaster-general, for the use of the said regiment, several sums of money amounting in the whole to 1400l. for and on account of the said regiment, and of the commissioned and non-commissioned officers and soldiers of the same, according to their respective proportions; all which he ought to have paid, &c. but avers that the said William Wilkinson had not paid, and refused to pay a great part thereof, to and amongst the said colonel and the commissioned and non-commissioned officers and soldiers of the said regiment, according to the several proportions of their pay.

To this replication, the defendant demurred; and shewed for cause, "that it is uncertain, multifarious, confused, perplexed, complicated, argumentative, double," and many other such epithets.

Mr. Caldecott, for the defendant, objected to the replication—

1st. That the plaintiff ought to have confined himself to one particular breach; as this is an action of debt upon the bond, to recover the penalty, and not an action for [773] damages. For the Act of 8, 9 W. 3, c. 11, § 8, does not extend to actions of debt brought for the penalty of a bond: it only relates to actions for damages for non-performance of covenants; and in such cases, enables the plaintiff to assign as many breaches as he shall think fit.

In the case of *Symms v. Smith*, Cro. Car. 176, the distinction is laid down, "that in covenant, the plaintiff may assign as many breaches as he will; but not in debt upon an obligation for performance of covenants."

Now here, it is charged that the agent received several sums of money, amounting to 1400l. great part of which he has not paid to the colonel, officers, and soldiers, &c. according to the several proportions of their pay.

In the case of *The Royal African Company v. Mason*, (which is cited in 1 Strange, 227,) P. 13 Ann. B. R. the action was of debt on a bond. The condition was, "that Mason (who was recited to be agent for the company at Bristol,) should, when required, pay to the use of the company, all the sums of money in his hands and possession, received by him for the company, to whom he was agent at Bristol." The "defendant pleaded performance of the condition, generally; viz. that he had paid the company all that he had received for them." The plaintiff, in his replication, assigned for breach, that Mason did receive of Jacob Reynolds, and divers others, for the use of the company, several sums of money amounting to 630l. which he was requested

to pay, but had not paid." This replication was holden ill; because many breaches were assigned; whereas the plaintiff ought to have assigned only one: and the plaintiff discontinued. (He cited this from a manuscript note of Ld. Ch. J. Reeves.)\*

2d objection to the replication. It says that the money was to be paid "to the colonel, and all the commissioned and non-commissioned officers, and soldiers of the regiment, according to the several proportions of their pay." Which is uncertain and complicated, and no issue can be taken upon it.

3d objection to the replication—It concludes with an averment: whereas it ought to have concluded to the country; there being an affirmative and a negative. For the defendant pleads "that Wilkinson, the agent, did pay all that he had received of the paymaster-general, &c." Then the replication alledges "that he had received 1400l. of him, and had not paid it." Which is an affirmative and a negative: and therefore the replication ought to have concluded to the country.

[774] Mr. Serj. Nares, for the plaintiff, was prevented from answering these objections; because the Court did not think that they required any answer.

Lord Mansfield—Mr. Caldecott's principles are right; and the case cited by him may be so too; but his application of them is wrong.

It is true, that where there are alternative parts of the condition, the plaintiff in an action upon the bond, for the penalty, must confine himself to a particular breach. But here is only one breach assigned in this case.

The colonel is answerable for his agent, whom he has appointed: and the breach here assigned, is singly this, "that the agent received 1400l. from the paymaster-general, which he has not paid to the colonel, officers, &c."

If he has omitted to pay any part of it, it is a breach of the condition.

The case cited from Ld. Ch. J. Reeves's notes is not like the present case. That was money received from several different persons: here, it was from one single person only. And the defendant has incurred a breach of the condition, if the agent has received a certain sum of money from the paymaster-general for the use of the regiment, and has omitted to pay any part of it to the colonel and officers, &c.

As to the 2d objection—The pay of a regiment is a thing very well known and notorious. The agent must be perfectly well acquainted with the respective proportions belonging to the colonel, officers, &c. and there was no need to spin out the proceedings to a great prolixity, by entering into the detail, and stating the various deductions out of the whole pay, upon various accounts and in different proportions.

3dly. The replication is rightly concluded with an averment. For though the plea avers generally "that William Wilkinson did pay all that he had received of the paymaster-general," yet the replication narrows this to a particular sum, which it specifies in certain to be 1400l. So that although there be an affirmative and a negative, yet they are not applied to the same thing: and therefore not within the rule.

Mr. Just. Denison was of the same opinion.

[775] In an action of debt on a bond, for the penalty, it is true that the plaintiff is to assign only one single breach: and the breach here assigned is a single breach. The plea is performance of covenants, generally; and that the plaintiff was not damaged. The replication shews that the agent received from the paymaster-general several sums amounting to so much; which it avers, "he has not paid over:" which is a single breach. The case cited was of several receipts from several persons.

It was not necessary to set out all the several days and times, and circumstances, and thereby render the record prolix, to no purpose.

The replication is a good replication; and not double, nor complicated, nor uncertain, nor multifarious, nor any of the numerous epithets that are given to it in the demurrer.

3dly. The objection to its conclusion is only form: and it is not shewn for cause, "that it does want a proper conclusion."

However, if it did, it would not avail: for this conclusion, with an averment, in the present case, is not wrong.

Mr. Just. Foster and Mr. Just. Wilmot concurred in the same opinion.

Per Cur. unanimously,  
Judgment for the plaintiff.

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\* See it also in Lucas, 227.

BALLARD AND ANOTHER, Chamberlains of Worcester, *versus* BENNET. THE SAME *versus* CLEMENT. 1759. Bye-law cannot be objected to, in a summary way, except in cases from London.

Mr. Norton, on behalf of the defendants in both causes, shewed cause against the issuing of a procedendo, to the Court below.

On Friday the 2d of June last, Mr. Serj. Nares had moved for a procedendo, to the Mayor, Aldermen, and Citizens of the City of Worcester, to proceed in these actions; which were actions of debt brought there, in the name of the chamberlains, and had been removed hither by habeas corpus cum causa; to which they had returned a bye-law, made by the corporation, "to restrain the sale of flesh meat to certain proper places, and that it should not be sold in the public streets, under a penalty:" for [776] which penalty, the respective actions were brought, in the Court of Pleas holden for the said city.

The words of the bye-law are "that all sorts of flesh-meat sold within the said city on the market days or fair-days by butchers and other persons not being inhabitants and keeping open shops within the said city, should be publicly exposed to sale in such new-erected shambles, and not elsewhere within the same city; and that no person or persons whatever should erect, put, or place, or cause to be erected, put, or placed, or assist in the erecting, putting or placing, any stall, standing bench, table, or other thing, in any of the streets, lanes, or alleys, within the said city or the liberties thereof, for the selling, or exposing to sale, by any foreign butcher or other stranger resorting to such markets or fairs, any sort of flesh meat whatsoever: and that every person offending in the premises should for every such offence forfeit and pay to the chamberlains of the said city for the time being the sum of three pounds, to be recovered by action of debt, in the name of such chamberlains, in the Court of Pleas held for the said city, and not elsewhere, with full costs of suit, and to be applied by them to the use and benefit of the poor belonging to the several alms-houses erected within the said city."

This bye-law the serjeant alledged to be a good one; and cited in proof of it, 1 Siderf. 284, *Player v. Jenkins*.

Mr. Just. Wilmot, at the time of the original motion, recollected that there was a \*1 case in the Year-Books, (*The Prior of Dunstable's case*,) about a man's being restrained from selling meat in his own house.

And Mr. Justice Denison and himself (the only Judges then in Court) made a rule to shew cause why there should not go a procedendo.

On 5th May 1759, Mr. Norton shewed cause against the procedendo; and objected to the validity of the bye-law.

But a preliminary doubt was made by the Court, (originally started by Mr. Just. Denison,) "whether the Court would suffer a bye-law to be objected to in this summary way, upon a motion on the return of a habeas corpus; in any other cases except those from the City of London."

[777] They agreed that this method had been always practised upon bye-laws returned into this Court, to writs of habeas corpus cum causa, directed to the Courts of the City of London: but they did not recollect any instances where the same thing had been permitted, in the case of any other city or corporation.

Mr. Just. Denison said that such a distinction between the City of London, and all other cities and corporations, might perhaps arise from particular methods of recovery being established and allowed by the customs of London, which cannot be pursued in this or any other Court: so that the shewing that to be the cause, is a good cause of detainer. For upon \*2 these writs of habeas corpus, the persons to whom they are directed must shew a good cause of detainer: and if this Court cannot proceed, as the customs of London authorize their Courts to proceed; it is a good cause of detainer. Therefore the Court will there enter into the validity of the bye-

\*1 It is in 11 H. 6, fo. 19, pl. 13, and fo. 25, pl. 2.

\*2 These writs issue on the civil side out of the King's Bench Office. They order the person of the defendant to be brought up; together with the day and causes of taking and detaining him.



law, to see whether that be the case or not: and if the bye-law appears to be bad, the party shall be discharged, as being detained without cause.

And no writ of error lies hither from the Courts of the City of † London. But in all other cities and corporations, if a habeas corpus cum causa issues, and a bye-law is returned as the foundation of the action below, the method is not, for the defendant to object to the bye-law upon motion: but the plaintiff is to begin de novo, and to || declare over again, here in this Court: and therefore the question is whether he ought not to do so here.

The Court agreed with Mr. Justice Denison, that it was incumbent upon the counsel for the procedendo to shew that in any other corporation besides London, the Court had ever entered into the question concerning the validity of the bye-law, upon motion.

But the counsel for the procedendo observed, that the action given by this bye-law is restrained to be brought in that Court, "and not elsewhere:" consequently, no action can proceed in this Court, founded upon this negative bye-law; nor can the plaintiff declare here, upon the present bye-law.

The only cases in the books, upon any bye-law containing such negative words, (and all of them in London;) they said, were 1 Lev. 14, *Mayor and Commonalty of Lon-[778]-don v. Bernardiston*. 2 Siderf. 178, *S. C. Chamberlain of London v. Barnardiston*. 1 Keble, 32, *S. C. Player v. Barnardiston*. \* 6 Mod. 123, *Cuddon, Chamberlain of London v. Prorost*; and 6 Mod. 177, *Fazakerly v. Baldo*: (both, on the same bye-laws as *Barnardiston's case*). They also cited a case of *The Chamberlain of London v. Grosvenor*, 14 G. 2, C. B. and a later one of *Harris v. Wakeman*, 28 G. 2, B. R. a writ of error upon a judgment given in an action founded on a bye-law in this very City of Worcester.

Mr. Serj. Nares, Mr. Morton and Mr. Aston, of counsel for the procedendo, desired further time to look into this preliminary question: for which, they said they were not prepared, as they were not at all apprized of an objection of this sort.

The Court granted it. But they observed, that if these negative words should be allowed to prevail, all the cities and corporations in England, and even all the little boroughs who had Courts of Record, would put negative words into their bye-laws, and exclude this Court.

The rules were therefore, at that time, enlarged.

These causes being now mentioned again.

Mr. Serj. Nares, Mr. Morton, and Mr. Aston acknowledged that they could not find any instance where the Court had entered into the validity of the bye-law returned, in a summary way, upon motion; except in those which had been returned from London.

But they argued, that there was no reason to distinguish between London and other great cities; and that the hands of the Inferior Court ought not to be tied up, where this Court cannot do the plaintiff the same justice that the Inferior Court (by virtue of their local customs) can. They urged the great inconvenience of obliging the parties residing in corporations in the country, to sue in this Court for penalties of very small value and upon local bye-laws: and they said it would be very hard, if the plaintiffs should be excluded from entering on the question here, upon motion, when it was impossible for them to support a declaration there.

They cited 1 Ro. Rep. 232, *Sterling's case*, as being within the same reason as this negative bye-law: which case was upon a charter, which had the exclusive words "and not elsewhere;" and would have been a ground for a procedendo, if it had been returned.

And they also mentioned *Wade and Bemboe's case*, in 1 Leon. 2, pl. 3, and Cro. Eliz. 894, *Grice v. Chambers*; [779] and 1 Mod. 96, *Anonymous*: which two latter cases are upon cognovit actionem, et petit quod inquiratur de debito; under customs prevailing in Norwich and in Bristol.

Mr. Norton contra—This is a mere personal action: it is not an action grounded

† In other corporations, a writ of error does lie, returnable in this Court.

|| V. 6 Mod. 177.

\* Mr. Norton said that 1 Lev. 14 was erroneously reported; for the bye-law had been searched; and there were no such negative words in it.

upon a custom. And it is a case where this Court can give the like remedy and do the same justice that the Inferior Court may.

Lord Mansfield—This is an action upon a bye-law, and comes removed hither from a corporation in the country, upon the return of a habeas corpus: and the whole question, at present, is, “whether the Court can enter into the consideration of the validity of the bye-law, upon the return.”

There is a settled course and form of proceeding in cases of this nature; of which there are many thousand instances: and yet, though there be such numbers of instances of this kind, there is not a single one, where the Court has ever determined the validity of the bye-law, upon the return, excepting in London.

As to the validity of this particular bye-law, if it be true, “that there never was such a one,” that is a strong argument against its being a good one. However, the validity of it is not to be disputed upon the return; but in the ordinary course of proceeding in the like cases, viz. by the plaintiff’s declaring here, and the defendant’s demurring to it, if he thinks proper. It never has been done, in this summary way, upon the return; nor even attempted or thought of before: and therefore we ought not to do it now. The proper course is settled; it must be by declaring here: and the defendant may demur, if he has any objection to the bye-law.

As to *Sterling’s case* in 1 Ro. Rep. 232, it is not an authority in this case: charters of exemption are very different from bye-laws of corporations.

Mr. Just. Denison was of the same opinion. He said that this had never been done, but upon returns from the City of London; and this was an attempt to get the opinion of the Court extrajudicially.

Mr. Just. Foster—Let the plaintiff declare here.

Mr. Just. Wilmot said he had searched very diligently; but could not find any instance, except in London, where the Court had ever entered into a question about the [780] validity of a bye-law, upon the return: and therefore he was clear “that the Court were not authorised to do so.”

Per Cur. unanimously.

The rule “to shew cause why a procedendo should not issue,” was discharged.

And the like rule was also made in the other cause.

REX *versus* RICHARD WAITE. 1759. Articles of the peace should be exhibited in the neighbourhood.

The Court rejected articles of the peace, which one Thomas Burrough, of the Devises, offered to swear against the defendant who resided at the same place.

Their reason, and their only one, (for the charge was exceedingly strong,) was because the exhibitant had not applied or endeavoured to apply to any justice of peace in his own neighbourhood: but had chosen to come hither at such a distance from the defendant’s residence: which method would put the defendant to the unnecessary inconvenience of being brought up hither, instead of finding security in the country.

For which reason, they directed the exhibitant to go before some justice of peace in the neighbourhood: and there exhibit his articles, and pray the security of the peace: which the defendant might then find in the country, without coming up to London for that purpose.

REX *versus* WILLIAM LEWIS, Capital Burgess and Alderman of New Radnor. Monday, 21st May, 1759. [S. C. Sayer’s L. C. 240. Prosecutor shall pay costs where he makes a groundless application for a quo warranto. V. post, 19th Nov. 1766. *Rex v. Edwin Wardroper*, accord. See also 4 Burr. 1965, 2024.]

Upon shewing cause against an information in nature of a quo warranto, to shew by what authority the defendant acted in the characters above mentioned, it appeared to the Court, that the charge was exceedingly groundless and frivolous, and could not but be known to the prosecutor to be so.

Whereupon per Cur.

The rule was discharged, with costs.

[781] *FOSTER versus SNOW*. Wedn. 23d May, 1759. Judge in vacation may order defendant to plead such plea as he will stand by.

Cause was shewn on the part of the plaintiff, against discharging an order made by Mr. Just. Denison at his chambers; and against the defendant's being at liberty to wave his plea, and plead the general issue.

Mr. Justice Denison's order (made in the vacation) was "that the defendant should plead such plea as he would stand by." And it was objected to it, "that such an order ought not to have been made by a Judge at his chambers."

The whole case was this. It was an action on a policy of insurance. The declaration was delivered in Hilary term last (on the 8th of February). The venue was laid in the County Palatine of Lancaster. The defendant's attorney applied to Lord Mansfield, and obtained an order from his Lordship, "for ten days time to plead; the defendant pleading an issuable plea, and consenting to take short notice of trial (if necessary) for the next assizes."

The defendant had filed a bill in Chancery: to which, no answer was put in. The defendant's attorney, being desirous to see what answer would be made to this bill in Chancery before he pleaded, endeavoured to stave off the common-law trial till after the then approaching assizes: in order to obtain which end, he pleaded a sham plea, "of a judgment recovered in another Court." On his pleading this sham plea the plaintiff's attorney immediately applied (it being then vacation-time) to Mr. Justice Denison, who made the above order. Then the plaintiff's attorney put in a replication "of nul tiel record;" and made up and delivered the paper books, with the common rule indorsed thereon, "to return them within four days; otherwise a writ to issue." The defendant's attorney returned the paper books within the four days: but at the same time gave notice that he would move the Court "that the Judge's order might be discharged; and that the defendant might be at liberty to wave his plea." And he afterwards made affidavit of all the above-stated facts; and also "that he verily believed, from what evidence he was at present possessed of, together with such further evidence as he expected to arise from the plaintiff's answer to the bill in Chancery, that the defendant would be able to make a good defence at the trial of this common law cause." And he offered to bring all the money demanded, into Court.

[782] The Court all agreed in justifying the order made by Mr. Justice Denison; not only as being rightly made upon the circumstances appearing to him; but also as being such a one as might be properly made by a Judge at his chambers.

Lord Mansfield said it was reasonable to indulge defendants with some time to make their defence, on special circumstances being made out; and that if the whole matter had appeared to him, when he gave the defendant ten days, he might perhaps have granted an imparlance.

Mr. Just. Denison observed that "pleading issuably" meant pleading such an issue as the plaintiff might go to trial upon.

Mr. Just. Foster observed, that if the Ld. Ch. Justice had been acquainted with the whole circumstances of the case, when he made his order for ten days; he would have granted so much time as to have carried it over the assizes.

The matter ended at last in a rule by consent: and the witnesses were to be examined before commissioners, &c.

*REX versus CORPORATION OF WIGAN; or REX versus CURGHEY ESQ. ET AL.*  
1759. Cross or concurrent mandamus to go to election not to be granted without special reasons. [See 3 Burr. 1387.]

Upon a vacation in a corporation, if a proper application for a mandamus to go to election be made and granted, it is not of course, that any other like motions may be made by other parties, for the same thing: but if there be a reasonable cause to suspect "that the party who first moved for it, does not really mean to carry it into execution," this must be particularly laid before the Court by affidavit; and then a rule shall be made "to shew cause." Which method was taken in the present case, where the other party had made a prior application: for upon affidavits of particular circumstances, a rule was made, on Mr. Aston's motion to shew cause why a cross-



mandamus should not issue, to be directed to William Curghey Esquire, commanding him to hold a court leet, in order to go to the election of a mayor.

Mr. Morton and Mr. Winn now shewed cause against this rule, and why the last applier should not have a concurrent mandamus, to command the Corporation of Wigan to go to the election of a mayor. They cited *Rex v. [783] Corporation of Scarborough*, M. 1753. *Rex v. Corporation of Haslemere*, M. 1753.—Both which cases turned upon this single question, “whether there was any reasonable cause to suspect that the party who first applied for the mandamus, did not really mean to carry it into execution.” Now here, they said, was no sort of ground for any such suspicion; nor was there, in fact, the least intention of that kind.

And they added, that if the application for a second writ was at all proper, yet it would be improper to specify the direction of it to the particular person named in the rule.

Mr. Aston, Mr. Yates, and Mr. Campbell, contra, insisted that they were the first appliers for a mandamus “to hold a court leet,” in order to go to the election of a mayor.

The case of *Scarborough* was only quia timet: and the motion was, for that reason only, denied by the two Judges then in Court.

They relied on the Act of 11 G. 1, c. 4, which, they said, was a very plain rule to go by. In *Evesham*, P. 6 (v. 2, B. R. on the death of an officer of the corporation, cross-mandamusses were moved for, on the same day.

As to the particular direction of the present concurrent writ—the Court do very often expressly direct the mandamus to particular persons by name. M. 9 G. 2, *Rex v. Borough of Oreford*, B. R. 1737, was so; and was a cross mandamus, without affidavit.

And it is rightly directed to Curghey, by name. H. 9 G. 2, B. R. *Rex v. Matthew Manning, in Thetford*, was directed to him by name: and many other like instances. There was another, which was expressly directed to Lord Arundel of Wardour, or to his steward, to hold a court leet; this was in 1753 and 1754; *Rex v. Williams* was the name of the cause.

Their mandamus is to the corporation: ours is under the third clause of 11 G. 1, c. 4, and is to be directed to one particular person, viz. the person who ought to hold the court leet. They said, they only wanted to be secure of an election within the year.

Lord Mansfield—The question seems to be now taken up, (though not before disputed,) “whether these cross or concurrent writs of mandamus are to be granted of course, without some special and particular reason.” And therefore

[784] I will consider it, upon the precedents; upon the circumstances of this case; and upon the reason of the thing.

The priority of application to the Court for the writ of mandamus to go to an election, is generally casual and accidental. Where, (as in the present case,) it depends upon the entering up the judgment of ouster, the prosecutor has some advantage, by knowing the precise time when the judgment of ouster was signed.

It has been now urged, as it seems to me, from the two precedents of *Oreford*, and of *Evesham*, “that cross or concurrent writs of mandamus to go to corporate elections, are to be granted of course.” These two instances passed without argument or opposition: whereas the two subsequent precedents cited on the other side, viz. those of *Scarborough* and of *Haslemere*, were debated and fully considered. And it is not the course of the Court, (as the Master reports to us,) to grant cross or concurrent writs of mandamus, of course, without special reasons.

If there is a ground of suspicion laid, “that the party first applying for such a writ does not mean to execute it,” it is reasonable to grant the carriage of another like writ to the other side. But here is no such ground laid, nor is there any reason at all to suspect it: on the contrary, they undertake peremptorily to execute the writ which they have applied for. But there is another ground laid in the present case, and a very material one too; viz. a doubt whether they will execute it effectually and legally, by directing their writ to the proper person. The Court cannot take upon themselves, previously to issuing the writ, to determine “to whom it shall be directed.” That may depend upon the very question to be tried. The Court do not use to specify by name, to whom the writ of mandamus shall be directed.

If we should grant writs to both parties, it would occasion not only double expence

and double trouble, but double elections : which would be infinitely inconvenient to corporations, and could not be prevented under such double writs.

The very words of 11 G. 1, c. 4, s. 2, shew that it would be determining the right before-hand, if we should order to whom the writ shall be directed.

As to the cause of suspicion here offered, the affidavits are extremely loose, and built upon mere imagination. Therefore there is no sufficient ground for granting two writs in this case.

Mr. Just. Denison concurred in general : and he was [785] particular in declaring two things ; viz. 1st, that the granting two concurrent writs of mandamus "to go to corporate elections," is not a matter of course to be done without special reason ; and 2dly, that the Court are not particularly to specify "to whom the writ shall be directed." And he mentioned a case of *Rex v. Nance*.\*

Mr. Just. Foster also concurred. He said it was at the peril of the person who desires the writ, to direct it to a proper presiding officer : and he cited the case of *Carmarthen*, where the Court would not specify, in particular, the person to whom it would be directed.

Mr. Just. Wilmot likewise concurred clearly, "that it was neither right in itself, nor the practice of the Court, to issue concurrent writs without special reason." And so, he said, were the cases of *Scarborough* and *Haslemere*. And here, he saw no ground of suspicion "that the first applier did not mean to execute it fairly."

And as to the Court's giving particular instructions about the person to whom the writ should be directed ; it was not usual, nor in this case proper : for it might be in many cases, and would be in this, a prejudging the right of the electors, before the proper time, and in an improper manner.

Per Cur. unanimously,  
Rule discharged.

REX versus BENJAMIN COX, ESQ. Monday, 28th May, 1759. Baking provisions on a Sunday, and the like, not an offence within 29 Car. 2, c. 7.

[Followed, *Bullen v. Ward*, 1905, 74 L. J. K. B. 917.]

The Court had granted a rule for the defendant, a justice of the peace for the county of Middlesex, to shew cause why an information should not be granted against him, for refusing to receive an information, regularly and duly laid before him, against a baker for exercising his trade on a Sunday, contrary to the statute of 29 Car. 2, c. 7, ("for the better observation of the Lord's day ;") Mr. Cox giving it as a reason for his refusal, "that the justices of Middlesex and of Westminster had come to such an agreement amongst themselves, not to receive such informations."

They laid the stress of the case upon the justices refusal to receive the information at all : though

[786] Mr. Just. Foster, on the original motion, thought that there was no need to receive it, if the justice was of opinion, upon its being opened to him "that the case stated to him was not an offence within the Act." And he intimated his own opinion, pretty strongly, "that it was not so ; and that it was better that one baker and his men should stay at home, than many families and servants." He said he was as much for the observation of the Sabbath, as any one : but he did not think a Pharisaical or a Jewish observation of it to be necessary.

Lord Mansfield likewise, at the same time, hinted his opinion "that the Sabbath would be much more generally observed by a baker's staying at home to bake the dinners of a number of families, than by his going to church, and those families or their servants staying at home to dress dinners for themselves."

However, they all agreed that it would be by no means amiss, that the justices at Hicks's Hall should have an opportunity of knowing the opinion of this Court upon this subject : and (for that purpose principally, as it seemed to me,) they granted a rule to shew cause.

Mr. Serj. Nares and Mr. Stowe now shewed cause ; and observed that the charge was not for baking bread, but for baking puddings, pies, and other such things for

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\* He was Mayor of Grampound, about 14 G. 2, 1741.

dinner. And that the Act of 29 C. 2, c. 7, § 3, allows of dressing meat, on a Sunday, for dinner; and excepts works of necessity and charity.

And all the justices of peace of Middlesex and Westminster have agreed that this is not an offence which that statute meant to punish. And this gentleman, Mr. Cox, heard the whole complaint, and then declared the opinion of himself and of his brethren, "that it was not an offence within the meaning of the Act of Parliament or any other law: for that he and the other justices considered it as a cook's shop, and as a matter of necessity, and of relief to poor people."

Mr. Norton, Mr. Morton, and Mr. Ashhurst contra, for the information, cited two cases, of *Rex v. Sergeson*, and *Rex v. Dawson*.

This does not appear, they said, to have been a baking for the poor only, or for the poor at all; which cannot be presumed: so that it does not appear to be a work of charity or necessity. Nor is it to be ranked under the appellation or nature of a cook's shop; and consequently not within the proviso in the third section.

[787] The words of the Act are "that no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day, or any part thereof; (works of necessity and charity only excepted)."

§ 3. "Provided, that nothing in this Act contained, shall extend to the prohibiting of dressing of meat in families, or dressing or selling of meat in inns, cooks' shops, or victualling-houses, for such as cannot otherwise be provided."

Lord Mansfield—The complaint now appears to have been founded upon a misrepresentation of the fact: for the affidavit charges this justice of peace to have refused receiving the information; and that he told them the justices had come to an agreement "not to grant warrants against persons for baking on a Sunday." Whereas it now appears that he did hear the charge; and that it was not baking in general on a Sunday; but baking pies, puddings, and meat for dinner; not saying a word about bread, which is the business of a baker's ordinary calling. And he told them "that this sort of baking or dressing meat on a Sunday, was not, in his opinion and in the opinion of the rest of the justices, an offence within the Act." I am not satisfied that their opinion was wrong. And if he really judged it not to be within the provision of any law, and had consulted his brethren, who thought so too, the Court would never grant an information against him; even though such opinion had been erroneous.

Mr. Just. Denison—This Court will never grant an information against a justice of peace for a mere error in judgment. And he declared that he thought the justices to be in the right in their opinion; and that this was not a case within the meaning of the law: it seems to be within the equity, though not within the words of the proviso of section 3. Therefore the rule ought to be discharged.

Mr. Just. Foster concurred, that the rule ought to be discharged. He was clear that this case was not within the provision of the Act: but it falls within the exception of works of necessity and charity, and also within the proviso, as being a cook's shop. And it is as reasonable that the baker should bake for the poor, as that a cook should roast or boil for them: there is no reason for any distinction.

And as the justice has acted rightly, and also upon right motives, the rule ought to be discharged with costs.

[788] A justice of peace has a right to judge for himself, whether the matter charged is an offence within the law: and if, upon hearing the charge opened, he thinks it not to be an offence within the law, he ought not to proceed upon it; which could be to no purpose but merely to put persons to unnecessary trouble and charge.

Mr. Just. Wilmot—It comes out now, that the justice did not refuse to hear and receive the complaint; though, when it was opened to him, he judged that he ought not to proceed upon it. And in this he judged right: for it is not an offence within the provision of the Act; it is particularly within the equity of the exception of cooks' shops.

Therefore I think the justice had no jurisdiction to proceed upon the complaint. I think that no justice of peace ought to be punished by an information, for an error in judgment. But I think that the justice was in the right, in the present case: and therefore that the rule ought to be discharged with costs.

Per Cur. Rule discharged, with costs.



REX *versus* INHABITANTS OF NETHER HEYFORD. 1759.

This case may be seen at large, in the quarto-edition of my Settlement-Cases, page 479, No. 152.

The end of Easter term, 1759, 32 G. II.

## [792] TRINITY TERM, 32 &amp; 33 GEO. II. B. R. 1759.

REX *versus* BEARDMORE, (Under-Sheriff of Middlesex). Saturday, 16th June, 1759.

Under-sheriffs will incur a contempt, and may be fined and imprisoned for not properly carrying a sentence into execution. [See 8 Durn. 324.]

Mr. Attorney-General had moved (on Monday the 29th of January last) for an attachment against Arthur Beardmore, the under-sheriff, for a contempt of the Court, in taking upon himself, without any pretence of authority, to remit part of the sentence pronounced upon John Shebbeare in Michaelmas term last: one part of this sentence was "that the defendant John Shebbeare be set in and upon the pillory."

And several affidavits were then produced by Mr. Attorney-General, which were very full in asserting "that the defendant only stood upon the platform of the pillory, unconfined and at his ease, attended by a servant in livery, (which servant and livery were hired for this occasion only,) holding an umbrella over his head, all the time: but his head, hands, neck, and arms were not at all confined or put into the holes of the pillory; only that he sometimes put his hands upon the holes of the pillory, in order to rest himself." And it was proved "that Mr. Beardmore attended as under-sheriff; with his wand; and that he treated the criminal with great complaisance, in taking him to and from the pillory."

A rule was thereupon made to shew cause why an attachment should not issue against Mr. Beardmore, the under-sheriff.

On Thursday, 8th February 1759, Mr. Morton, Mr. Serj. Davy, and Mr. Howard shewed cause.

Mr. Beardmore's affidavit shewed, that his officiating at all in this affair was quite casual and unexpected, on a sudden message from his brother under-sheriff. It was as full and explicit as possible, "that he had no sort of design or intention either directly or indirectly to favour [793] Shebbeare; that he gave no particular direction to his under-officers about it, but meant and intended that this sentence should be executed in the usual and ordinary manner, as other sentences of the like kind were and used to be executed; and that he stood at a shop opposite the pillory, during the whole time, without almost ever taking his eyes off from it, during the whole time, in order to see the sentence properly executed; and that he would have obliged him to stand in what he, (Mr. Beardmore,) took to be the proper manner, if Shebbeare had offered to withdraw himself from such position." And he positively swore "that, according to the best information he could get, he looked upon the manner in which Shebbeare stood, to be the usual and proper manner of standing, pursuant to rules worded as this rule is: and that he did, according to the best of his judgment, fully and duly execute the judgment of the Court in the usual and common manner."

And he produced fourteen or fifteen affidavits proving that the manner in which Shebbeare actually stood, was with his hands in and through the small holes, and his head and face fully exposed through (some of them said in and through) the large hole: and that he stood so, during the whole time, that the rule required him to stand.

And several of the deponents (sheriff's officers and others) swore positively, that the standing without confining the head, was the usual ordinary manner, and had been so for thirty or forty years, in Middlesex, of criminals standing pursuant to rules of this kind; and that it had been usual in that county, not to fasten or confine the head in the pillory, for a great many years backwards, and ever since one or two persons who were locked down in the pillory had been killed: and several of them particularised how much inconvenience might follow from fastening it down upon the head. And two of the sheriff's officers swore "that they always deemed and conceived it to be a full execution of the words of the rule, to stand as this man stood, with the hands in, and the head and face exposed through the holes of the pillory."

But Mr. Beardmore and his counsel admitted (or at least did not pretend to contradict) that his arms were not put through the small holes, and that the pillory was not shut down upon Shebbeare, nor his head absolutely thrust through it: which the sheriff's officers swore they did not apprehend to be necessary or usual, unless the person was refractory. Neither indeed was it pretended, that the upper board of this pillory was at all let down over his neck.

[794] Mr. Howard observed, (amongst other things,) that the sentence of quartering and burning the bowels of traitors is never strictly executed, nor the punishment of burning in the hand, which is constantly and notoriously done in the face and with the knowledge of the Judges themselves, with a cold iron.

Lord Mansfield—If the charge be true, it is admitted that such a disobedience to the rule of the Court, by their own officer, is punishable in this summary way.

The fact charged is, "that by the permission and under the inspection of the under-sheriff, the criminal stood upright and erect upon the platform of the pillory; and that his head, neck, arms or hands were not put through the holes of the pillory: nor his head even inclined to it."

As to the defence which Mr. Beardmore has set up—it would have been more judicious to have made no defence at all, than such a one as this. The attempt to justify, upon oath, the offender's standing upright, as a legal execution of the sentence, is an aggravation: it is contrary to every man's conviction; and the form of a pillory also demonstrates what is meant by being set in, as well as upon it. The offender was no more in the pillory, than the footman who stood by him.

Then as to the other part of the defence, the usage—there is not a single instance particularized or shewn of this kind; or to prove that there has been such a usage.

None of his affidavits swear, that the method now taken was the usual and ordinary method; though two of them say they conceive it to be a full execution of the rule. They only say "that it was not usual or customary for many years backward, in Middlesex, to fasten or confine the neck in the pillory:" and they give the reason of it too, and mention some inconveniences of that method.

One of them says that this man stood as he had usually seen others do: but he specifies no instances. Revie, one of the persons who makes affidavit, says he has known this practice about setting in the pillory forty years, having lived so long near Charing Cross: and he never saw a criminal so publicly exposed in and upon the pillory before, as this man was. To be sure, the face of a man who stands upright, is more exposed to view, than it would be if his head were bent down and put in the pillory. And therefore, though the words of the affidavit are artfully drawn, to convey another meaning, the mental reservation of the swearer guards him from perjury, sup[er]-[795]-posing the fact to be that he never saw a man stand upon the pillory before, in the manner that Shebbeare did.

So many affidavits, so studiously and artfully penned, to be falsely sworn in one sense and read in another, are an aggravation.

And therefore the rule ought, in my opinion, to be made absolute.

Mr. Just. Denison concurred.

Nothing imports us more, than to see that the judgments of the Court be duly executed.

Now no ministerial officer, or any one that has seen a pillory can doubt about the meaning of setting a criminal in the pillory. The very form of the pillory shews what it must mean. And it cannot be pretended that standing erect upon the pillory, is being set in it.

If there had been such a usage in Middlesex, it was high time to put a stop to it. But here is no such usage proved.

Therefore the under-sheriff ought to answer upon interrogatories.

Mr. Just. Foster concurred: and he considered this affair, as highly concerning the honour and dignity of the Court, and the effectual execution of justice. Mr. Beardmore cannot think, nor will he venture to say, upon his examination on interrogatories, "that this is the usual method of putting offenders in the pillory."

Mr. Just. Wilmot also concurred, that this inquiry was a matter of the highest importance to the honour of the Court, and the due execution of the sentence on offenders; and that this offence is of the most pernicious tendency; nothing being of worse consequence, than that an officer of the Court should combine with a criminal to frustrate the sentence of the Court.



He mentioned a passage that occurred to him upon this occasion, which he remembered to have met with in the Year-Books, and which is quoted in *The Mayor of Oxford's case* in Palmer, 454 : where the reason given in the record, for the plaintiff's recovering a large sum in a special action against the defendant for beating him, being his adversary's attorney was "quia the defendant, quantum in se fuit, non permisit regem regnare." And it may be, with at least as much propriety, said of this [796] under-sheriff in the present instance, that "quantum in se fuit, non permisit regem regnare."

And he expressly declared, "that in order to execute the true intent and meaning of this rule, the head and hands ought to be put in and through the pillory, and remain so during the whole time."

Mr. Beardmore does not swear that he ever saw a sentence executed in this manner: nor do his affidavits specify any instance of it. He inquired into the manner of executing the sentence, only in order to elude it: no man could doubt how it ought to be executed.

I think his defence makes his case worse, rather than mends it.

Therefore he was clearly of opinion with his Lordship and the rest of his brethren, "that the attachment should issue against Mr. Beardmore."

The whole Court commended Mr. Attorney-General for bringing this complaint before them; as the honour and dignity of the Court, and the end and very essence of justice were so materially concerned in the due and regular execution of their sentences.

Per Cur. unanimously, rule for the attachment made absolute.

On the Monday following, (viz. 12th February 1759,) the defendant appeared, and gave bail to answer interrogatories: and was sworn to make true answer thereto.

N.B. He had given notice "that he would come in and confess the contempt, and submit directly to the judgment of the Court." But this notice was withdrawn; his counsel being satisfied that this could not be done within the \*course of the Court; especially as this was not a mere single fact, but a complicated charge, arising from several circumstances.

Lord Mansfield said they were certainly right in withdrawing their intended motion.

And Mr. Morton, of counsel for the defendant, said that this same thing was formerly attempted in *Dr. Colebatch's case* (who would immediately have come in and submitted to the judgment of the Court:) but he was obliged to be examined upon interrogatories.

[797] The defendant accordingly gave bail, (himself in 200l. and each of his two sureties in 100l.) to appear and answer to interrogatories; and then was sworn to make true answer to such interrogatories, as should be exhibited against him.

And after having been examined, the interrogatories and examination were referred to me, as usual: and I made my report. The examination was much to the same effect as his defence upon his affidavits. And the rule was as follows—

Saturday next after the morrow of the Ascension, &c. 32 G. 2 (26th May 1755).

Upon hearing the report of James Burrow, Esq. Coroner and Attorney of this Court, it is adjudged by this Court, "that the defendant is in contempt:" it is thereupon ordered "that he be committed to the custody of the marshal of the Marshalsea of this Court." But by consent of His Majesty's Attorney General, it is ordered that the said defendant be continued upon his recognizance; and that he the said defendant do personally appear in this Court on the second day of next term, to receive the judgment of this Court. It is thereupon further ordered that he the said defendant be now discharged out of the custody of the said marshal.

The defendant now personally appearing in Court pursuant to the last rule—

Mr. Just. Denison pronounced the sentence.

He first expatiated upon the offence. In doing which, he declared, that it was at the sheriff's peril, to execute the rule of the Court in a proper manner; and that no one could possibly doubt that the suffering a gross offender, an infamous libeller of the King and Government, to stand in triumph, erect upon the pillory, with a servant holding an umbrella over his head, instead of standing with his head in the pillory,



by way of disgrace and ludibrium (which is the intent of this kind of punishment,) was a highly improper and insufficient manner of executing this rule of the Court.

After which, he gave the sentence upon the defendant Beardmore, for this his contempt; viz.

To pay a fine of 50l. and to be <sup>\*1</sup> committed to the custody of the marshal, for two months, and till the fine shall be paid.

[798] REX *versus* MAYOR AND JURATES OF RYE. Tuesday, 19th June, 1759. Consent to try a right in a feigned issue, where the mayor and jurates could not join in a return to a mandamus.

Sir Richard Lloyd shewed cause why an attachment should not issue against the mayor and jurates, for not returning a mandamus directed to them; commanding them "to admit and swear Edwin Wardroper into the office of one of the jurates of that corporation; or to shew cause why they refuse to admit him."

His cause was, "that it was not possible for them jointly to make any return at all." For the mayor claims a sole and exclusive right to nominate this jurate; and the jurates deny that the mayor has any such sole and exclusive right: so that it is impossible for the mayor and jurates to join in any return; unless either the one or the other should give up the right which they insist upon. The jurates would return "non fuit electus:" but the mayor refuses to join in this return; because he says that the jurate is duly chosen: and the jurates can not force him to join in their return. Therefore it would be hard to punish the innocent promiscuously with the guilty.

Sir Richard was for the jurates; and he offered to put the right into any method of trial: but he said, they could not give up their franchise. It may be tried, either upon a return of "non fuit electus," or upon a feigned issue. We are not perverse and obstinate; but lie under a real honest difficulty: we cannot pay obedience to the writ, consistently with our oaths.

And an attachment will answer no end or purpose: for if an attachment should go, and the defendants should be examined upon interrogatories, it would come out to be a mere question of right.

Note—The right claimed by the mayor was "to fill up the vacancy of jurates happening during his year, generally:" but the jurates deny that the mayor has such a right, generally: though they admit that he has it upon the single day of his election; but not afterwards, (as they alledge).

It ended in a rule by consent, to try the right in a feigned issue, at the sittings after this term, for Middlesex: on the question—"Whether Edwin Wardroper was duly elected, or not:" and further, that the books shall be inspected, and copies taken, &c. and the books themselves produced at the trial, on proper notice, &c. and that the party who shall prevail, may be at liberty to enter up his judgment as of this term.

[799] V. 6 Mod. 152, *Domina Regina v. Chapman, late Mayor of Bath*; (7th point.) Comberb. 373, case of *New Sarum*. *Rex v. Churchwardens and Overseers of St. Chad's*, H. 8 G. 2, B. R. reported in Lucas, 56.

PRISONER'S CASE. Wed. 20th June, 1759. Construction upon the Act for the Relief of Insolvent Debtors.

Lord Mansfield declared, it was the opinion of all the Judges, upon a consultation had amongst them, "that the late Act of 2 G. 2, c. 22, (for the Relief of Insolvent Debtors with Respect to the Imprisonment of their Persons) being expired, nothing further can be done upon that Act: but that they are within the provision of the new Act."

And the Court declared to those now present in Court, that they must immediately give notice pursuant to the <sup>\*2</sup> new Act: for that this new Act requires fourteen days notice; and there are only fourteen days of the term now remaining.

<sup>\*1</sup> He was still under-sheriff at this time.

<sup>\*2</sup> 32 G. 2, c. 28, s. 13. [Qu. post, 901, and see 4 Burr. 2528.]

Mr. Just. Denison observed that the Judges came to a like resolution upon the expiration of the former Act, as they are come to now, (v. ante, 747, 748).

Note—That Act of 2 G. 2, c. 22, was a temporary Act: which was explained and amended by an Act of 3 G. 2, c. 27, and continued by 8 G. 2, c. 24, and 14 G. 2, c. 34, (which perpetuates the clause of setting † mutual debts one against the other;) and again amended and continued by 21 G. 2, c. 33, and finally revived and continued by 29 G. 2, c. 28, until the first day of June 1759. So that this Act expired on the 1st of June. But the late Act of † last session, does not commence till the 15th of the same June. Consequently, there is a chasm of fourteen days.

REX *versus* ROBERT ROBINSON, Clerk. Friday 22d June, 1759. Indictment lies for disobeying an order of sessions. [See 3 vol. 1337. Cowp. 648. 4 Durn. 205. 5 Durn. 543, 546. 6 Durn. 171.]

[Followed, *R. v. Lovibond*, 1871, 24 L. T. 359. Referred to, *R. v. Hall* [1891], 1 Q. B. 764.]

This was a motion in arrest of judgment, upon an indictment against the defendant for refusing to obey an order of the General Quarter Sessions for the county of Stafford made upon him for his keeping and maintaining James and Peter Robinson his two infant grand-children: in which, the breach was laid according to 43 Eliz. c. 2, § 7.

[800] It came on, no less than four times, before the Court.

The indictment recites an order of sessions made on the 11th of January 1757, 30 G. 2,\* directing “that the defendant Robert Robinson should, from the date thereof, weekly and every week pay or cause to be paid unto the overseer of the poor of the parish of Waterfal for the time being, the sum of 2s. for the relief and maintenance of his said grand-child James Robinson; and the like sum of 2s. for the relief and maintenance of his said grand-child Peter Robinson; and to continue such respective payments until further order.” With which order the defendant was duly and legally served on 21st of the same January.

And the charge is, “that the defendant not regarding the said order nor the laws and statutes of this realm relating to the relief of the poor of this kingdom, did not on 21st January, 30 G. 2, nor hath since the date of the said order, weekly and every week or otherwise howsoever, paid or caused to be paid unto the overseer of the poor of the said parish of Waterfal for the time being, either the said sum of 2s. for the relief and maintenance of the said James Robinson, or the like sum of 2s. for the relief and maintenance of the said Peter Robinson, or any part of either of the said sums; nor hath he the said Robert Robinson, at any time or times from or since the date of the said order, relieved, maintained or provided for them the said J. R. or R. R. or either of them, according to law: but he the said R. R. upon the said 21st day of January 30 G. 2, and continually afterwards, until the day of the taking the inquisition, unlawfully, wilfully, obstinately, and contemptuously, did and yet doth neglect and refuse to pay or cause to be paid unto the overseer of the poor of the said parish of Waterfal for the time being, weekly and every week from the date of the said order, the said several and respective sums abovementioned, contrary to the purport and direction of the said order, and in manifest breach and contempt of the same; to the great damage of the inhabitants of the said parish of Waterfal, to the evil and pernicious example of all others in the like case offending; and also against the peace of our said lord the King his Crown and dignity.”

The indictment was found at a Quarter Sessions holden the 12th of July 31 G. 2. The defendant had been convicted upon it; and judgment signed, as post, pa. 801.

On Monday 5th February 1759, Mr. Morton moved in arrest of judgment—

† See this point of setting off mutual debts, and these Acts of 2 & 8 G. 2, and also that of 8, 9 W. 3, c. 11, s. 8, most fully, clearly and satisfactorily explained by Lord Mansfield, post, 28th Nov. 1759, pa. 901, *Young v. Diego Arines*.

‡ 32 G. 2, c. 28.

\* N.B. The order recites the death of the father of these children; their being destitute of subsistence; the complaint of the parish; the ability of the grandfather to maintain them; and other proper foundations for such an order; and that the facts were by proper evidence made to appear to the justices at sessions.

[801] This is a<sup>\*1</sup> new offence, with a particular penalty; and section 11th of 43 Eliz. c. 2, prescribes a very summary method of recovering the penalty. Therefore it is not indictable. 6 Mod. 86, *Watson's case*, and *Castle's case*; and Cro. Jac. 643, *Castle's case*: both which cases are express, "that where a statute creates a new offence, and gives a particular penalty, the party shall not be punished by indictment." Now here, the 7th section gives a particular penalty, viz. "upon pain that every one of them shall forfeit 20s. for every month which they shall fail therein;" and the 11th section directs how that forfeiture shall be levied and employed.

But it being litigated by the other side, previously to their shewing cause, "whether the motion in arrest of judgment was made within time:"

The secondary certified, (on Thursday the 3d of May last,) and

The Court then held, (notwithstanding the case in 1 Salk. 78, *The Queen v. Darby*, which seems contrary,) "that a motion in arrest of judgment may be made (on the Crown side) at any time before sentence pronounced." For that the judgment signed in the office is only an interlocutory judgment: and the award "quod capiatur" is only to bring the defendant in, to receive the final judgment or sentence of the Court: but is not the final judgment itself.

They observed that the judgment in *Darby's case*, in Salkeld 78, is there said to be a "capiatur pro fine;" and the capias there issued might possibly be for the fine, after a final judgment.

As to the objection in arrest of judgment, it was, for the present, adjourned.

On the Monday following Mr. Aston, supported by Mr. Gilbert, shewed cause why the judgment against the defendant should not be arrested.

They did not dispute the rule laid down in *Castle's case*: but denied that here was a particular penalty prescribed by this Act of 43 Eliz. c. 2, § 7. And cited 2 Hawk. P. C. c. 25, § 4, pa. 211, from whence they endeavoured to prove that an indictment is not excluded unless it be so particularly expressed in the Act of Parliament.

They urged that an indictment is the proper remedy for disobeying an order of sessions. And, in the present instance, they said, the remedy given by the Act 43 Eliz. [802] is inadequate: for the child may die within the month; and the forfeiture is only 20s. for every month that they shall fail. Another reason why an indictment is not excluded, is because if the party liable should remove out of the county, the remedy given by the statute would be of no effect. And here, the defendant in fact did remove out of the county. They remarked that the case in 5 Mod. 329, and 2 Salk. 474, *S. C. Rex v. Turnock* or *Turner*, was exactly such an indictment as this; and no such objection was there made; but it was quashed upon one of quite another kind, (namely, the omission of the word "quarterialia.")

The case of <sup>\*2</sup> *Rex v. Davis*, M. 28 G. 2, B. R. proves "that an indictment will lie, where the remedy is not adequate." (That was an indictment against a parish officer, for refusing to receive a pauper regularly sent to his parish,) *Rex v. Boys*,† P. 26 G. 2, 1753, B. R. proves the same thing.

And here is no particular mode prescribed how the penalty is to be ‡ levied. And the forfeiture it not given by way of execution; but in nature of a new judgment. Here is no remedy at all given, in case the disobedience be in non-payment for three weeks; being only so much per month.

2 Hale's H. P. C. 171, says, "that if there be a prohibitory clause, an indictment will lie, upon the prohibitory clause."||

An indictment (it must be agreed) would not lie upon the statute; because it gives a particular remedy. But yet the statute does not take away the common law remedy; and the rather, as this remedy, prescribed by the Act, is not an effectual and adequate one.

<sup>\*1</sup> V. ante, pa. 543, *Rex v. Wright, Clerk*, P. 1758, 31 G. 2, 1st obj. S. P.

<sup>\*2</sup> V. post, 803, S. C. cited at large.

† V. post, 805, S. C. cited at large.

‡ V. § 11th, which directs it to be "levied by distress and sale; or in defect thereof, the offender to be committed without bail or mainprize, till the forfeitures shall be satisfied and paid."

|| But see the next clause in the same book—"That if the Act be not prohibitory, the particular remedy only can be pursued."



This is an indictment at common law, for disobeying an order of sessions; not an indictment upon the statute, for this particular offence.

Mr. Morton contra, in reply, cited 7 Co. 36 a. where it is said, "that an Act of Parliament which gives a penalty, ought only to be followed, in the prosecution and levying of it."

And this Act specifies the remedy, as well as makes the offence. This is a summary law; and is directory, "to pay such a sum as the justices shall assess." And the remedy is adequate. The defendant does not appear [803] to be removed out of the county: this is only asserted, not proved. As to the small space of time within the month, no penalty at all is incurred, till there is a month's neglect: it was not the intention of the statute to inflict any, until after a month's failure of compliance with the order.

Cur advis'.

The Court having taken some time to consider it,

Lord Mansfield now delivered their opinion.

The objection to this indictment is, "that the offence is not indictable; because the Act of Parliament has<sup>\*1</sup> pointed out a particular punishment and a specific method of recovering the penalty which it inflicts."

The rule is certain, "that where a statute creates a new offence, by prohibiting and making unlawful any thing which was lawful before; and appoints a specific remedy against such new offence, (not antecedently unlawful,) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other." And this is the resolution, in *Castle's case*, Cro. Jac. 643.

But where the offence was antecedently punishable by a common-law proceeding, and a statute prescribes a particular remedy by a summary proceeding: there, either method may be pursued, and the prosecutor is at liberty to proceed either at common law, or in the method prescribed by the statute; because there the sanction is cumulative, and does not exclude the common law punishment. 1 Salk. 45, *Stevens v. Watson*, was a resolution upon these principles: in that case,† keeping an alehouse without licence was held to be not indictable, because it was no offence at common law; and the statute which makes it an offence, has made it punishable in another manner.

There was a case in this Court in M. 28 G. 2, *Rex v. Davis*, in arrest of judgment upon an indictment against the defendant, overseer of the poor of the parish of St. Peter ad Vincula, within the liberty of the Tower of London, for refusing to receive and provide for Hannah Gothridge, a pauper removed to that parish by an order of two justices made by virtue of 13, 14 C. 2, c. 12, by which Act the justices are empowered to remove a pauper to the place of his last legal settlement. But there is no provision by that Act, to punish the officer, in case he refuses to receive the pauper: so that the only remedy was at common law, to indict him. Afterwards, by 3, 4 W. & M. c. 11, it is enacted, that if an officer refuse to receive a person removed by an order of two justices, he shall forfeit 5l. to be recovered in a summary [804] way.—It was objected, "that this was a matter not indictable, because it was a new offence created, and a particular method appointed by this last-mentioned Act." On the other hand it was said "that notwithstanding the remedy given by the last-mentioned Act, the common law remedy, by indictment, remains; and the officer of the poor may be proceeded against, either way." The Court held the offence to be indictable; and discharged the rule to shew cause why the judgment should not be arrested: for they held the offence to have been indictable after the Act of 13, 14 C. 2, c. 12, and consequently not a new offence originally created by the 3, 4 W. & M. c. 11.\*2

So, in the present case, a remedy existed before the stat. of 43 Eliz. for disobedience to an order of sessions is an offence indictable at common law. Here, the relief is to be assessed and directed by order of sessions: and a particular proceeding, in a summary way, is prescribed by the Act, as a particular sanction and method of punishment, in case of failure. But it is to be presumed, that the Legislature then knew and con-

\*1 V. § 7 and 11.

† The 3d point of it.

\*2 V. *Rex v. Boyall*, Tr. 1759, 32, 33 G. 2, B. R. 2d July 1759, post, pa. 832, a like determination to *Rex v. Davis*.

sidered "that disobedience to an order of sessions was an offence indictable at common law." So that they must have intended that there should be, and there actually are, two remedies in the present case; one, to proceed by way of indictment for disobeying the order, where the weekly payment is neglected or refused to be made; the other, to distrain for the 20s. penalty after the expiration of the month.

The former method has been taken, in the present case: and there is no doubt but that an indictment will lie for disobeying an order of sessions.

But <sup>†1</sup> notwithstanding that here are two remedies given; yet it would be extremely oppressive, to take the remedy by indictment, if there are no circumstances which obstruct the proceeding in the shorter way of summary remedy; this would indeed be very wrong and unreasonable, where the summary remedy can be put in practice.

But in some cases it may be impracticable to proceed in the summary method, by way of distress; as if the party upon whom the order is made, be gone out of the county, (which is said to be the case here;) in which case, the penalty cannot be levied by distress and sale, nor the offender committed by the justices.

And there may also be a disobedience to the order even before the month is out; and the forfeiture is only [805] 20s. for every month which they shall fail. However, that would be too severe, to indict for disobedience to the order, with such very great haste as not to wait till the month should be expired.

By 43 Eliz. c. 2, § 2, it is enacted "that the old churchwardens and overseers shall account for the money in their hands, and shall pay over the balance to the churchwardens and overseers, upon pain of <sup>\*1</sup> forfeiting 20s. for each default." Yet there was a case in P. 20 G. 2, B. R. *Rex v. Bill*, where two overseers were indicted for not obeying an order of sessions whereby they were ordered to pay over the balance of their accounts to the new churchwardens and overseers.

In the case that has been <sup>†2</sup> mentioned of *Rex v. Boys*, Trin. 27, 28 G. 2, B. R. there was no other remedy but by way of indictment. It was an indictment before the justices of the liberty of St. Albans for not obeying an order of sessions whereby the defendant was ordered to pay the costs of an appeal against a poor rate, which by 17 G. 2, c. 38,|| is to be recovered in the same manner as costs upon an appeal against an order of removal; which by 8, 9 W. 3, c. 30,<sup>\*2</sup> are recoverable by distress and sale (or commitment where no distress is to be had,) where the party lives out of the jurisdiction, (by warrant of some justice of peace for the place where the party inhabits;) but if the party lives within the jurisdiction, (which Boys did,) there is no other remedy but by way of indictment. And on demurrer, judgment was given for the King.

So that the case seems to be exactly parallel and in point with the present case. For that was a case where the summary method could not be used; because the defendant inhabited within the jurisdiction; and the summary remedy is given only against such as live out of the jurisdiction: so that the particular remedy failed; and an indictment consequently lay.

The true rule of distinction seems to be, that where the offence intended to be guarded against by a statute, was punishable before the making of such statute prescribing a particular method of punishing it, there such particular remedy is cumulative, and does not take away the former remedy: but where the statute only enacts "that the doing any act not punishable before, shall for the future be punishable in such and such a particular manner," there it is necessary that such particular method, by such Act prescribed, must be specifically pursued; and not the common law method of an indictment.

We are all of opinion,

[806] That the judgment ought <sup>\*3</sup> not to be arrested: and therefore the rule must be discharged.

<sup>†1</sup> V. post, accord.

<sup>\*1</sup> V. § 4, which directs the method of enforcing them to account and pay over balance.

<sup>†2</sup> V. ante, 802.

|| V. § 4th.

<sup>\*2</sup> V. § 3d.

<sup>\*3</sup> V. post, pa. 832, *Rex v. Boyall*, (3d objection in that case) S. P. accord.

REX *versus* ROBERT PARNELL. Saturday, 23d June, 1759. Articles of the peace appearing to be untrue, the party may be committed for perjury.

The defendant stood convicted of a very gross, malicious, corrupt and wilful perjury, in certain articles of the peace exhibited by him, upon oath, against Sir Thomas Allen and his servants; for which perjury he had, some time ago, been committed in Court, upon his voluntarily appearing there, to complain of difficulties which he pretended to meet with, in obtaining process upon his articles: which articles were very express and positive; and, by the course of the Court, must have been looked upon by the Court, to be true; according to the declared opinion of the Court in <sup>\*1</sup> *Lord and Lady Vane's case*.

But upon this man's subsequent application as above, and upon reading the affidavits offered by Sir Thomas and his servants and orders, in answer to that complaint, it appeared manifestly to the Court to be a malicious voluntary and gross perjury,

Whereupon the Court not only rejected his complaint, and stayed process against the defendants, but also committed the complainant for perjury; taking a recognizance from the defendant's clerk in Court "to prosecute him for the perjury."

Which perjury being afterwards fully proved upon him at the trial, the sentence now pronounced upon him was—

To be set in and upon the pillory at Charing-Cross (on the 16th July next,) for one hour: and to be transported for seven years.

Note—He appeared, throughout the whole of this transaction, to be a very malicious dangerous fellow.

[807] ASTLEY, BART. *versus* YOUNGE, ESQ. Tuesday, 26th June, 1759. For libellous words contained in an affidavit produced in a Court of Justice on a defence against a charge, no action lies. [And see 1 Bosanq. 527.]

Tr. 32, 33 G. 2, Rot'lo. 25.

[See *Dawkins v. Rokeby*, 1873, 75, L. R. 8 Q. B. 264; L. R. 7 H. L. 744; *Seaman v. Netherclift*, 1876, 1 C. P. D. 544; 2 C. P. D. 53.]

This was an action upon the case, for speaking and publishing defamatory, false, malicious and libellous words, of and concerning the plaintiff Sir John Astley.

The plaintiff, after premising (as usual) the innocence and integrity of his character, good manners, &c. sets out in his declaration, that the defendant being one of the justices of peace for the county of Wilts, and having refused to grant a licence to one Henry Day for keeping of a public inn and ale-house in Everly in the county of Wilts aforesaid; <sup>\*2</sup> application was made to this Court concerning the said refusal: and on that application, Sir John Astley, the plaintiff, made an affidavit in writing and upon oath, which was produced and read before the said Court, of certain matters and things relating to the said refusal; and alledges that he had sworn the same with great truth and veracity. That the defendant maliciously intending to scandalize Sir John, &c. on the 1st of September 1757, at the City of London, in a certain discourse with diverse subjects of this realm concerning the said Sir John and his affidavit aforesaid, falsely and maliciously spoke and published to those subjects the following false, defamatory and malicious words, viz. "Sir John Astley, in his affidavit, hath sworn falsely; and I have proved to the Court the contrary of what Sir John hath sworn. Sir John hath a great estate: but I would not, for his whole estate, have sworn as he did." And in another discourse on the same day, &c. with diverse other subjects, the defendant maliciously intending as aforesaid, maliciously and falsely, &c. published the following words, viz. "Sir John is forsworn;" (meaning that the said Sir John Astley had been guilty of perjury). † Whereas in truth and in fact, he the said Sir

<sup>\*1</sup> *Rex v. Ld. Viscount Vane*, Hil. 17 G. 2, 1743, B. R.

<sup>\*2</sup> V. ante, 556, 561.

† Here, the words are laid, in several different manners, as to the phrase and expression; but without any material difference of import: as "Sir J. A. hath sworn falsely; Sir John hath a great estate; but for his whole estate, I would not have sworn as he hath done." Again, "Sir J. A. in his affidavit hath sworn falsely; and



John had not in his said affidavit nor in any part thereof sworn falsely, nor ever was guilty of any perjury whatsoever. By reason of which said malicious, false and scandalous words, &c. he the said Sir J. A. hath been grievously injured, &c.

Then the declaration proceeds, to this effect, viz.

[808] And whereas, whilst the aforesaid application to the Court of our said lord the King before the King himself, concerning the said refusal of the said Edward Younge to grant a licence, was depending in the said Court, and before the publication of the libel herein after mentioned, to wit, &c. the said Sir John had made and exhibited his affidavit as aforesaid, and been sworn to it, &c. nevertheless the defendant, well knowing the premises, but again contriving and maliciously intending to vilify and asperse the reputation and character of the said Sir John, and to bring him into very great infamy and disgrace, afterwards, viz. on 24th January 1758, did wickedly and maliciously make, exhibit and publish to the same Court of our lord the King before the King himself, a certain malicious, false and scandalous libel, contained in a certain affidavit in writing of him the said Edward, concerning (amongst other things) the said Sir John Astley and his affidavit aforesaid; in which affidavit of the said Edward Younge there were and are contained (amongst other things) certain false, malicious and scandalous matters concerning the said Sir John and his aforesaid affidavit, according to the tenor following, viz. "And moreover he" (meaning the said Edward Younge) "should have thought himself deserving of all which Sir John Astley hath so falsely sworn against him, if the fear of any power upon earth could have moved him to act judicially against his judgment;" as by the said affidavit of the said Edward, remaining affiled of record in the said Court, &c. more fully appears. Whereas in truth and in fact, he the said Sir John Astley did not in or by his said affidavit swear any thing falsely against the said Edward, nor ever was guilty of any perjury or false swearing whatsoever. By reason of which making, exhibiting and publishing of the said malicious, false and scandalous libel so published by the said Edward Younge as aforesaid, the said Sir John is very much injured in his character, &c. to the damage of the said Sir John of 5000l. And thereupon he brings his suit, &c.

The defendant (having obtained leave to plead double,) first pleads "not guilty," to the whole declaration: and issue is joined thereupon.

Then for further plea to the second count, the defendant, setting forth the complaint made against him, as above, justifies that he made such affidavit as in the said second count is mentioned, in his own defence against the said complaint made to this Court against him for his refusal to grant such licence, and in answer there-[809]-to and to the said affidavit of the said Sir John so made to support, corroborate and strengthen the same complaint as aforesaid.

The plaintiff demurred generally to the defendant's plea to the last count: and the defendant joined in demurrer.

Mr. Serj. Davy argued this demurrer, for the plaintiff—The plea, he said, was insufficient. For it admits the charge of making the affidavit maliciously and with intent to asperse the character of Sir John Astley: and the defendant justifies it, not as being true, but only as being made in answer to a complaint supported by Sir John's affidavit; but does not alledge it to be a necessary part of his defence. And every thing must be taken most strongly against the party pleading. Therefore it must here be taken "that it was not a necessary part of his defence."

And this is a libel, undoubtedly.

Lord Mansfield—Shew that a matter given in evidence in a Court of Justice may be prosecuted in a civil action, as a libel. The Court, indeed, before which such evidence is given, may censure it.

Serj. Davy—I will prove it; (1st) from authorities; (2dly) from the reason of the thing.

First—He cited, as authorities, that (as he said) would ‡ prove it, 4 Co. 14 b. pl. 3, *Buckley v. Wood*; and 1 Hawk. P. C. 194, 195, (where Hawkins offers his own private opinion, and a very just and reasonable one).

I have proved to the Court the contrary. Sir John hath a great estate; but for his whole estate, I would not have sworn as he did." Again, "Sir J. A. hath sworn falsely; and I have proved to the contrary." Lastly, Sir John Astley is forsworn.

‡ Sed vide post, 810.

Secondly.—It would be most highly inconvenient, if it was otherwise. For any man's character might be cruelly injured by such an artifice as this: and if he could not be protected by legal methods, he might (as in a state of nature) be driven to revenge himself. It is very seldom, that the Court, before whom such an affidavit is wantonly and maliciously exhibited, interfere by their censure.

This is an absolute direct and unprovoked charge of perjury: it is a libel, in the form of an affidavit. Recrimination does not at all serve to shew innocence. This was not done to defend himself, but to asperse Sir John.

And the plea is no answer to the matter charged in the declaration. He is charged with meaning and intending to accuse Sir John of perjury: and he does not deny it. This is a matter of fact; which he ought to have answered.

[810] The plea admits "that this was a libel:" and the truth of a libel can not be justified.

Mr. Winn contra, was beginning to argue the case on behalf of the defendant.

But Lord Mansfield told him, it was unnecessary for him to speak to it; as the matter was so plain.

Here was a charge against the defendant in a Court of Justice, made upon oath, and supported by an affidavit of Sir J. A.: and in the affidavit of the defendant in answer to this complaint, he mentions the charge upon him, and denies it, with this conclusion of calling it "what Sir John Astley has so falsely sworn against him."

Now in every dispute in a Court of Justice, upon oath: where one by affidavit charges a thing, and the other by affidavit denies it; the case is ordinarily much the same (in effect) with the present; and each party may bring a civil action against the other: for it often happens that the affidavits and evidence are, in terms, directly opposite to each other.

As to the authorities cited, the former is not applicable to this case; and the latter even lessens the authority of the former: and though there may be a good deal of sense perhaps, in the opinion of Hawkins, yet neither of these two authorities relate to giving evidence, nor to a Court that has jurisdiction.

And as to the reason of the thing—There can be no scandal, if the allegation is material: and if it is not, the Court before whom the indignity is committed by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon record.

This that is now under our consideration, arose upon the very point in question: it is not a collateral recrimination. And nothing is more common than to use the word "untruly" upon these occasions; viz. "as the adverse party has untruly sworn:" which is much the same thing as the expression here used, "which Sir J. A. hath so falsely sworn against him."

In the case of *Lake v. King*, 1 Saund. 131, the matter charged as the foundation of that action, (which was an action upon the case for printing and publishing a scandalous libel upon the plaintiff,) was contained in a petition to a committee of Parliament for grievances, exhibited in a Court of Justice. It was agreed "that no action lay for exhibiting the petition, (which was law-[811]-ful,) although the matter contained in it was false and scandalous: because it was in a summary Court of Justice, and before those who had power to examine whether it was true or false:" and judgment was given for the defendant, upon this point, "that it was the order and course of proceeding in Parliament, to print and deliver copies, &c. of which the Court ought to take judicial notice."

There is another case, which is vastly stronger; viz. 1 Ro. Abr. 87, title "Action sur Case," letter M. pl. 4. In an action upon the case by A. against B. the plaintiff declares, that he took his oath in this Court of B. R. against B. of certain matters, to bind him (B.) to his good behaviour: and thereupon B. then said, falsely and maliciously, intending to scandalize the plaintiff, in the hearing of the justices and officers of the Court, and others there being, "there is not a word true in that affidavit; and I will prove it by forty witnesses." It was holden "that the action was not maintainable: for the answer which B. made to the said affidavit was a justification in law, and spoken only in defence of himself; and that in a legal and judicial way, (in as much as he said he would prove it by forty witnesses)".

As to the words, that case is quite parallel to the present: and they were only spoken in his own defence, and by way of justification in law, and in a legal and judicial way, in answer to a complaint made against him to the Court. So here the

defendant's affidavit is in defence to a complaint against him ; which complaint was supported by the affidavit of the present plaintiff Sir John Astley : in answer to which affidavit of Sir John's, the defendant made the affidavit containing the words upon which the present action is grounded.

This ought not to be made a matter of question : and we are all of us clear in the same opinion.

And if the matter of fact be justified, the epithets that the plaintiff has thrown into his declaration fall to the ground.

As to the words spoken by the defendant out of Court—there is a plea of not guilty to that count. So that that point is not now before us.

This expression was taken notice of by the Court, at the time when the affidavit was read ; and disapproved of indeed as to the word “falsely ;” which was thought too rough and coarse an expression, but yet was not judged to require a formal censure from the Court.

[812] Mr. Just. Denison concurred with his Lordship ; and thought the matter to be extremely plain.

As to the epithets and innuendoes thrown into the declaration, they are immaterial ; since the substantial fact itself is justified ; for if the matter is not actionable, the manner is of no consequence.

Mr. Just. Foster concurred.

Mr. Just. Wilmot also concurred ; and added, that the case in \*1 Ro. Abr. 87, pl. 4, is in † Sir William Jones, 431, and in ‖ March 20, pl. 45 : and in Sir William Jones the very word “false” is made use of ; le defendant malitiosè dit, “que ceo fuit false affidavit : et que 40 voilent jure al contrarie.”

Per Cur. unanimously, and clearly,

Judgment for the defendant.

MAUD *versus* BARNARD. Friday, 29th June, 1759. Writ may be served at any time of the return day, though after the rising of the Court. [See 2 Wils. 372, and 1 Durn. 192.]

The question, upon the regularity of serving a writ, was “whether a writ returnable on such a day can be served after the Court is risen upon that day.”

This service was at Rochester, in Kent ; about 8 o'clock in the evening.

To prove it irregular, were cited Cro. Eliz. 761, *Woolley v. Mosely*, (sub finem :) “A writ may be executed on the day of the return because the sheriff may have it in Court to return.” 2 Salk. 626, *Harvey v. Broud*—“A writ may be executed the day it is returnable ; but not after.” 6 Mod. 130, *Parkins v. Woollaston*, “The execution of a capias on the day of the return, sedente Curia, is good : secus, not.”

But Per Cur.—It must, at least, be proved by the person who objects to the service, “that the Court was up :” for, otherwise, we will intend it to be regular.

Lord Mansfield—And in the reason of the thing, it is as impossible for the sheriff to bring the defendant into Court before its rising, as before the end of the day of its rising, in all cases where the distance is too great to bring him up within either time ; as in the present case, from Rochester, after 7 or 8 in the evening ; which was the time when the process was served.

[813] But however, there was a case in point in this Court, in the 11 G. 2, \*2 *Powell v. Pugh*, or *Pugh v. Powell* ; where process was holden to be well served on the day of the return, after the rising of the Court.

Note—There have been more determinations of the same kind : viz. In the case of *Weyburn v. Neale*, M. 19 G. 2, 1745, B. R. Mr. Miller moved to stay proceedings, for that the defendant was served with the writ, on the day of return, at eleven at night. And it was sworn “that the Court was not sitting upon that day at five in the afternoon.” (In fact, it rose at two, that day.) And upon shewing cause, the rule “to shew cause why the proceedings should not be set aside,” was discharged.

In the case of *Hall v. Gutton*, H. 2 G. 2, B. R. the defendant was served on the

\*1 There called *Moulton and Clapham*.

† There called *Boulton v. Clapham*.

‖ There called *Molton v. Clapham*.

\*2 It was *Moss v. Powell*, Tr. 11, 12 G. 2 ; see the note below.



27th of November at seven in the evening : and the Court rose that day at three. It was denied "to stay proceedings."

In the case of *Moss v. Powell*, Tr. 11, 12 G. 2, B. R. the defendant was served with a copy of the process, between seven and eight in the evening of the day when the writ was returnable ; after the Court was up. The Court held the writ to be well served : and that the plaintiff had the whole day : and they would not take notice at what hour the Court rose.

Per Cur'—The rule "to shew cause why the proceedings in the present case should not be set aside," was discharged.

(So that the point is now settled).

*SYMES versus SYMES*. 1759. Prohibition does not lie after sentence. [See 4 Burr. 2035. 3 East, 477. 5 East, 348.]

A motion for a prohibition to the Ecclesiastical Court, was denied by the whole Court ; for that where the Ecclesiastical Court have jurisdiction (as in the present case they had,) and they have pronounced sentence, the remedy must be by appeal, and not by way of prohibition : but if they proceed where they have no jurisdiction at all ; there a prohibition may be applied for, after sentence in the Ecclesiastical Court.\*

They were clear that the present case was within the jurisdiction of the Ecclesiastical Court : and they had already given sentence of excommunication.

Therefore they refused even to make a rule to shew cause : though it was much pressed by Mr. Popham.

[814] *COPPENDALE versus BRIDGEN AND ANOTHER*. Saturday, 30th June, 1759. Nulla bona is a good return where the goods are affected by the defendant's bankruptcy. [See Bull. 41. 2 Durn. 142.]

This was an action on the case, against the defendants as Sheriff of Middlesex, for a false return, in returning "nulla bona" to a fieri facias directing them to levy 2050l. debt, and 6l. 10s. damages on the goods of John Debonaire, recovered against him by the plaintiff, in the Court of Common Pleas.

A special case was settled and agreed upon at the trial, (after the general issue pleaded ;) and a verdict was taken for the plaintiff, for 292l. 7s. damages, subject to the opinion of the Court upon the said case : which is as follows—

It was proved at the trial, that the plaintiff sued out a bill of Middlesex against Debonaire, on the 2d of May 1757, returnable on Wednesday next after three weeks from the day of Easter. That a precept was made out thereupon ; and the party arrested the same day. That being so under arrest, on the 4th of the same May, he was charged with process out of the Court of Common Pleas, at the suit of one Joseph Solomons : and was, the same day, brought by habeas corpus, to Mr. Just. Clive's chambers in Serjeant's Inn ; and committed to the Fleet, charged with both actions.

That the plaintiff in Trinity term 30, 31 G. 2, according to the course of the Court, obtained a judgment against him in the Court of Common Pleas, for 2000l. debt, and 6l. 10s. damages.

That on 17th June, a fieri facias thereupon issued, at the plaintiff's suit, to the Sheriff of Middlesex, returnable from the day of the Holy Trinity in three weeks, (which was the 26th day of June :) and that on the 18th of the same month, the defendants, being sheriff, took divers goods of the said Debonaire, in execution, and levied thereout the clear sum of 292l. 7s. And that on the 5th day of November the defendants returned "nulla bona."

It was also stated, that the said Debonaire was a trader within the intent of the several statutes concerning bankrupts ; and that he remained in custody, at the plaintiff's suit from the time of the first arrest, (which was on the said 2d of May 1757, as aforesaid,) until and upon the 2d of July following : on which day, he was discharged out of custody, as to the plaintiff's suit, but continued in custody, as the said Solomons's suit, until the 6th day of the same July. [815] And that a commission of bankruptcy, on the 5th day of the said July, was issued against the said Debonaire

\* V. post, *Full v. Hutchins*, Clerk.

and he was duly declared a bankrupt, on the same day : and on the 21st day of the same month, his effects were in due manner assigned.

And the question submitted to the Court is, "whether upon the whole of this case, the plaintiff is intitled to recover against the defendants in this action."

Mr Ashhurst for the plaintiff.

The question is whether Debonaire's lying in prison two months will have so far relation to the time of the first arrest, as to affect his goods which were taken in execution upon a process returnable before the two months were expired ; but not actually returned till after he had lain in prison two months.

The Act of 21 Jac. 1, c. 19, § 2, ought to be taken favourably for particular creditors.

As to the cases of *Came v. Coleman*, Tr. 2 W. & M. in Cam' Seac', 1 Salk. 109, and *Duncombe v. Walter*, Hil. 32, 33 C. 2, in C. B. 3 Lev. 57, and *Hill, et Al. v. Shish*, Pasch. 3 Jac. 2, in 2 Shower, 512, and *Smith v. Stracy*, Tr. 2 Ann. coram Holt at Nisi Prius, in 1 Salk. 110, 111.—There was a later case than any of<sup>\*1</sup> these, in P. 17 G. 2, C. B. of † *Tribe v. Webber* ; which denied that of *Smith v. Stracy*, and is full in point against it.

And he cited Skinner, 270, *Hinton's case*, and 1 Lord Raym. 724, *Cole v. Davies et Al*, *Assignees of Maul, a Bankrupt* ; and argued from them, "that the execution is good, to all intents and purposes : " and even the plaintiff himself, he said, would not have been obliged to refund the money, if it had been paid to him upon a return "that it was levied."

But the sheriff is undoubtedly liable to the plaintiff's demand ; because the truth of the return must be taken to be what was true at the return-day of the writ ; and it must be considered as if it had been actually returned upon the day whereon it was made returnable.

The case of ‖ *Cooper et Al' v. Chitty et Al'*, B. R. M. 1756, 30 G. 2, proves that no wrong would have been done by the sheriff, nor could he have been hurt, by [816] returning "that he had levied the money, and had it ready : " for at the return-day, the man was not a bankrupt.

And no subsequent relation can exculpate the sheriff for returning " nulla bona."

Mr. Yates for the defendants.

The question turns upon two considerations ;—

1st. Whether the present return shall be taken as a return made upon the return-day : and if so, then whether it was a good return, as supposed to be made upon the return-day.

2d. Whether it is to be taken as a return made upon the subsequent day, when it was actually made.

First—The relation is to the time of the first arrest. Consequently, the goods were not the bankrupt's goods, even at the time when the writ was returnable ; but were then, by such relation, the property of the assignees : the defendant Debonaire himself had then (by reason of such relation,) no interest in them ; nor consequently, could the plaintiff have any right to them vested in him by the seizure of them.

If a judgment is reversed, a plea of " nul tiel record " is good.

And as to the plaintiff's refunding the money, if he had received it upon a return of its being levied ; he answered, that if the plaintiff had actually received the money of the sheriff, he must have refunded it ; and he cited 2 Strange, 996, *Rush et Al' v. Baker*, as a proof of his assertion.

But secondly—The sheriff was not called upon to make a return, till the 5th of November ; which was long after the bankruptcy and the assignment.

And no fiction of law shall make an officer guilty of a false return. But here, the supposing the writ to have been actually returned at and upon the day, is a mere fiction, and contrary to the fact stated.

The sheriff had no right to take the goods of the assignees. And trover would lie against him for it, if he should do so. <sup>\*2</sup>*Cooper v. Chitty*, M. 1756, 30 G. 2,

<sup>\*1</sup> V. ante, pa. 438, *Rose v. Green*, where four of these cases are cited and discussed.

† Davis's Laws relating to Bankrupts, pa. 376, gives a full report of the case of *Tribe v. Webber* : and the different reports of the case of *Duncomb v. Walter*, are there compared and adjusted.

‖ V. ante, pa. 20.

<sup>\*2</sup> V. ante, p. 20.

B. R. was so determined. And the sheriff ought not to be liable to an action both ways.

[817] Mr. Ashhurst, in reply—

This is a complex act of bankruptcy: therefore it differs from a bankruptcy arising upon a single act. Here, the man is not a bankrupt, till he has lain two months in prison.

The right of seizure of the goods was vested in the plaintiff upon the day of the return: and therefore could not be devested by a subsequent assignment of them. And upon the day when the writ was returnable, no body could then say “that the defendant would lie in gaol two months, and by so doing become a bankrupt.”

This is not like the reversal of a judgment. For, here, the right to seize the goods was actually vested in the plaintiff: therefore the sheriff is guilty of a false return, in returning “nulla bona.” It was the duty of the sheriff, to make his return on the day when the writ was returnable; and he shall not profit by the not returning it in time.

As to 2 Strange, 996, *Rush et Al’, Assignees of Ryland, v. Baker*; though the action might lie in that case, against the defendant Baker, yet this plaintiff would not, in the present case, have been liable to refund the money, if he had received it upon a return “that it had been levied.” But if he would, the sheriff can not avail himself of that.

Lord Mansfield—This bankrupt was first arrested at the suit of the man who is the present plaintiff against the sheriff; he was afterwards charged in custody, at the suit of Solomons.

The 1st question is—Whether the return be false; i.e. whether these were the goods of the bankrupt, or not. And that depends upon the bankruptcy of the defendant in the original action.

If this man, Debonaire, was a bankrupt on the 2d of May, when he was first arrested at the plaintiff’s suit; or even upon the 4th of May, when he was charged in custody at the suit of Solomons; the goods could not belong to him, but must have belonged to the assignees, by relation backwards to that time.

Now the words of the \*1 Act are as plain as possible: they are “that all and every person, &c. who shall, &c. or, being arrested for debt, shall, after his or her arrest, lie in prison two months or more, upon that or any [818] other arrest or detention in prison for debt; shall be accounted and adjudged a bankrupt to all intents and purposes, from the time of his or her said first arrest.”

This man was arrested on the 2d of May, and on the 4th of May, was charged in custody, with that and another action: and it is admitted, “that he did lie two months in prison,” viz. till the 6th of July, at Solomon’s suit; and till the 2d of July, before he was discharged as to the plaintiff’s suit.

The lying two months in prison is a strong presumption that the person was insolvent at the time of the arrest. And the Act says that “if he lies in prison two months upon that, or any other arrest, he shall be adjudged a bankrupt from the time of the first arrest.” So that here is plainly an act of bankruptcy on the 4th of May; whatever dispute may be made about there being one upon the 2d.

Consequently, the sheriff’s return is true.

If the sheriff had returned, “that he had levied, &c.” and had actually paid the money to the plaintiff, on the 26th of June, (which was within the two months,) the sheriff would have been excused; because it was impossible for him, at that time, to know that the defendant would lie two months in prison; and therefore he was under an invincible ignorance of this event. But the plaintiff could have had no advantage by this: for still he would have been liable to refund the money: although the sheriff might be excusable in paying it to him.

But at the time when this return was in fact made, it was then certainly true, and known to the plaintiff to be true, “that the man was become a bankrupt:” and the goods were then the property of the assignees.

And in the case of \*2 *Cooper v. Chitty et Al’*, it was determined “that in such case the sheriff might and ought to return nulla bona.” Therefore this is a plain case.

Nothing could support the plaintiff’s claim, but his shewing that the bankruptcy

\*1 21 Jac. 1, c. 19, s. 2.

\*2 V. ante, pa. 31 to 38.



was not incurred till after the 18th of June ; which was the time when the goods were taken in execution.

Mr. Just. Denison concurred.

When the sheriff made the return, it was then certainly true "that the defendant was a bankrupt, before the [819] taking of the goods." Indeed if he had returned the writ upon the day, when it was made returnable, perhaps he might have been himself justified in returning "that he had levied the goods," and even in paying the money over to the plaintiff : but yet the plaintiff must have refunded it, even in that case.

However, it is here stated, "that the return was made on the 5th of November : " which was long after the relation had taken place.

Mr. Just. Foster—The relation, in this case, is in favour of equity and justice ; and is expressly directed by the statute.

And this return is true : for the man was a bankrupt at the time of the sheriff's making it, by such relation backward, prior to the taking of the goods. If he had made this return on the day of the return of the writ, I cannot say that even that would have been a false return : because the relation is made to be to the time of the first arrest ; by the express words of the statute.

Mr. Just. Wilmot was of the same opinion with the rest of the Court.

The Act is positive, in making the bankruptcy to commence from the time of the first arrest ; wherever the trader shall lie in prison two months, upon that or any other arrest. And the reason why it should be so, is very obvious ; viz. because it is a presumption of his insolvency at the time of the arrest : for a man in trade must be very low, both in point of fortune and credit, who lies two months in prison, without being able either to pay his debt or to procure bail.

As to a return of this sort made on the 26th of June, which was the very day upon which the writ was made returnable ; I have some doubt about it, if that had been the case. I am not so clear that he could then have returned "nulla bona : " because, at that time, there was no act of bankruptcy ; and it was impossible for the sheriff to know that there would be one in future, by the man's lying two months in prison, and thereby becoming a bankrupt relatively to the time of the first arrest.

But there can be no sort of doubt but that at the time when the return was actually made, it was true "that the defendant was become a bankrupt, by having lain two months in prison : " and consequently, the goods were then the property of the assignees, by relation to the time of the first arrest.

[820] It appears to us, upon the state of the case, that the return was not actually made, till the 5th of November. And indeed if the sheriff had, at the very day of the return of the writ, returned "that he had levied the money," and had thereupon immediately paid it over to the plaintiff ; there could be no sort of doubt but that the assignees might nevertheless have recovered it back from the plaintiff. So that the plaintiff could not, even in that case, have profited by such return.

Per Cur. Let the postea be delivered to the defendants ; in order to have a judgment of nonsuit entered thereon.

COLLINS, SEN. *versus* COLLINS, JUN. Monday, 2d July, 1759. Set-off may be pleaded to a bond for payment of an annuity. [See Bull. 179. Sayer's L. of Dam. 67. 5 Ves. 330. 2 Durn. 389. 8 Durn. 126.]

Pas. 32 G. 2, Rot'lo. 405.

This was an action of debt upon bond.

The condition appeared, upon oyer, to be "to pay the plaintiff an annuity of 10l. a year during his life ; and likewise to maintain him in meat, drink, washing and lodging, in the dwelling-house at Crundall-End, for and during his life."

To this declaration, the defendant pleaded (by leave) several pleas.

As to the payment of the annuity of 10l. per annum—There was a plea of a set-off ; (viz. that only 60l. is due to the plaintiff on account of the said annuity ; and that the plaintiff owes him more than 60l. viz. 500l.).

As to the maintaining the plaintiff, &c.—There was a plea \* that the plaintiff

\* See this plea more at large, post, 821.

left the house voluntarily, and did not board and lodge in the house: so that he (the defendant) was not obliged to board, wash, and lodge him. But the defendant avers that he was always ready to maintain him, &c. at and in the house. (V. *infra*.)

The plaintiff demurs: and the defendant joins in demurrer.

The latter plea depended upon the words of the condition; which was,—“that if Joseph Collins the Younger, his heirs, executors or administrators, do, and shall, well and truly pay or cause to be paid unto Joseph Collins the Elder, and his assigns, yearly, and every year during his life, one annuity of 10l. of lawful money of Great Britain, clear of all taxes, &c. on the 25th of March [821] and 29th of September yearly; and if the said Joseph Collins the Younger, shall find, provide and allow to and for the said Joseph Collins the Elder, good and sufficient meat, drink, washing and lodging in the dwelling-house at Crundall-End aforesaid; then this obligation to be void: but if default shall be made in the payment of the said annuity of 10l. or any part thereof, at, or upon any or either of the days abovementioned for the payment thereof; or if he the said Joseph Collins the Younger shall neglect or refuse to maintain and keep the said Joseph Collins the Elder, during his natural life, as aforesaid: then, and in either of the said cases, to be and remain in full force and virtue.”

The defendant (having leave to plead several pleas, &c.) pleaded a set-off, (as is beforementioned) to the former part of the condition, which was for payment of the annuity. And, as to the latter, he pleaded, that the house at Crundall-End was the house where the said Joseph Collins the Younger dwelt, and ever since has dwelt, with his family; and that he did admit the said John Collins the Elder, and receive him into the said house: and did, until his departure after mentioned, find, provide, and allow to the said Joseph the Elder, meat, drink, &c. (in the words of the condition:) but that he the said Joseph the Elder, of his own accord, departed from the said house at Crundall-End, and has never yet returned, to be there provided with meat, drink, &c. (ut supra;) nor hath ever required to be provided with any, or to have any allowed, there. And the said Joseph the Younger has always been ready to have provided the said Joseph the Elder with meat, drink, &c. (ut supra,) at and in the said dwelling house, if he had not departed, or would have returned thither; but that he always has refused and still does refuse to return; but has continued absent from thence. Therefore he could not provide him with meat, drink, &c. (ut supra) at or in the said dwelling house.

To this plea, the plaintiff demurred: and the defendant joined in demurrer.

Mr. Serj. Poole, on behalf of the plaintiff, argued that this case of an annuity or yearly payment does not fall within the \*statute of 8 G. 2, c. 24, § 5, concerning set-offs; because the action is not brought for a sum complete and certain, but for a part of a growing sum payable for life: whereof future payments will be continually becoming due.

Now if the judgment be here entered for the remainder (as that Act directs,) it passes in rem judicatam; and the plaintiff cannot recover any more, on any future default of payment, upon the same bond.

[822] By § 4 of this Act, the provision for setting mutual debts one against the other, was looked upon as highly just and reasonable at all times: it is therefore provided that the clause in 2 G. 2, c. 22, “for setting mutual debts one against the other” shall be and remain in full force for ever.

Section 5 of this Act of 8 G. 2, c. 24, provides “that by virtue of the said clause in 2 G. 2, c. 22, (which is thereby made perpetual,) mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty: and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued, or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side: and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no

more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

This is not a bond conditioned for performance of covenants or agreements contained in any deed or writing: it contains a quite different and distinct condition. The present action is an action of debt upon a bond conditioned to pay an annuity and maintain a parent.

Mr. Serj. Hewitt contra—This is a new case.

The setting off of mutual debts arises on 2 G. 2, c. 22, § 13, (which was a temporary Act,) and on 8 G. 2, c. 24, § 4, 5, (which makes the former perpetual).

This last section (§ 5,) provides generally, "that wherever the debt arises upon a bond or specialty with a penalty, and accrues by reason of such penalty, a set-off may be pleaded." My brother Poole says, "it extends only to cases where the debt is a sum certain." But the words of the Act are general: and are not at all confined to sums certain. And the plaintiff may afterwards recover, for subsequent defaults; notwithstanding the prior judgment; for the penalty will always remain a duty.

Our plea covers the whole demand.

[823] Mr. Serj. Poole was beginning to reply—But \* an observation having been made by Mr. Just. Denison, upon the latter part of the condition;

Mr. Serj. Hewitt desired it might stand over till next paper-day; (intending to make a motion in the interim, for leave to amend). To which request the Court agreed.

*Uterius concilium.*

On the next paper-day, (26th June,) Mr. Serjeant Poole proceeded in his reply; (Serjeant Hewitt not having moved to amend). He argued, that a set-off could not be pleaded, under this Act: for this Act is general, and has no such provision as there is in the Act of 8, 9 W. 3, c. 11, § ult. viz. "that the judgment shall stand as a security." And therefore if the plaintiff should now recover judgment, there would be an end of the bond: and there would remain no security at all for future payment of the annuity.

And he agreed with Mr. Serjeant Hewitt, that this is a new case.

Mr. Serjeant Hewitt insisted, that this Act of 8 G. 2, c. 24, differs materially from 8, 9 W. 3, and from 4, 5 Ann. c. 16, § 13, for bringing in the money, and having the bond discharged. The present Act says, "that the plaintiff shall recover the sum truly and justly due, and no more." And my brother Poole says, "that after the matter is passed in rem judicatam, the plaintiff cannot afterwards recover any more upon the same bond." But I answer, "that the plaintiff would be at liberty to bring an action for any future breach:" for the present judgment (upon the set-off) would not be for the penalty, but only for the sum truly and justly due, and no more.

Lord Mansfield—These clauses in 8, 9 W. 3, c. 11, and 8 G. 2, c. 24, are extremely beneficial to the subject.

Therefore his Lordship chose, he said, to consider of it: and did not mean to give his opinion at present. However, by way of breaking case, he entered into an explication of the Acts; which he thought ought to be considered all together as being made in *pari materia*. So that stoppage or setting-off must have the same effect, under the 8 G. 2, as payment had under 8, 9 W. 3.

Therefore he thought, (at present,) that it was most beneficial to the subject, that in the case now before the Court, the set-off should be allowed. But he assured Serjeant Poole, that if they should be of that opinion on deliberation, he should not, as it was a new case, be caught by his demurrer: for that they would give him leave to withdraw it, and reply.

Cur. advis'.

[824] Lord Mansfield now delivered the resolution of the Court: viz. that they were all (upon deliberate consideration,) unanimously and clearly of opinion (as it struck him before) that this is a case within 8 G. 2, c. 24, § 4, 5, where mutual debts may be set-off, just as much as actual payment of the money might have been before.

He said he would consider how the law stood, before the Acts of 2 G. 2, c. 22, and 8 G. 2, c. 24, and under the Act of 8, 9 W. 3, c. 11.

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\* "Whether the son was not obliged to maintain his father, generally, wherever he should be; though he was obliged to lodge him only in that specific house."



The Act of 8, 9 W. 3, c. 11, is intitled, "An Act for the Better Preventing Frivolous and Vexatious Suits." The \*last clause of it is a provision intended to meet the case of non-performance of covenants and agreements secured by bonds or indentures; and which covenants or agreements are to be performed at different times, or the monies paid by instalments, &c.

Before that Act, a plaintiff could only assign one breach, upon such bond or indenture: and if the defendant could prove that the whole debt was paid, there was an end of the matter. But if the defendant had only paid part of the debt, and not the whole, then the judgment was taken for the whole penalty: and this judgment for the whole penalty stood as a security for the residue of the demand which remained unpaid. So that the judgment stood for the whole penalty, though only part remained due: and the plaintiff was justly intitled only to that, and no more; which often forced the defendant, in such a case, into expensive suits in equity, for relief.

To prevent which, the † last clause of this Act of 8, 9 W. 3, c. 11, provides, "that in all actions, in any of His Majesty's Courts of Record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit; and the jury shall assess damages and costs on so many of them as the plaintiff shall prove to have been broken: and the like judgment shall be entered on such verdict, as had been usually done in such like actions." Then there is a suitable provision for suggesting several breaches, where the judgment passes by default, confession, or on demurrer. Then the Act provides, "that if after judgment, and before execution executed, the defendant shall pay into Court all the damages and costs on the several breaches assigned and found, a stay of execution on the judgment shall be entered upon record: or if, by reason of any execution executed, [825] the plaintiff shall be fully paid and satisfied all such damages and costs, and the charges of such execution, then the body, lands or goods of the defendant shall be discharged of such execution; which shall likewise be entered upon record. But yet, in each case, the judgment shall remain as a further security, to answer damages to the plaintiff for future breaches; upon which, the plaintiff may have a *scire facies* on the judgment, suggesting other breaches: whereupon there shall be the like proceeding as was in the action of debt upon the bond, for assessing damages on such breaches; and on payment or satisfaction, as before, of such future damages, costs and charges as aforesaid; all further proceedings shall be again stayed; and so, toties quoties; and the defendant, his body, lands, or goods shall be discharged out of execution, as aforesaid."

A very beneficial remedy, and a very just one to the subject, this is. The judgment is to be for the whole penalty, and is to remain as a further security; though, execution is to be stayed on payment of the sum due, &c. So that the penalty is a security for the debt, interest and costs, upon any future breach.

Before this statute, the actual payment of money in discharge of the demand, was exactly upon the same foot, as the set-off of a debt is now put upon: and a plea of payment of a sum of money sufficient to discharge the whole demand was just the same then, as a set-off of a debt large enough to balance the whole demand is now: that is to say, it was a full answer to the plaintiff's demand; and he could have no judgment at all against the defendant.

But if it had come out, that there had been a failure of payment of any part of the plaintiff's just demand, the plaintiff would have been intitled to take his judgment for the whole penalty: (though execution was to be stayed on payment of damages already incurred, and costs;) and this judgment for the whole penalty was to stand as a security, to answer future breaches.

But the payment here intended was to be an actual payment. For stoppage, or setting-off debt against debt, was not then equivalent to actual payment; but cross actions must, at that time, have been brought, for the respective mutual debts.

Since these two very beneficial Acts of 2 G. 2, c. 22, and 8 G. 2, c. 24, stoppage, or setting-off of mutual debts, is become equivalent to actual payment: and a balance shall be struck, as in equity and justice it ought to be.

[826] At common law, before these Acts, if the plaintiff was as much, or even

more indebted to the defendant than the defendant was indebted to him, yet the defendant had no method to strike a balance: he could only go into a Court of Equity, for doing what is most clearly just and right to be done.

The 2 G. 2, c. 22, was made to answer this just and reasonable end; and enacts generally, "that, where there are mutual debts between the parties, one debt may be set against the other." Upon which Act of 2 G. 2, doubts about the different natures of debts have arisen, the 8 G. 2, c. 24, was thereupon made; the 5th section whereof is a † general provision without exception. So that the objections which have been here made, on the part of the plaintiff, are made by construction only.

It is objected, first, "that this is not an action brought upon a penalty for non-performance of an agreement or covenant contained in any indenture, deed or writing."

This is an agreement between the parties, and an agreement in writing; the condition of the bond is an agreement in writing; and people have frequently gone into Courts of Equity upon conditions of bonds, as being agreements in writing, to have a specific performance of them.

It is said that if the plaintiff should take his judgment upon this Act of Parliament, it would not be a judgment for the penalty, but a judgment only for the sum due, and no more; and that after the matter has once passed in rem judicatam, the plaintiff cannot afterwards recover any more upon this bond, whatever may become due by future non-payments, for that here is no provision "that the judgment shall stand as a security for future payments," as there was in the Act of 8, 9 W. 3, c. 11, made for the better preventing frivolous and vexatious suits.

The judgment is indeed by this Act of 8 G. 2 directed to be entered "for no more than shall appear to be justly and truly due to the plaintiff:" but as it is clearly within the words and meaning of the Act, that the penalty is to remain as a security against future breaches, in this case of a set-off pleaded, as much as it would have done upon the Act of 8, 9 W. 3, c. 11, if payment had been made agreeably to the directions therein contained.

But as this has not been before settled, "that a set-off may be pleaded in such a case as this, where the condition is for the payment of an annuity or growing sum," it would be hard to bind the plaintiff down [827] strictly to his demurrer. Therefore my brother Poole may move to withdraw the demurrer, and to reply in a proper manner: which will give the plaintiff an opportunity of disputing the debt pleaded by way of set off, if he thinks proper.

Which Mr. Serj. Poole moved accordingly: and the Court granted it; but added that it should be upon payment of costs.

*WILSON versus DAY.* 1759. [S. C. cited Brown. 100.] A colourable exception of part of the effects assigned will not prevent the operation of the bankrupt laws.

This was an action of trespass for breaking and entering the plaintiff's house, and taking away his goods. "Not guilty" was pleaded; and also (by leave) a justification under a commission of bankruptcy, awarded against one Lawson.

At the trial, the matter was referred to the opinion of the Court.

N.B. John Day (the defendant) was a messenger under the said commission of bankruptcy; and in this his justification, made title to the possession of the house under an assignment from the commissioners.

The general question reserved for the opinion of the Court was "whether an assignment made by Lawson was, in itself, an act of bankruptcy:" and it was directed to come on, by way of motion.

Lord Mansfield stated the material facts of the case to be to the following effect:—

One Lawson, a trader, who was concerned with one Titley in circulating notes, and was really indebted to the plaintiff Wilson, being in a fright on Titley's going off, sent for Wilson on the Thursday, (the 16th of November,) and told him "that Titley was gone off, and that many notes were standing out against him, and that he could not stand his ground;" and therefore proposed to secure Wilson: and on the Saturday following (the 18th of November) sent for an attorney and pressed him to draw an

\* V. § 13.

† See it, at large, ante, pa. 622.



assignment immediately from him the said Lawson to Wilson. The attorney could not do it till the Monday; and it was privately executed on that day, though it bore date on the preceding Saturday. It was executed to Wilson, to secure money really due to him, and which he was liable to pay on Lawson's account: and it purports to be only a security for such money, but does not liquidate the sum due. A day or two after, a defeasance was executed; which was a separate deed, making the former void upon payment of all the money due to [828] Wilson: but this defeasance did not specify how much it was, any more than the assignment did. After payment of Wilson's debt; as to the residue, it was to be in trust for Lawson himself. The assignment was a general assignment of every thing that Lawson had in the world; and imported that it was made to secure a large sum (1800l. or upwards). It begun with a recital "whereas I am obliged, upon urgent and necessary business, to leave London;" it recited also "that Lawson had not then money enough by him, nor could raise it soon enough to answer all the demands that Wilson had upon him." There was no counterpart: and the original remained in the custody and keeping of the assignor. No other possession was delivered, but only that a letter of attorney was given to one Betham (who was clerk to Lawson and privy to the whole, and who was concerned in the bad part of circulating the notes,) "to collect, receive, dispose, &c. &c.:" but the goods continued in Lawson's house. No notice was given to the debtors of Lawson, who owed him money, till Lawson went off; which was in a few days after. At the trial it appeared that the debt really due to Wilson from this Lawson, was about 1840l. although the deed, which recited Lawson's circumstances to be bad, and their manner of dealing, recited also that there might be about 3000l. that Wilson might be liable to pay, but mentions only 30l. as actually due; and then assigns every thing in the world to Wilson; debts, &c. &c. without any exception whatsoever.

Mr. Serj. Whitaker, Mr. Morton, and Mr. Yates were of counsel for the defendant.

They argued that the deed itself is fraudulent, and an act of bankruptcy within \*1 21 J. 1, c. 19, for it was in trust for Lawson himself after Wilson should be paid; and was executed privately at a tavern, on the Monday at night.

It was done in contemplation of Lawson's running away; and with intent to give Wilson the preference to other creditors; and was therefore a fraud upon the other creditors. It appears upon the face of the deed, "that Lawson was then become insolvent."

It assigns all his effects whatsoever; and neither values the effects assigned, nor liquidates Wilson's demand upon Lawson.

The visible possession was not altered: Betham remained the acting agent, as before.

This is like the case of \*2 *Sir Edward Worsley v. De Mattos et Al*, H. 1758, 31 G. 2, B. R.

[829] Mr. Norton and Mr. Aston contra, for Wilson the plaintiff.

This case differs from that of *De Mattos*. This is only in the nature of a mortgage, to secure Mr. Wilson's debt only, and indemnify him against the other demands to which he was liable, and what he was likely to suffer on Lawson's account. The sum of 1840l. was then actually due from Lawson to Wilson: and the principal operation of this deed was to secure that debt.

And a trader who is likely to become a bankrupt may give the preference to one creditor, rather than to another, at any time before his bankruptcy.

But it will be objected, "that this assignment was under a contemplation of his becoming bankrupt; and therefore is itself an act of bankruptcy."

Answer. This is only, or chiefly at least, a security for the 1840l. by way of mortgage; and was therefore made for a valuable consideration.

The deed does not import that he was absolutely unable to answer the demands upon him; but only "that he had not then money enough by him to answer them."

And the occasion and necessity of his absence from London is expressly recited to be "upon urgent and necessary business:" which is very different from his running away, or absconding.

\*1 § 2.

\*2 V. ante, 467.



The intent of this deed is, expressly, to retain only so much as will satisfy Wilson's demands (though those demands are not indeed particularly liquidated).

Lord Mansfield thought it a plain case, both upon the deed, and upon the collateral circumstances.

The system of the bankrupt laws is, that the bankrupt's effects shall be taken out of his own possession, and be divided equally amongst all his creditors.

In <sup>\*1</sup> *Gainor's case*, (of the black ginger,) the deed was holden to be void, and to be itself an act of bankruptcy: and yet, in that case only one creditor was virtually excluded.

[830] It is not necessary that the deed should be fraudulent, as between the parties: nor is this deed at all so; for it is a very fair deed, as to the parties. But it is made to prefer this Samuel Wilson to the bankrupt's other creditors.

Then he recited the deed, and particularly the following expressions in it; viz. "and whereas, by reason of, &c. I cannot at present raise, &c. so soon as the money due to the said S. W. will become payable; and whereas I am obliged, on account of necessary business, &c. to be absent, &c." And he observed, that the assignment is of every thing that he had in the world; not excepting even apparel, &c.

Now though a trader, before he becomes a bankrupt may prefer one creditor to another, and may pay him his debt: or may make a mortgage, with possession delivered; or (as was the case of <sup>\*2</sup> *Small v. Oudley*,) may assign part of his effects to one particular creditor: yet an assignment of his whole estate is of a very different consideration: that tends to defeat the whole system of the bankrupt laws.

Here he assigns all, and invests his own clerk with the management of his effects, instead of the commissioners.

This deed is an act of bankruptcy itself. It defeats the whole bankrupt law: nothing remains for the creditors in any shape: but his whole estate is put into the hands of his own trustees, immediately. Therefore he is of course a bankrupt, the moment he has executed this deed: for there is nothing at all left for his creditors. And this for an unliquidated demand, too: which makes it stronger.

Thus it stands upon the deed.

But the circumstances confirm it. For here is no visible change of possession; and the letter of attorney "to receive the debts" is a secret transaction, unknown to every body else; whereas, according to the case of † *Ryal v. Rowles*, there ought to be notice to the creditors.

Therefore I think this deed is in itself an act of bankruptcy.

Mr. Just. Denison concurred, for the same reasons.

And he also observed, that such a deed as this ought not to be established: because the whole power that [831] ought to be in the assignees is put into the hands of Betham the bankrupt's own clerk: which is directly contrary to the very end and intention of the bankrupt-laws.

It is apparent, that where a trader conveys his whole estate and effects, it must be with an intent to defeat his creditors in general. And here it is to satisfy an unliquidated demand too: which is a circumstance that serves to confirm its being the intention of the present deed.

All these cases must depend upon their circumstances: and here they are as strong as I ever met with. It is a case within the letter of the Act.

Mr. Just. Foster—A trader before bankruptcy, may pay a particular creditor, or he may mortgage his effects to a particular creditor, with possession delivered: and here it is a mortgage, it is true, with a resulting trust to Lawson; but here is no alteration of possession; no delivery; (which is the badge of ownership).

<sup>\*3</sup> *Twyne's case*.

This, if it were to be permitted, would defeat the whole system of the bankrupt-laws.

<sup>\*1</sup> See this case cited at large, in that of *Sir Edward Worsley et Al' v. De Mattos and Slader*, ante, 477.

<sup>\*2</sup> In December 1727, in *Canc'*: best reported in 2 Peere Wm. 427. But see it stated from the register book, in *De Mattos's case*, ante, 480, 481.

† 27th Jan. 1749, in *Canc'*. See this case also cited and discussed in that of *De Mattos*.

<sup>\*3</sup> 3 Co. 81 a.

Mr. Just. Wilmot was of the same opinion.

If this should be allowed, it would defeat all the bankrupt laws.

The deed is a conveyance of his whole estate and effects: and it appears to be made, when the trader was insolvent and running away.

A mortgage by a trader, of his effects, is good, if he parts with the possession: and the reason is, because he might have absolutely sold it, and paid the creditor the money.

But here is a conveyance of his whole estate and effects, and no possession delivered; no alteration of possession: but the same person, Betham, continued to act, just as he was used to do before.

Therefore this deed alone is an act of bankruptcy, without meddling with any other circumstance collateral to it.

This conveyance of the whole, without leaving any thing at all remaining towards satisfying the rest of his creditors, is a very different case from an assignment of a particular part of his effects, to a particular creditor.

[832] Lord Mansfield added, that a colourable exception of a small part of his estate or effects would not help the matter: for the Court would never suffer that an evasion should prevail, to take such a case out of the general rule, which is so essentially necessary to be observed, in order to a due execution of this system of laws.

The Court was therefore unanimous, (and clearly so,) that there ought, in this case, to be a judgment of nonsuit entered for the defendant.

REX *versus* BOYALL. 1759. Indictment does not lie for not performing statute labour on the highway. [See 4 Vin. 511, pl. 37. 5 Durn. 546.]

Mr. Winn shewed cause against quashing an indictment against the defendant, a parishioner of Market-Deeping in Lincolnshire, for not sending out his carts, &c. to the six days highway labour, pursuant to an order from the overseers, &c.

The indictment sets forth—That John Mawly and J. Thornton, on the 23d of June, &c. at the parish of M. being then and continually from thenceforth until after the 29th day of the said June the surveyors of the highways in the said parish, did appoint the said 29th day of June for the providing stones, &c. for the amendment of the highways; the same being one of the six days appointed for providing stones, &c. for amendment, &c. in the year for which they were surveyors. Then it sets forth that they gave public notice in the parish church, of their having appointed the said 29th of June for providing stones, &c. But that nevertheless the defendant, who on the said 23d of June, and until and after the said 29th of June, at the parish aforesaid, kept a draught, well knowing the premises, did not find and send, on the said 29th of June, one wain or cart furnished after the custom of the county with oxen or other proper cattle and other necessities meet to carry things convenient for that purpose, and also two able men with the same, for the providing stones, &c. for amendment of and working in the said highway in the parish aforesaid: but therein wholly neglected and made default; in contempt, &c. and against the form of the statute, &c.

V. 22 C. 2, c. 12, § 9: (which is the statute here intended).

Three objections were taken to this indictment: viz.

1st objection—That John Mawly and J. Thornton are not sufficiently alledged to be surveyors of the said high-ways: it is only “that they being surveyors, &c.” And is not said by whom they were appointed.

2d objection—It is not said, on what day they were so appointed: whereas a particular time is prescribed by the Act of Parliament for their appointment. V. § 12, which limits it to some day in Christmas week.

3d objection—That a \* particular remedy is appointed by this statute of 22 C. 2, c. 12, namely, in § 9 and 12: and therefore, this being a new offence created by this statute, and the statute, prescribing a particular remedy, that particular remedy must be pursued; and an indictment will not lie.

Mr. Winn's answers to the objections, were as follows—

To the 1st objection, he answered, that 2 Mod. 128, *Rex v. Moor*, is in point that

\* V. ante, 800 to 807, *Rex v. Robinson*; particularly pa. 804.

the words "being above such an age," are good in an indictment. And these words are "being then surveyors."

To the 2d objection,—He answered, that the allegation "that they being then surveyors," is sufficient; without specifying when they were so appointed.

To the third objection—That this is in itself an indictable offence; and was so, at the making of 22 C. 2, c. 12.

The Act of 2 & 3 Ph. & M. c. 8, is the first statute that gives a forfeiture for default in this respect. The 5 Eliz. c. 13, § 8, gives power to the sessions, to proceed to enquire of defaults, and to assess fines for them: (which must be by way of indictment). In West's Precedents, 2d part, § 218, anno 34 Eliz. there is an indictment for this same offence.

Or, perhaps, the defendant might be out of the jurisdiction of the justices; and if so, the justices could not proceed as the Act directs.

And this is a mandatory statute.

Mr. Vivian, contra.

In support of the 1st and 2d objections—It ought to have been mentioned by whom, and when the surveyors were appointed.

[834] In support of the 3d objection, he cited 2 Hawk. P. C. 211, § 4, where the \*1 rule is particularly and expressly laid down. And 22 C. 2, c. 12, § 9, prescribes a particular method; so also does § 12 of the same statute. In 7 Rep. 36, (on penal statutes,) it was resolved "that the Act which gives the penalty, ought to be pursued." Brownl. 106. *Rex v. Marriot*, 1 Show. 398. *Stephens v. Watson*, 1 Salk. 45. Palm. 388, S. P. 2 Ro. Rep. 299. Cro. Jac. 643, *Castle's case*. *Queen v. Watson*, cited in 6 Mod. 86. *Rex v. Davyes*, 3 Keb. 34. *Rex v. Sparks*, 3 Mod. 79.

Lord Mansfield—As to the 3d objection—It was an offence indictable before the appointment of the summary remedy prescribed by the Statute of 22 C. 2. The case of † *Rex v. Davis*, M. 28 G. 2, B. R. was of the same kind. Therefore the summary jurisdiction is || cumulative, (although there is another remedy given,) and does not exclude the common-law remedy.

I do not approve of indicting, where there is another remedy: it carries the appearance of ‡ oppression. Yet it is not to be understood that we are obliged to quash indictments upon motion, in every case, where they are not to be supported upon a demurrer.

As to the 1st objection—"being" is a sufficient averment.

And the 2d objection has nothing in it.

Mr. Just. Denison concurred.

The rule was therefore discharged.

REX versus COWLE. Tuesday, 3d July, 1759. Rules to shew cause why a supersedeas should not issue on a certiorari to return all indictments against the defendants, justices of the town of Berwick, discharged.

On shewing cause (upon Tuesday 22d January last) why a supersedeas should not issue, to a certiorari directed to the corporation-justices of Berwick, "to remove an indictment for an assault;" and also on the adverse party's shewing cause (at the same time) against other \*2 cross-rules for attachments against the justices to whom the said certiorari was directed, "for refusing to receive or return the said certiorari; and for committing the defendant to prison on his refusal to plead in their Court of Sessions and Gaol-Delivery, after he had offered his certiorari to them, and tendered sufficient and proper security thereupon;—"

[835] It was insisted by Sir Richard Lloyd, Mr. Clayton, and Mr. Selwyn, who were counsel for the corporation-justices (and consequently, argued for the supersedeas, and against the attachments,) that this Court have no jurisdiction over Berwick: where the proceedings are not according to the laws of England, but according to a quite different law.

\*1 V. ante, 805, the true rule of distinction declared by Lord Mansfield.

† See it cited at large, ante, 803, 804.

|| V. ante, 805, accord.

‡ V. ante, 804, accord.

\*2 See both rules (verbatim) at the end of this case, pa. 864.



Berwick, they said, was formerly part of Scotland, and was ours only by conquest, and remains unincorporated with England, and is governed by its own former laws.

It is in the very same situation as Ireland was, immediately after its being conquered. V. 8th vol. of State Trials, pa. 346, Prynne's argument in *Lord Maguire's case*.

A conquered country retains its own laws, till others are given by the conquerors. No certiorari therefore lies, to Berwick.

The proper method would be, to issue a commission, to judge according to their own laws. So as to Jamaica, Guernsey, Jersey, Sarke, &c. \*1 2 Salk. 411, *Blanckard v. Galdy*. Hale's History of the Common-Law, 183, 186, 187, 188, 189. *Calvin's case*, 7 Rep. 21, 23.

But suppose the King himself to be a party, it may be said "that he may choose his Court." Yet still it ought to be tried according to the laws of the place where the cause arises. And Hale, 186, does not contradict this: for he does not say where it shall be tried.

In 11 E. 3, (amongst the records of the Tower) as is asserted in *Calvin's case*, 7 Rep. 23 a. b. there is a commission to the King's justice of Berwick upon Tweed and Scotland, to try according to the laws of the place, "secundum legem et consuetudinem regni Scotiæ." And as Berwick is in no county, how or where could this matter be tried, if a certiorari should go.

A certiorari is a mandatory writ remedial. Therefore it can not extend beyond the realm of England. *Calvin's case* 20 a. is expressly so. And no certiorari ever did go; so as that there has been any proceeding upon it: perhaps they may have been sent out ex improviso: and nothing further done upon them.

To prove "that Berwick is no part of England," they cited 1 Sid. 381, 462, *Jackson and Crispe v. Mayor, &c. of Berwick*; and Godbolt 387, *Cremer and Tookley's case*; [836] where a case is cited, "of debt on an obligation, and the venue laid at Berwick; which was adjudged against the plaintiff; because the Court had not jurisdiction."

Informations indeed were lately granted, for bribery in the election for Berwick; though they never came to any effect. (*Rex v. Watson*, Hil. & Pasch. 1755.)

The Act of 8, 9 W. 3, c. 33, (which perpetuates 5, 6 W. & M. c. 11,) requires the recognizance to be conditioned "to try at the next assizes for the county, where the indictment was found." But Berwick is no county of England. 2 Show. 365, *Mayor of Berwick's case* declares so, and that the King's writ does not run into Berwick.

Therefore, if this certiorari should be granted, it would occasion a failure of justice.

Lord Mansfield said it was necessary for the Court to know the constitution of Berwick perfectly, and search it to the bottom, before they could give any opinion. And for that purpose

Both the Court themselves, and likewise the defendant's counsel, desired an opportunity of seeing the charters of that town.

The whole matter was therefore adjourned; that the charters of the Corporation of Berwick might be inspected and produced: which was accordingly afterwards done. And

The substance of their several charters is as follows—

From the year 1296, (when this town was conquered by Edward the First,) this corporation hath had several charters granted to it by different Kings and Queens of England; particularly one in the reign of Edward 4th; in the introduction to which, it appears "that several charters had been granted to the town of Berwick, by his ancestors, before his reign." It is to this effect—

\*2 Edward by the grace of God King of England and of France and Lord of Ireland, to all archbishops, bishops, abbots, priors, dukes, earles, barons, justices, sheriffs, ministers, and to all bailiffs and his faithful people, greeting—We have seen the charter of † Edward late King of England our progenitor, made in these words,—Edward by the grace of God King of England and of France and Lord of Ireland, to all archbishops, &c. &c. We have seen the charter which we lately caused to be made, in [837] these words, Edward by the grace of God King of England and Lord of Ireland, to all archbishops, &c. It appears to us by inspection of the rolls of the Chancery of \*3 Edward late King of England our grandfather, that our said grandfather

\*1 V. 4 Inst. 286.

\*2 Edw. 4th.

† Edw. 3d.

\*3 Edw. 1st.

caused his charter to be made in these words "Edward by the grace of God King of England, Lord of Ireland and Duke of Aquitain, to all archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, mayors, ministers, and to all bailiffs, and others his faithful people, greeting: know ye, &c." It makes this town of Berwick a free borough, and the men of it free burgesses: and after granting to them all the liberties and free customs of a free borough for ever, and empowering them to hold guilds and choose a mayor (to be sworn in before the King or before the Chancellor or Treasurer and Barons of Scotland, if the King be not present,) and four bailiffs, this charter goes on as follows (*viz.*)—"We further grant, that the aforesaid burgesses and their heirs their tenements which they have within the said borough and shall have hereafter, in their last will and testament may freely bequeath to whom they will, without lett of us or our heirs or ministers whatsoever; and that they shall not implead nor be impleaded elsewhere than within the same town or borough before the mayor and bailiffs aforesaid, *de aliquibus tenuris intrinsecis transgressionibus aut contractibus intra eundem burgum factis.* We grant furthermore (to the aforesaid burgesses) that they have the return of all our writs touching that borough; so that no sheriff nor other bailiff or ministers of ours enter that borough, to do any office there for any thing to that borough belonging, but in default of the mayor and bailiffs of the same borough: and that the said burgesses and their heirs, *per breviam nostram de cancellaria Scotiæ*, may choose a coroner *de seipsis*, &c." Then it grants a prison, and several privileges.

"Furthermore we will and grant that the said burgesses shall not be put upon any assizes, juries or recognitions, by reason of their intrinsic tenure, against their wills, out of the aforesaid borough."

This charter of Edward 1st grants two markets, a fair, and sundry other privileges to this corporation; and bears date on the 4th of August anno regni 30<sup>mo</sup>.

The charter of Edward 3d recites "that the former charter (of Edward 1st) afterwards fell into the hands of Robert A Brus, when he took the town of Berwick: and was carried away by him;" but Edward 3d by his first charter (dated the 4th June anno regni 10<sup>th</sup>) exemplifies and confirms it; and by his second charter (dated 28th March anno regni 30<sup>mo</sup>) which is an *inspeximus* of his own former charter, he furthermore grants [838] and confirms as follows—"And because we are so much the more affectioned to our realm of Scotland, for that the said realm, by our well beloved and trusty cousin Edward Baliol late King of the said realm of Scotland, was to us given and granted; and therefore we affect, with a more earnest desire, the honours and advantages as well of the same realm, as of the town of Berwick upon Tweed, which, from the hands of the Scots our enemies (who, at the time that we were employed in the parts of France about the expedition of our wars there, had invaded and taken it,) is by us nearly conquered; we have granted and by this our charter confirmed, for us and our heirs, that our burgesses, of the said town of Berwick their heirs and successors in the same town abiding and resident, have and hold all and singular the liberties above specified, and the same liberties and every of them from henceforth fully enjoy and use; and likewise that the same burgesses their heirs and successors be ruled by the same laws, customs and usages that the burgesses of the same town had and used in the time of Alexander of famous memory late King of Scotland; without impeachment of us or our heirs, justices, escheators, sheriffs, or other our bailiffs or ministers whatsoever; and that the customers, weighers, and all other officers whatsoever that in the same town shall happen to be assigned by us or our heirs, be resident and abiding upon their offices continually, so that by their absence or default merchants upon delivery of their merchandise be not lett nor hindered; and the said customers, weighers, and officers, or burgesses of the same town to give an account for any thing touching the said town, or their offices in the said town, or to answer for any trespasses, debts, covenants, or any contracts made or to be made in the same town, for the which they shall be bound to answer to us or our heirs, shall not be compelled to come elsewhere than before our chamberlain of the same town of Berwick, or our justices thereunto assigned within the said town of Berwick: so that the chamberlain always of the aforesaid town for the time being, for all things touching his office, shall make his account before our Treasurer and Barons of our Exchequer of England, as before this time hath been accustomed."

The charter of Edw. 4th concludes with approving and confirming *cartam prædictam* (the 2d charter of Edw. 3d) and bears date on the 18th of February anno regni 22<sup>mo</sup>.



Queen Elizabeth, by letters patent granted to the town of Berwick, dated 4th May anno regni 1<sup>mo</sup> after mentioning the letters patent of Queen Mary and of King Henry the 8th, and the above charter of Edward the 4th, ratifies and confirms every thing contained in Edward the 4th's charter, H. 8th's and Queen Mary's: which charter of Queen Mary is dated on the 25th of April anno regni [839] primo, and is an inspeximus and confirmation of that of King H. 8th, which charter of H. 8th bears date on the 6th November 2 H. 8, and is an inspeximus and confirmation of the charter of Edward the 4th.

But the charter under which the Corporation of Berwick now claim all their privileges, and which is confirmed to them by \* Act of Parliament, is that which was granted them by King James the 1st, dated 30 April anno regni secundo. The preamble to which, is as follows—

James, &c. Whereas our borough of Berwick upon Tweed is an ancient and populous borough; and the burgesses of the said borough, sometimes by the name of mayor, bailiffs, and burgesses of the same borough, and sometimes by other names, have had, used and enjoyed divers liberties, franchises, immunities, customs, pre-eminences, and other hereditaments, as well by divers charters and letters patent of divers our progenitors and predecessors Kings and Queens of England, as also by reason of divers prescriptions and customs used and had within the said borough; and whereas our well-beloved subjects the now mayor, bailiffs, and burgesses of the borough of Berwick upon Tweed aforesaid have humbly beseeched us "that we would exhibit and extend our Royal grace and bounty to the said mayor, bailiffs, and burgesses on this behalf, and that we will vouchsafe (for the better governing, ruling, and bettering of the said borough) by our letters patent to make, reduce, constitute and create anew the said mayor, bailiffs, and burgesses into one corporate and politic body, by the name of Mayor, Bailiffs, and Burgesses of the Borough of Berwick upon Tweed, with augmentation and additions of certain liberties, privileges, immunities, and franchises, as to us shall seem most expedient;" we therefore, willing that from henceforth for ever hereafter there be continually had and used one certain and undoubted manner in our said borough, of in and about the keeping of our peace, and for the ruling of the said borough and of our people there inhabiting and of others thither resorting, and that the said borough may be and remain in all future times a borough of peace and quiet, to the fear and terror of evil and the reward and nourishing of good men, and also that our peace and other facts of justice and good government may the better there be kept and done; and hoping that if the mayor, bailiffs, and burgesses of the said borough and their successors may by our Royal grant enjoy greater and larger dignities, privileges, jurisdictions, liberties, and franchises, then they will think themselves more especially and strongly obliged unto the performance and execution of their best service to us our heirs and successors; and also at the humble petition, &c. &c. We [840] have willed, ordained, &c. and by the presents, &c. do will and ordain, &c.

In this charter, amongst many other privileges, are the following: viz. a power to make bye-laws, and to fine or imprison such as break them; and also these ensuing clauses—

And we will, and for us our heirs and successors do grant to the said mayor, bailiffs, and burgesses and their successors, that they and their successors, from henceforth for ever hereafter, may have and hold, and may be able to have and hold within the said borough, a Court of Pleas, every Tuesday in every second week throughout the year, to be holden before the mayor, bailiffs, and recorder of the said borough for the time being, or before any three of them (whereof we will that the mayor of the said borough for the time being shall be one,) in the guild-hall or toll-booth of the said borough; and that they may hold, in that Court, by complaints in the same Court to be levied, or otherwise according to the laudable and reasonable customs before used and accustomed in the said borough, all and all manner of pleas, actions, suits, complaints, and demands, as well real as personal and mixed, of all personal transgressions whatsoever, with force and arms, and whatsoever other transgressions done, moved, arising, had or committed, or hereafter to be done, moved, had or committed within the said borough, suburbs, liberties, and precincts thereof, and of all and all manner of intrusials, tenures, burgages, lands, tenements, goods, chattles, debts, pleas



upon the case, deceits, accounts, covenants, detinues of charters, escripts, muniments, and chattles, the taking and detaining of beasts and cattle, and other contracts whatsoever of whatsoever cause or thing arising or in time to come happening to arise within the said borough, suburbs, liberties, and precincts thereof, to whatsoever sum or value the said transgressions, debts, accounts, covenants, deceits, detinues, or other contracts shall amount; and that such like pleas, complaints, quarrels, suits, and accounts may be there heard and determined before the said mayor, bailiffs, and recorder of the said borough for the time being or any three of them (whereof we will that the mayor of the said borough for the time being shall be one) by such and such like proceedings, ways and means according to the laws and customs of our kingdom of England, or according to the ancient reasonable and laudable customs of the said borough heretofore used and allowed in the said borough, and in as large manner and form as in any Court of Pleas in any city, borough or town corporate within this our kingdom of England or in our said borough of Berwick upon Tweed heretofore hath been used and accustomed or may or ought to be done. And further we will, and by these presents for us our heirs and successors do grant to the said mayor, bailiffs and burgesses of the said borough and their successors, that they and their successors from time to time in all issuing times [841] may have and may be of force to have the cognizance of all and all manner of pleas, quarrels, complaints, actions, and demands whatsoever as well real as personal and mixed, in what Courts soever of us our heirs and successors moved and begun or to be moved and begun, of whatsoever things, causes and matters happening, arising or growing within the said borough, suburbs, liberties and precincts thereof, as they have been anciently accustomed within the said borough.

Furthermore, we will, and by these presents for us our heirs and successors do grant to the said mayor, bailiffs, and burgesses of the said borough and their successors, that the said mayor, bailiffs, and burgesses of the borough for the time being be not put in assize, juries, attainments or other recognizances, by reason of any intrusials, tenures, or against their wills, without the said borough, and that the said burgesses of the said borough and their successors be not constrained or compelled by us our heirs or successors or our officers or servants of us our heirs or successors, to go or to be sent to war without the said borough and suburbs, liberties, and precincts thereof, but by the special commandment of us our heirs and successors, as before in the said borough hath been lawfully used and accustomed; and that no man may take lodging within the said borough by force or by livery of our marshals of us our heirs or successors. We have granted, moreover, and by these presents for us our heirs and successors of our special grace and of our certain knowledge and mere motion do grant to the said mayor, bailiffs, and burgesses of the borough and their successors, that they may have the return of all our writs, precepts and process of us our heirs and successors, of whatsoever Courts of us our heirs or successors coming and arising within the said borough, and the execution of them; so that no sheriff, minister or bailiff for us our heirs or successors shall enter into the said borough, suburbs, liberties, or precincts thereof, to do any office there for any belonging to the said borough, but in default of the mayor and bailiffs of the said borough. And further, of our special grace and of our certain knowledge and mere motion, we have given and granted and by these presents for us our heirs and successors do give and grant to the said mayor, bailiffs and burgesses of the said borough and their successors, that the said mayor, bailiffs and burgesses of the said borough or any of them, or the Custom-House officers or weighers of us our heirs and successors within the said borough for the time being or any of them, shall not be employed nor shall be compelled to answer for any intrusials, tenures, or transgressions, debts, contracts, accounts, or any other causes or things within the said borough, suburbs, liberties, limits, or precincts thereof done or to be done, elsewhere than within the said [842] borough before the mayor and bailiffs of the said borough and their successors, or before the justices of us our heirs and successors assigned unto it within the said borough and not elsewhere.

And further we will, and by these presents for us our heirs and successors do grant to the said mayor, bailiffs, and burgesses of the said borough and their successors, that the mayor of the said borough for the time being, and the recorder of the said borough for the time being, and such burgesses and aldermen of the said borough who have sustained the office of mayor of the said borough or hereafter shall sustain it,

after they have executed the said office of mayoralty, as long as they shall be burgesses and aldermen of the borough, and every one of them, may and shall be for ever hereafter from henceforth, within the said borough and within the suburbs, liberties, and precincts thereof, our justices for us, our heirs and successors, to keep and preserve and cause to be kept and preserved the peace of us our heirs and successors within the said borough, liberties and precincts thereof, and also to keep and cause to be kept all ordinances and statutes for the good of our peace and for the preservation of the same, and for the quiet ruling and governing our people published within the said borough, suburbs, liberties and precincts thereof in all their articles according to the force, form and effect of such ordinances and statutes, and to chastise, correct and punish all and all manner of persons whatsoever of what estate, degree or condition soever they shall be, offending against the form of those ordinances and statutes or any of them within the said borough, suburbs, liberties, and precincts thereof, and to do that all those within the said borough, suburbs, liberties, and precincts, thereof, who shall threaten any of our people to hurt their bodies or burn their houses to find sufficient security before them or any of them for the peace and good behaviour towards us and our liege people, and if they shall refuse to find such security then to cause them to be safely kept in the gaol and prison of the said borough until they find such security; and that the mayor, recorder and such of the aldermen or burgesses of the said borough who have at any time borne the office of mayor or hereafter shall bear it, after they have borne the said office of mayor of the said borough, and as long as they shall be burgesses or aldermen of that borough, or any three or more of them (whereof we will that the mayor and recorder of the said borough for the time being be two) may have from henceforth for ever hereafter full power and authority from time to time to enquire and determine within the said borough, suburbs, liberties, and precincts thereof of all and all manner of felonies, murders, homicides, robberies, assaults, riots, routs, forces, (forcible) entries into lands and tenements, trespasses against the peace of us our heirs and successors, unlawful conventicles, ambidexters, conspiracies, contempts, concealments, and [843] also of all misprisions, offences, misdeeds, defaults, negligences, causes and articles which do belong or hereafter may be able to belong to the authority or power of justices or keepers of the peace of us our heirs or successors, in as ample manner and form as any justices or keepers of the peace of us our heirs or successors in any of our counties within this our kingdom of England, by the laws and statutes of the same kingdom, for the offence so done and committed in the said county as justices of the peace, may be and may be able to hear and determine. And also we will, and by these presents for us our heirs and successors do grant to the said mayor, bailiffs, and burgesses, of the said borough and their successors, that the mayor and recorder of the said borough for the time being, and such like burgesses and aldermen of the said borough who at any time have borne or hereafter shall bear the office of mayor of the said borough, after that they have borne the said office, as long as they shall be burgesses and aldermen of the said borough, or any three or more of them (whereof we will that the mayor and recorder of the said borough shall be two,) from time to time hereafter may be our justices, and every one of them from time to time may be justices of us our heirs and successors, from time to time to deliver the gaol of the said borough of the prisoners being therein; and that the coroner for the time being shall make return from time to time, of all juries, inquisitions, pannels, attachments and indentures by him taken or hereafter to be taken before the said mayor, recorder and the said burgesses or aldermen of the said borough for the time being or any three or more of them (whereof we will that the mayor and recorder of the said borough for the time being shall be two,) when and as often as they will deliver the said gaol of the prisoners being in that gaol; and be attending them in all things touching the said gaol delivery, and the commandments of the said mayor, recorder and burgesses or aldermen aforesaid for the time being or any three or more of them (whereof we will that the mayor and recorder of the said borough be two) shall execute from time to time, in the same manner and form as any Sheriff of our kingdom of England have accustomed and ought to do, return, intend and execute (any manner of way) by the laws and statutes of this our kingdom of England, before the Justices of Gaol Delivery in any the counties of the said kingdom; and that the same mayor, recorder and aldermen of the said borough for the time being or any three or more of them (whereof we will that the mayor and recorder of the said borough for the time being be two) may have and shall have, and



may erect from henceforth hereafter, a gallows within the said borough, suburbs, liberties, or precincts thereof to hang and execute felons, murderers, and other malefactors within the said borough adjudged to death according [844] to the laws of England; and that the said mayor, recorder, and such like burgesses or aldermen of the said borough who at any time have borne the office of mayor of the same borough or hereafter shall bear it, after that they have borne the said office, as long as they shall be burgesses or aldermen of the said borough or any three or more of them (whereof we will that the mayor and recorder of the said borough for the time being shall be two,) may take and arrest whatsoever felons, thieves or other malefactors within the said borough, suburbs, liberties, and precincts, thereof found or to be found, by themselves or by their ministers or deputies constituted in the said borough; and that they may carry them to the gaol within the said borough, there to be kept in safe custody until by due process of law they shall be delivered, any other ordinance, decree or custom to the contrary notwithstanding. Moreover we have granted and by these presents for us our heirs and successors of our special grace, certain knowledge and mere motion do grant to the said mayor, bailiffs and burgesses of the said borough and their successors, that they and their successors from henceforth for ever hereafter may have, enjoy, and receive, and may be able and of power to have, enjoy levy and receive, to the proper use and behalf of the said mayor, bailiffs, and burgesses of the said borough and their successors, and all manner of fines, ransoms and amerciaments whatsoever or for whatsoever trespass or other offence or other matters and causes committed and to be committed within the said borough, suburbs, liberties, and precincts thereof, and all and all manner of fines, issues, amerciaments, forfeitures, profits, and perquisites of the said Court, so to be imposed or forfeited before the said mayor, recorder and bailiffs in the Court of the said borough, and before the said mayor, recorder and the said aldermen of the said borough or any three or more of them as aforesaid as justices of the peace or of our gaol delivery within the said borough, liberties, or precincts thereof, for whatsoever cause or causes coming, happening, arising, or growing, as before hath been used and accustomed in the said borough; and also all and all manner of goods and chattels whatsoever waived, deodands, chattels of felons and fugitives outlawed and to be outlawed, waived and to be waived, condemned and to be condemned, adjudged and to be adjudged, attained, convicted and to be convicted, of fugitives and men in exigents, of all and singular tenants, inhabitants and men resident in the said borough, suburbs, liberties and precincts thereof, from time to time arising, happening and coming; and that it shall be lawful to the said mayor bailiffs and burgesses of the said borough, and their successors, the same fines, issues, amerciaments, forfeitures and profits from time to time to levy and collect, by the proper ministers of the said mayor, bailiffs and burgesses of the said borough, according to the laws and customs of England, or according to the ancient customs of the said borough.

[845] And further, of our abounding special grace and of our certain knowledge and mere motion, we grant and confirm, for us our heirs and successors, to the said mayor, bailiffs and burgesses of the said borough and their successors, all and all manner of lawful liberties, grants, franchises, immunities, privileges, exemptions, quittances, jurisdictions, customs, and free usages, as well by land as by water, as well within as without the said borough, suburbs, liberties, limits and precincts thereof, through our whole land and power, in these our present charters, or in any other charters of our progenitors or predecessors, Kings and Queens of England, expressed or not expressed; and also all and singular such lands, tenements, hereditaments, customs, liberties, privileges, franchises, immunities, quittances, exemptions, and jurisdictions, which the mayor, bailiffs, and burgesses of the said borough, or any of them, by what means or names soever, or by what incorporation soever or pretence of any incorporation, heretofore have had, used, or enjoyed, or ought to have, hold, use or enjoy, to them or their successors for ever, of state of inheritance, by reason or pretext of any charters or letters patent, or of any use, prescription, or custom, or by any other manner, right, or title, heretofore had, used, or accustomed; notwithstanding that any charters aforesaid were carried away and removed from thence, by Robert Bruce King of Scotland, our progenitor; and notwithstanding that the said borough of Berwick hath come into the hands of our progenitors Kings of Scotland, after the said grants of our said progenitors Kings of England; and although the said mayor, bailiffs, and burgesses of the said borough, or their predecessors or burgesses of the



said borough, or any of them, by whatsoever name or names, or by whatsoever incorporation or pretext of any incorporation heretofore known or incorporated or not incorporated, have used or enjoyed, or not used or enjoyed the said liberties, grants, franchises, immunities, privileges, usages, and free customs: and we, of our special grace, all and singular the things above before granted and recited, for us our heirs and successors, to the same mayor, bailiffs and burgesses of the said borough, and their successors, do grant and confirm, and for ever strengthen, by these presents. Wherefore we will, and firmly command, for us our heirs and successors, that the said mayor, bailiffs, and burgesses and their successors may have, hold, use, and enjoy for ever, all liberties, authorities, jurisdictions, franchises, and quittances aforesaid, according to the tenor and effect of these our letters patent, without lett or hindrance of us our heirs and successors, or justices, sheriffs, or other bailiffs or ministers whatsoever, or of any other of them; nulling and forbidding that the same mayor, bailiffs and burgesses, and the men of the said borough, or any of them, or any of the burgesses of the [846] said borough, by reason of the premises or any of them, by us or by our heirs, justices, sheriffs, escheators, or other bailiffs or ministers of us, our heirs or successors whatsoever, be letted, molested or grieved, or in any thing disturbed thereof.

Some other clauses of this charter, (and which were produced by those who supported the rule for the certiorari,) were as follows—

And further of our abundant grace, we will, and by these presents for us, our heirs and successors, do grant to the said mayor, bailiffs, and burgesses, of the said borough and their successors, that the mayor, bailiffs, and burgesses of the borough aforesaid or the greater part of them (whereof we will that the mayor of the said borough for the time being shall be one) shall have and by these presents may have full authority, power, and faculty, of framing, constituting, appointing, ordaining, making, and establishing, from time to time, such like laws, statutes, ordinances, and constitutions which to them or the greater part of them (whereof we will that the mayor for the time being of the said borough shall be one,) in their best discretion shall be thought to be good, profitable, wholesome, honest, and necessary, for the good rule and government of the mayor, and bailiffs, and burgesses aforesaid, and all and singular other burgesses, officers, ministers, artificers, inhabitants, and residents whatsoever within the said borough for the time being.

And that the mayor, bailiffs and burgesses of the borough aforesaid for the time being, or the greater part of them (whereof we will that the mayor of the said borough for the time being be one,) as often as they shall frame, establish or ordain such like laws, institutions, orders, ordinances, and constitutions, in form aforesaid, may and may have power to make, ordain, limit and provide such like pains, punishments, and penalties, by bodily imprisonment or by fines and amerciaments or by either of them, upon and against all offenders against such the laws, institutions, decrees, constitutions, and ordinances, or any of them, as to the said mayor, bailiffs and burgesses for the time being or the greater part of them (whereof we will that the mayor of the said borough for the time being be one) shall be thought fit, necessary and requisite to be done for the observation of the same laws, ordinances, and constitutions; and to levy and have the same fines and amerciaments, to the use and behoof of the aforesaid mayor, bailiffs, and burgesses, of the said borough and their successors, without hindrance of us our heirs or successors, and without any account therefore to be made to us our heirs or successors or ministers of us our heirs [847] or successors: all and singular which laws, ordinances, and constitutions, to be made as aforesaid, we will shall be observed, under the pains therein to be contained; so always that the said laws, ordinances, institutions, constitutions, imprisonments, fines and amerciaments may be reasonable, and not repugnant or contrary to the laws, statutes, customs, or rights of our kingdom of England, or reasonable and laudable prescriptions and customs in the said borough anciently used and accustomed.

There are also several other clauses contained in King James's charter, not pertinent to the present question.

On Friday 25th May last, Sir Richard Lloyd, Mr. Gould, Mr. Yates, and Mr. Selwyn, who were of counsel for superseding the certiorari, argued upon the three following questions.

1st question—Whether Berwick is part of the realm of England.

2d question—Whether it is governed by the laws of England.

3d question—Whether, supposing that it is, it would follow “that a certiorari lies.”

First—To prove that Berwick is not part of the territorial realm of England, they cited *Calvin's case*, (6 Jac. 1). 7 Rep. 23, express and *Craw v. Ramsey*, Vaughan, 278, 300. 2 Vent. 4, S. C. and *Currie's case*, cited in 3 Leon. 20, and the statute of 21 H. 8, c. 6, concerning mortuaries, (five or six years before the incorporating Wales with England), § 7, which shews the sense of the Legislature, “That Berwick and Calais were not comprehended within the term realm of England.” So also is 1 Mod. 37, *Crisp's case v. Mayor of Berwick*; and Vaughan, 414, concerning process into Wales.

And not being part of the realm of England, it is <sup>\*1</sup> not bound by Act of Parliament, unless named: for which reason, in 1 W. & M. (the Act for Encouraging the Exportation of Corn,) Berwick not being mentioned, a new Act was made, which named it expressly.

Second question—The charters could not make the inhabitants of this conquered place to be subjects of England: and the charter of Ed. 4 directs that they shall be governed by laws received from Alexander King of Scotland. The charter of 1 Jac. 1, (which was confirmed by Act of Parliament) establishes their old usages; and gives them a Court of Oyer and Terminer, and a Court of Gaol Delivery, with an express exclusion of all other jurisdictions out of the town of Berwick: but neither this charter nor this Act of Parliament gave them title to the laws of England.

[848] 21 Ed. 1, Parliament roll—*Boyl v. Barnaby*, proves that they were governed by the laws of Scotland. And it appears from 2 Peere Wms. 75, 76, <sup>\*2</sup> that the laws of a conquered country shall hold place, till new ones are given to them by the conqueror. So also is 1 Salk. 411, *Blankard v. Gally*. And if they are governed by their own laws, it would be nugatory and fruitless, for this Court to issue a certiorari to them.

Third question—There is no difference between Berwick and Ireland, as to this point: and according to 2 Vent. 7, a certiorari will not lie to remove an indictment from Ireland.

In Vaughan, 403, 404, it appears that he was of opinion “that the alteration of the jurisdiction in Wales might most probably be wrought by an Act of Parliament not now extant.”

A certiorari would not only create delay; but would occasion an insuperable difficulty of trial: and it would be nugatory to grant one, where the Court cannot proceed upon it; as in *Dr. Sands's case*, 1 Salk. 145, where it was, for that very reason, denied.

Now all indictable offences are local: therefore, they must be tried † there. And yet no process of this Court would lie there; nor could the trial be in the adjoining English county, because Berwick is no county in England. 2 Shower, 365, *Mayor of Berwick's case*. The case of county bridges is the only criminal case, where the trial may be in the adjoining county, upon suggestion: for all the precedents are of civil cases, and those transitory too. Salk. 651, title Trial, pl. 31, *Way v. Yally*. And there is no precedent of any cause removed from Berwick and finally determined here.

Mr. Norton contra—The general question is, “whether a certiorari will lie to Berwick, to remove an indictment found at a general gaol-delivery there, for a misdemeanor.”

The case now under consideration requires it, if any can; since the Judge who is to try the cause is both party and witness.

The answer that has been insisted upon, is “that Berwick is an exempt jurisdiction; and no certiorari lies thither.”

Three objections have been made to this certiorari: (1st.) That Berwick is not part of the realm of England; (2d.) If it is, yet it is not governed by English laws: (3d.) That if the Court should grant the certiorari, yet they can not proceed upon it.

[849] I premise that this Court hath a general supervision of all inferior jurisdic-

<sup>\*1</sup> Sed v. 20 G. 2, c. 42, s. 3, which declares and enacts, “that in all cases where England hath been or shall be mentioned in any Act of Parliament, the same has been and shall be deemed to comprehend and include Wales and Berwick.”

<sup>\*2</sup> It is the third resolution of the Privy Council.

† V. 5, 6 W. and M. c. 11. 8, 9 W. 3, c. 33, (but they only relate to Quarter Sessions).

tions in England: and, they may also grant certioraris, before it appears whether they can proceed upon them or not.

Answer to 1st objection—The clause in 20 G. 2, c. 42, § 3, proves clearly “that Berwick is part of the realm of England.”

The argument also from their sending members to represent them in Parliament, is irrefragable. And Prynne’s Parliamentary Writs prove that Berwick sent members, before the time of Ed. 4.

This Court constantly sends certioraris to the Cinque Ports.

Answer to 2d objection—Their charter of 1 Jac. 1 ties them down, to proceed by the laws of England, in criminal matters. Consequently, this Court will superintend their proceedings under their charters. And their acceptance of a charter which subjects them to the laws of England, renders them liable to this superintendency.

The 3d objection would come more properly, upon the return of the certiorari: the writ ought to be obeyed, and a return made.

Answer to the 3d objection—But however, from the necessity of the case, this matter must be tried in the adjoining county; like the case of Wales, or of county-bridges: both of which are done by the Court’s general power, and to prevent failure of justice.

An indictment is no more local than a real action is: and yet these are tried in Northumberland. And the Militia-Act considers Berwick as being in Northumberland.

Precedents too are not wanting. In 3 Jac. B. R. an information *qui tam*, &c. on the Statute of Uniformity, was brought up by certiorari; and process issued. In M. 8 Ann. an information in this Court was granted for an offence in Berwick; and the rule was made absolute. In 9 G. 1, B. R. there was a mandamus to swear Wilson and three others churchwardens of Berwick. And Berwick is put under the ecclesiastical jurisdiction of the \* diocese of Durham, by their charter. In 1754, an indictment against Moscroft and two others, for an assault, was removed hither, from thence, by certiorari: and they appeared and pleaded. In H. and P. 1755, in the contest between Mr. Wilkes and Mr. Watson, informations for bribery were granted: the rules were made absolute.

[850] The affidavits of the facts being read, it appeared that the indictment was for an assault upon the then mayor, who still continues a justice of peace for the borough of Berwick.

Lord Mansfield said, it would be proper to look into the precedents that had been cited; and they would give their opinion, next term.

*Curia advisare vult.*

Lord Mansfield now delivered the opinion of the Court, to the following effect.

The objections and arguments that have been urged against this certiorari may be reduced to the following heads.

1st. That this Court has no jurisdiction over the town and borough of Berwick, or any local matters arising there; because it is not to be deemed part of the realm of England, and the King’s writ does not run there: consequently, this Court has no authority to remove a record from thence, by writ of certiorari, for any purpose whatsoever.

2dly. That supposing the Court may, for some purposes, have jurisdiction there, yet the end, for which the certiorari is desired upon the present occasion, can not be attained.

3dly. That though the Court should have authority, and the end be attainable; yet the ground, upon which the certiorari is applied for, is not sufficient.

As to the first—The best way of considering it, may be, concisely to deduce the condition and constitution of Berwick contrasted with Wales; to shew that arguments from the case of Wales hold to Berwick, equally at least, in all respects; in many, *à fortiori*.

Edward the First conceived the great design of annexing all other parts of the island of Great Britain to the realm of England. The better to effectuate his idea, as time should offer occasion, he maintained “that all the parts thereof, not in his own hands or possession, were holden of his Crown.”

The consequence of this doctrine was, that, by the feudal law, supreme jurisdiction resulted to him, in right of his Crown, as Sovereign Lord, in many cases [851]



which he might lay hold of; and when the said territories should come into his hands and possession, they would come back as parcel of the realm of England, from which, (by fiction of law at least,) they had been originally severed.

This doctrine was literally true, as to the Counties Palatine of Chester and Durham.

But, (no matter upon what foundation) he maintained that the principality of Wales was holden of the imperial Crown of England: he treated the Prince of Wales as a rebellious vassal; subdued him, and took possession of the principality. Whereupon, on the 4th of December in the 9th year of his reign, he issued a \*<sup>1</sup> commission to enquire “per quas leges et per quas consuetudines ante cessores nostri reges regere consueverant principem Walliæ et barones Walenses Walliæ et pares suos et alios inferiores et eorum pares, &c.”

If the principality was feudatory, the conclusion necessarily followed, “that it was under the Government of the King’s laws, and the King’s Courts, in cases proper for them to interpose:” though (like Counties Palatine) they had peculiar laws and customs, jura regalia, and complete jurisdiction, at home.

There was a writ at the same time issued to all his officers in Wales, “to give information to the commissioners:” and there were fourteen interrogatories specifying the points to be inquired into. The \*<sup>2</sup> Statute of Rutland refers to this inquiry. By \*<sup>2</sup> that statute he does not annex Wales to England, but recites it as a consequence of its coming into his hands—“Divina providentia terram Walliæ, prius nobis jure feodali subjectam, jam in proprietatis nostre dominium convertit, et coronæ regni Angliæ, tanquam partem corporis ejusdem, annexuit et univit.”

The 27 H. 8, c. 26, adheres to the same plan, and recites “that Wales ever hath been incorporated, annexed, united, and subject to and under the imperial Crown of this realm, as a very member, and joint of the same.”

Edward the First having succeeded as to Wales, maintained likewise “that Scotland was holden of the Crown of England.”

That jurisdiction which resulted to him as superior lord, he often exercised as sitting in this Court—\*<sup>3</sup> upon a complaint of a burgess of Berwick, against his own commissioners, whom he would not suffer to be tried in the Courts of the King of Scotland—†<sup>1</sup> Upon complaint of a merchant.—||<sup>1</sup> Upon a complaint of M’Duff—†<sup>1</sup> Upon a complaint of Austria claiming the Isle of Man.—||<sup>2</sup> Upon [852] a complaint of the Abbot of Reading—¶ Upon a complaint of the Bishop of Durham claiming the town of Berwick, as belonging to his see. In the 24th year of his reign, he treated the King of Scotland as a rebellious vassal; and took Berwick, and the rest of Scotland, into his own hands and possession. And as this Court exercised that jurisdiction which resulted to the King, in the capacity of superior lord of Scotland; à fortiori, it did so, when the county came into the King’s hands and possession. Therefore the Court of King’s Bench ‡<sup>2</sup> actually sat at Roxburgh in Scotland.

\*<sup>1</sup> While he continued in possession of Scotland, he granted a charter to the town and borough of Berwick, under the Great Seal of England, (though he then had a Great Seal of Scotland). The charter requires the mayor to be sworn before his Chancellor or Treasurer, and Barons of his Exchequer in Scotland; and the writ to chuse a coroner is to issue out of his Chancery in Scotland. He seems to consider the whole country as united into one realm; for the privileges are given “per totum regnum et potestatem nostram in terra et potestate nostra.”

In a few years, Berwick with the rest of Scotland was lost; and continued so, many years.

†<sup>2</sup> Edward the 3d renounced all pretension to the kingdom of Scotland, in property, or superiority, divisum à regno Angliæ.

\*<sup>1</sup> Rotul’ Walliæ, 9 Ed. 1, M. 5. Leges Walliæ, Hoeli Boni, 518, published by Wotton.

\*<sup>2</sup> 12 Ed. 1. See it in the 2d vol. of the book of old statutes, intitled “Statu Walliæ.” See also in Hale’s Hist. of the Common Law, p. 183, 184, this preamble to it; and likewise in Vaughan, 400.

†<sup>1</sup> Rymer, 605.

||<sup>1</sup> 21 Ed. 1, Rymer, 606.

\*<sup>3</sup> Rymer, 2 vol. 596.

||<sup>2</sup> Rymer, 2 vol. 615.

¶ 22 Ed. 1, Rymer, 632,

†<sup>1</sup> Rymer, 608.

‡<sup>2</sup> Hale’s Hist. Common Law, fo. 201.

\*<sup>4</sup> 30 Ed. 1.

†<sup>2</sup> 2 Ed. 3, Rymer, 4th vol. 337.

<sup>1</sup> Edward the 3d procured from K. Ed. Baliol, and the Parliament of Scotland, a grant and cession of Berwick, separate from Scotland, for ever, "*et regali dignitati et coronæ ac regno Angliæ perpetuis temporibus annexa, unita, et incorporata.*" In the 10th year of his reign, he granted to Berwick an exemplification and confirmation of the charter of Ed. 1st.

Berwick was again lost, when Edward the 3d was in France; and retaken after his return: and, in the 30th year of his reign, he gave a new charter, confirming the former, with some additions; particularly, that they should be governed by the laws and usages, which they enjoyed in the time of Alexander late King of Scotland; (who reigned before the competition about that Crown).

Berwick was lost again; and again recovered by Edward the 4th, who confirmed the former charters, by a <sup>\*</sup>1 charter and <sup>†</sup>1 Act of Parliament.

[853] Between this time and the 33d of Hen. 8th (the particular time does not appear, because the returns are lost,) Berwick was summoned, as a borough of England, to send members to Parliament: and they did so, till the Union: and they still continue to send members to the Parliament of Great Britain, by summons, as being parcel of the realm, not under any of their charters, none of which give them such a right. That of E. 4 is an *inspeximus* of the preceding ones: and the charters of 19th April, 1 H. 8, 25th April, 1 Qu. Mary, 4 May, 1 Qu. Eliz. are confirmatory charters only. None of them give them a right to send members to Parliament: and yet they have sent them, ever since King Henry the 8th's time.

Their present constitution is under letters patent granted in <sup>\*</sup>2 Jac. 1, which are expressly confirmed by <sup>†</sup>2 Act of Parliament. Under these, they act: and they have had no charter since.

Before the Union, Berwick was bound by every English general Act of Parliament, in like manner as Wales was bound: and that was as being part of the realm of England. Where it is particularly named in Acts of Parliament, that is superfluous: and so also is the naming of Wales. If it was not part of England before the Union, it is now no part of Great Britain: for only England and Scotland are united. It is bound by all general laws since the Union.

In general Acts, not applicable to Scotland, and where Scotland is not intended to be included, the method is, by provision, to declare "it does not extend to Scotland." Where provisions are made for that part of Great Britain called England, Wales and Berwick upon Tweed are comprehended under that description.

Wales from the time it came into the hands of Ed. the 1st was deemed to be within the realm, upon the doctrine of having been holden before of his Crown: and in consequence of such tenure, by deductions from the principles of the common law, this Court exercises jurisdiction over matters in Wales given by no Act of Parliament; (for the <sup>1</sup>2 notion of "some old statute that has been lost," depends only upon a loose <sup>‡</sup> imperfect note of Ld. Ch. J. Vaughan's).

Scotland was considered upon the same foot.—This Court exercised the sovereign jurisdiction over it, before it came into the King's hands; and afterwards, at the time when the first charter was granted to Berwick. The chance of war refuted the claim of the rest of Scotland, as belonging to England; and confirmed it, as to Berwick.

But, if Berwick was to be deemed a dominion of the [854] Crown, and no part of the realm of England; it may be under the control and superintendence of the King in this Court.

The constitution given to Berwick by the Crown of England, approved by Parliament, shews it necessarily is so; much stronger than in the case of Counties Palatine or Wales. The people of Berwick have not *jura regalia*, or a complete jurisdiction within themselves, like a County Palatine: they have no sovereign Courts of the King within themselves, like Wales. They are made a free borough, to hold in burgage, by rent. Such a creature of law must necessarily be collected, as part of a kingdom, and subordinate

<sup>1</sup> 6, 7, 8 Ed. 3, Rymer, vol. 4, pa. 536, 590, to 595, 614.

<sup>\*</sup>1 22 Ed. 4. <sup>†</sup>1 22 Ed. 4, c. 8.

<sup>\*</sup>2 20th April 2 J. 1. <sup>†</sup>2 Jac. 1, c. 28, (called, in Hawkins's edition, 1 J. 1, c. 28).

<sup>1</sup>2 V. Vaughan, 403, 404.

<sup>‡</sup> V. Vaughan, 395, the memorandum in the margin.

In the time of King Alexander, they were subject to the Supreme Courts of Scotland. They could have no laws or customs but such as were suitable to the subordinate condition of a borough.

The metamorphosis from a Scotch to an English borough did not make them independent ; but only changed the sovereign jurisdiction. They are made a corporation in England ; to sue or be sued, in that capacity, in England : to take lands, in that capacity, in England. The burgesses in that capacity are to enjoy many privileges in England : they send representatives to Parliament, by summons, as a borough in England.

This Court alone can judge of their franchises, as a corporation : and who are intitled as members of it ; and what are their privileges ; and whether they continue to exist, or not : as, if you suppose a question to arise “ whether they are dissolved ; ” or, “ who is mayor, &c.” who can judge, but this Court ? the charter of James the 1st supposes it : because he commands the Attorney and Solicitor-General to bring no writ of quo warranto for things past. In Hilary term 14, 15 Car. 2, a quo warranto was brought in this Court, against the Mayor, Bailiffs and Burgesses of Berwick ; but not proceeded in.

Another part of their constitution, more immediately applicable to the present question, is what relates to pleas of the Crown.

The charter grants them a court leet agreeable to the laws and statutes of England ; a commission of peace and oyer and terminer, with the same authority which belongs, or hereafter may belong to justices of the peace in England ; and to hear and determine in like manner as justices of peace, by the laws and statutes of England. It grants them a commission of gaol delivery, under which they must proceed by indictment, according to the course of the law [855] of England ; as in fact, they always do, and have done in the present case. It grants a gallows, to execute those adjudged to death, according to the law of England.

The charter gives them power to make ordinances with penalties of fine and imprisonment : so as they be reasonable, and not repugnant to the laws, statutes and customs of England. In short, they have no criminal law, but the law of England ; and no criminal jurisdiction, but with such a reference to the law of England, as necessarily includes this Court.

Suppose they should adjudge a man to death, for a crime not capital by the law of England. Suppose they indict a man for disobeying an ordinance repugnant to the law of England. Suppose they should indict a man for treason, though the fact would not amount to treason within our laws ;—suppose, as justices of the peace, they make illegal orders without any authority, in a summary way ; there can be no redress but here : and if this Court could not interpose, they would, under the grant of a limited subordinate authority, be absolute.

Another objection is, “ the King’s writ does not run there.”

That is applicable only to the writ of venire, and other jury process ; or perhaps, to original writs which are the commencement of suits between party and party.

When this Court removes, by writ of certiorari, an indictment for a misdemeanor, from Wales, the Welch sheriff is commanded to cause the defendant to appear : and when he has appeared, and issue is joined, there is a suggestion “ that the King’s writ does not run into Wales.” So, the very record which says, “ the King’s writ does not run,” shews many that do.

The reason why a venire does not run to Berwick, is, because they are exempted from being summoned out of the borough, to serve upon juries.

But the charter supposes that other writs ministerially directed, may run : because the return of all writs, precepts and process issuing out of the King’s Courts, and the execution thereof, is granted to the mayor, bailiffs, and burgesses, exclusive of any sheriff, minister or bailiffs.

Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King,) such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no [856] clause in the constitution given to Berwick : upon a proper case, they may issue to every dominion of the Crown of England.

There is no doubt as to the power of this Court ; where the place is under the subjection of the Crown of England ; the only question is, as to the propriety.

To foreign dominions, which belong to a prince who succeeds to the throne of



England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland, or to the electorate: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Dutchy of Normandy, they have been considered as annexed to the Crown,\*<sup>1</sup> in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny.

But notwithstanding the power which the Court have, yet where they cannot judge of the cause, or give relief upon it, they would not think proper to interpose. Therefore upon imprisonments in Guernsey and Jersey, in Minorca, and in the plantations, I have known complaints to the King in Council, and orders to bail or discharge: but I do not remember an application for a writ of habeas corpus. Yet cases have formerly happened of persons illegally sent from hence and detained there, where a writ of habeas corpus out of this Court would be the properest and most effectual remedy.

In Cro. Jac. 543 a precedent is cited, in 43 Eliz. of a \*<sup>2</sup> habeas corpus to Berwick. I have caused the records to be searched for that case; and the orders of the Court, and return to the writ of habeas corpus are found. The Court had fined the Mayor and Bailiffs of Berwick 2000l. for not returning the † writ: they had also issued an alias habeas corpus. § Then, the alias habeas corpus not being returned, they ordered the fine to be estreated, and that a pluries habeas corpus should issue, sub pena 500 merc', returnable immediately before the Chief Justice at his chambers in Serjeant's Inn. At the same time, they issued an alias attachment against the mayor and bailiffs; and ordered *Ld. Willoughby*, then Governor of the town of Berwick, to execute it, returnable octabis Hilarii. The ‖ next day, the estreat of the fine was suspended, upon Henry Brearly's being discharged out of prison, and bailed to appear in this Court, at the octave of S. Hilary, (the return of the attachment against the mayor and bailiffs).

In Hilary term, they are \*<sup>3</sup> ordered to return the pluries [857] habeas corpus: and afterwards, the mayor and two of the bailiffs were committed, and examined upon interrogatories, as in contempt; and two of them were †<sup>1</sup> ordered to find bail at the suit of Henry Brearly, before they were discharged.

The return states the charter of Ed. 3d, and that by their laws and customs, the guild had authority to punish for colouring foreigner's goods, or being in partnership with a foreigner, by fine, imprisonment and disfranchising. They state that Henry Brearly was found guilty of being in partnership with a foreigner, and fined 100l. which he not only refused to pay, but treated them with scandalous and contumelious reproaches. That they duly committed him to prison, till the fine should be paid: and disfranchised him.

There is an order, the \*<sup>4</sup> same Hilary term, stated to be upon the recommendation of the Court, (therefore, I suppose, by consent,) "that the fine of 100l. set upon Brearly by the guild, should be reduced to 10l. and that upon his submission, he should be restored to his freedom:" (but he was to remain disfranchised till he should make his submission).

As to the other prerogative writ, of prohibition—It was taken for granted, in 2 Ro. Abr. 292, "that a prohibition lay, out of this Court to the Consistory Court of Durham, in a matter arising in Berwick:" though the suggestion "that the land out of which the tithes were claimed lay in Scotland and not in Berwick," was holden insufficient. (How Berwick †<sup>2</sup> came to be part of the diocese of Durham, I have not learned.)

Then, as to writs of mandamus—In Trin. 9 G. 1, a mandamus issued, directed to Sir Geo. Wheeler, to admit and swear four persons elected to be churchwardens of Berwick.

\*<sup>1</sup> V. Hale's Hist. Com. Law 184, to 189.

\*<sup>2</sup> For one Browley, as he is there called.

† M. 43 Eliz. hab. cor. for Henry Brearly, v. H. 43 Eliz. Rot'lo. 88.

§ Die Jovis prox. post, 15 Sancti Martini.

‖ The former was die Jovis, the latter die Veneris prox' post quinden' Sancti Martini A. 40 Eliz.

\*<sup>3</sup> Die Ven' prox' post octab' Sancti Hil. anno supradicto.

†<sup>1</sup> Die Sab'ti prox' post oct. Sancti Hil. A. 43 supradicto.

\*<sup>4</sup> Die Jovis prox' post octab' Pur.

†<sup>2</sup> V. ante, 489.

The Act of 11 G. 1, c. 4, proceeds upon the ground "that a writ of mandamus, out of this Court, lies to Berwick."

The last sort of writ not ministerially directed, is a certiorari.

A certiorari, for a proper purpose, lies to any dominion of the Crown of England. Mr. Just. Dodderidge, in <sup>†1</sup> *Sir John Carew's case*, says "the register makes mention of a certiorari to remove a record taken at Calais."

And there are precedents of certioraris to Berwick, directly.

[858] In Pasch. 3 Jac. 2, an indictment against Scott, Howlettson, and Watson, for a riot, &c. was removed from Berwick, by certiorari; process issued upon it, out of this Court, against the defendants, to appear. In Michaelmas term following, the indictment was quashed; and the town clerk of Berwick amerced 5l. for not returning the caption.

In Trinity vacation 1754, two indictments were removed from Berwick, by certiorari: the defendant appeared in this Court and pleaded not guilty.

There is no instance of a doubt ever having been made before the present case, concerning the authority of this Court, to send a writ of certiorari to Berwick. And we are all clearly of opinion, "that the Court, by law, has such power.

Two great authorities are indeed urged, in opposition to this; they are no less than those of Ld. Ch. Justice Coke, and Ld. Ch. Justice Hale.

Lord Coke, in <sup>\*1</sup> *Calvin's case*, says "that Berwick, is no part of England, nor governed by the laws of England." And Ld. Ch. Justice Hale follows him, and <sup>†2</sup> says "Berwick was sometimes parcel of Scotland; but was won by conquest by King Edward the First. And afterwards lost by King Edward the Second, and afterwards regained by Edward the Third. It was governed by the laws of Scotland, and their own particular customs; and not according to the rules of the law of England, further than as by custom it is there admitted." "Yet now," says he, "by charter, they send burgesses to the Parliament of England."

In *Calvin's case*, there was no question concerning the constitution of Berwick. And we plainly see, by what has passed in the present case, how little was known, even at Berwick itself, concerning its own constitution. What was dropped about it in *Calvin's case*, was a mere obiter opinion, thrown out by way of argument and example. My Lord Coke was very fond of multiplying precedents and authorities; and, in order to illustrate his subject, was apt, besides such authorities as were strictly applicable, to cite other cases which were not applicable to the particular question under his judicial consideration. In the case then under judicial consideration, the question was <sup>†1</sup> "whether Robert Calvin the plaintiff, born in Scotland after the descent of the Crown of England to King James the First, was an alien born, and consequently disabled to bring any real or personal action for any lands within the [859] realm of England." But it never was a doubt, "whether a person born in the conquered dominions of a country is subject to the King of the conquering country." And therefore the argument will not hold, from the case of Berwick to the point then in question: neither was the case of <sup>\*2</sup> Calais in any sort apposite to it.

As to the laws by which Berwick is governed—

Whatever may be the case (when more particularly inquired into) with regard to their <sup>†3</sup> civil constitution, it appears very sufficiently, that in Pleas of the Crown, Berwick has no other laws by which it is governed, but the laws of England. The statute of 11 G. 2, c. 19, for the more effectual securing the payment of rents and preventing frauds by tenants, supposes this. All the provisions of that Act are extended to Berwick, <sup>†2</sup> by name. Some of these provisions relate to ||ejectments, which concern civil matters: and they do proceed there by ejectment. But it is manifest that Lord Coke is mistaken in saying, generally, "that Berwick was not

<sup>†1</sup> V. Cro. Jac. 484.

<sup>†1</sup> 7 Co. 23 b.

<sup>†2</sup> Hale's Hist. Common Law of England, pa. 184. V. Rot. Parl. 16 R. 2, n. 41, 42.

<sup>†1</sup> *Calvin's case*, fo. 2 a.

<sup>\*2</sup> V. *Calvin's case*, 22 a.

<sup>†3</sup> V. Fitzherbert's Abridgment, title Obligation, pl. 15.

<sup>†2</sup> § 1, 11.

|| § 12, 13.

governed by the laws of England." For, in criminal matters, the fact is clearly otherwise.

And *Ld. Ch. J. Hale*, is as clearly mistaken, in saying "that Berwick sends members to the Parliament of England, by charter." For it is by writ of summons that they send them thither, in consequence of their being a borough. Chester, both county and city, first sent members to Parliament by virtue of an Act of Parliament \*<sup>1</sup> made in H. the 8th's time.

But though the Court has power by law, to send a writ of certiorari to Berwick, yet it ought not to issue in vain. And therefore we should be satisfied, that the end for which it is prayed be attainable : and the ground sufficient for removing the record, in order to attain that end. The end here avowed is, that the matter may be tried in this Court. And it is objected that there can be no such trial, because the trial must be local, and no jury can come from Berwick.

But the law is clear and uniform, as far back as it can be traced. Where the Court has jurisdiction of the matter, if, from any cause, it cannot be tried in the place, it shall be tried as near as may be. All local matters arising in Wales, triable in this Court, are by the \*<sup>2</sup> common law, tried by a jury of the next county in England. So, as to the †<sup>1</sup> Cinque Ports, the venire facias shall be awarded de vicineto of the next vill, either in the county of Kent, or the county of Sussex. So ‡ it is also as to the isle of Ely : so, § likewise as to Ireland ; a venire was directed to the Sheriff of Salop, as the next English county. So, in parts of England itself where an impartial trial cannot be had in the proper county, it shall be tried in the next : as 5 G. 1, *Reg. v. Inhabitants* [860] of the County of the City of Norwich, about the county bridge, the trial was in Suffolk.

This is the ancient and general rule, wherever the Court has jurisdiction : and this general rule has often been applied to Berwick.

Edward the First, by an ordinance in Parliament, extended these rules as to complaints against the King of Scotland, that they might be tried in this Court by a jury of Northumberland, or any other county, or before commissioners appointed by the King. There was a precedent applying this rule to Berwick, in 42 Eliz. affirmed upon a writ of error : and the like in 44 Eliz. The like\*<sup>3</sup> the 20 Car. 2, *Crispe and Jackson v. Mayor and Burgesses of Berwick*. And *The Mayor of Berwick's case*, ‡<sup>2</sup> 36 C. 2, lays down as a certain principle, that where a local matter arising at Berwick is tried here, there is to be a suggestion made on the roll, that "breve domini Regis ibi non currit," as it is in Wales. A tipstaff was in that case sent, to take the mayor up.

There are two precedents in the reign of Ja. 2, of informations in this Court for misdemeanors in Berwick : and in Michaelmas, 8 Ann. the †<sup>4</sup> Attorney General filed an information here for misdemeanors in Berwick. In Hilary and Easter 1755, this Court after much litigation, granted informations for ‡<sup>3</sup> bribery in Berwick, at the election of their members to Parliament, as being an offence and misdemeanor at the common law : which shews Berwick, in respect of the jurisdiction of this Court "to proceed originally by information for misdemeanors committed there," to be upon the same foot, as any other part of England. And the Court never would have granted those informations, without being satisfied "that they might be tried :" because a defect of power to try, necessarily infers a want of jurisdiction.

There is not one authority to the contrary. And in reason, it would be most absurd : because it would really be putting the place out of the protection of the law ; and there must, in many important cases, be a total failure of trial, and consequently, of justice.

Suppose the office of mayor should be usurped : the usurpation is a crime ; and

\*<sup>1</sup> 34 H. 8, c. 13.

\*<sup>2</sup> 19 H. 6, fo. 12 b. pl. 31.

†<sup>1</sup> 2 Ro. Abr. tit. Trial, letter I, pl. 6, 7, pa. 596, 597.

‡ *Howse v. Bishop of Ely*, Moore, 88.

§ 2 Ro. Abr. 597, pl. 8.

\*<sup>3</sup> 1 Lev. 252. 1 Mod. 36, 37. 1 Sid. 381, 462. 1 Ventr. 58, 90. Raym. 173. 1 Keb. 414, 676.

†<sup>2</sup> 2 Shower, 365.

\*<sup>4</sup> Sir James Montagu. It was against Robert Mills and George Lindsay.

† V. ante, 849.



cannot be tried before the man himself who is accused, or any jurisdiction in the town. Much less could a question, "whether the corporation was dissolved," be tried before themselves. Such questions could not be tried originally before commissioners sent thither by the King: they could only be [861] judged in this Court. To try franchises of this kind in any other shape, would not only be contrary to the common law, but to the † Act abolishing the Star-Chamber, and all the statutes there recited.

Suppose an action between the corporation and their own lessee to be depending at Berwick, or any suit instituted there between the corporation and any other person, on a point of property; they could not judge in their own cause: and if it could not be tried elsewhere, there must be a failure of justice.

Every rule of the common law, which holds in the case of Wales, concludes a fortiori to Berwick; both as to the jurisdiction of this Court, and the method of trial. Berwick is only a borough; it has neither jura regalia nor Superior Courts: Wales had both. A small part of the county of Durham is nearer to Berwick than Northumberland is: but at the time of first sending process to the latter, the King's writ did not run to the former, being a County Palatine. So that Northumberland was the nearest English county for the purpose of trial; as the King's writ did not run to Durham.

†<sup>1</sup> The objection made when this matter first came on, appears now to be groundless: "that they proceeded by laws and usages, of which this Court cannot judge." Whereas, their trials as to criminal matters at least, are in the course of the common law, and entirely governed by the laws of England.

Therefore we are all of opinion that these indictments may be tried in this Court, by a jury of the county of Northumberland.

The 3d objection urged against the certiorari, was, that though it should be admitted "that the Court have authority to issue it, and that the end is attainable," yet there is not ground sufficient to take the trial from the ordinary local jurisdiction of Berwick.

Most certainly, the Court ought to be satisfied of the ground, before they send a certiorari for that purpose. The \* King has a right to chuse his Court: but upon the application of the defendant, there should be always a reason. †<sup>2</sup> The higher the inferior jurisdiction is, and the greater the inconveniences are of removing the cause, the stronger the reason should be: but a doubt, "whether a fair, impartial, or satisfactory trial or judgment can be had there," is a reason to remove from the highest.

In the case of || *Rex v. Lewis*, Tr. 12 G. 1, after considering the matter at different times, and looking into precedents; and there being an affidavit produced, [862] inducing a suspicion "that a fair trial could not be had in Wales;"—a certiorari was granted to remove the indictment from the Grand Sessions of Anglesea. This suspicion only, being properly verified by affidavit, was in that case holden to be a sufficient reason for removing that indictment from a very high Court.

Let us inquire into the reason alledged in the case now before us, "why there cannot be a fair trial in Berwick."

The defendant in this case swears to his innocence: and he and five more swear "that he cannot have a fair trial, owing to party differences, and great contentions that have lately happened in the borough. That the justices, before whom he is to be tried, warmly supported a motion to disfranchise him for the offence laid in this indictment: which was rejected by a great majority of the burgesses. That the matter of the indictment arose at an assembly of the corporation, in consequence of a violent division which engaged the whole body."

I suppose the magistrates of Berwick may be in the right, and men of the greatest integrity: but they admit a great contention in the borough; that the matter laid in the indictment arose from a warm dispute at the guild, upon a point of business, which produced a riot and tumult, that broke up the guild in great confusion: that the justices are all of one side upon this point.

† 16, 17 C. 1, c. 10.

†<sup>1</sup> V. ante, p. 835, 836.

\* V. *Rex v. Inhabitants of Clace*, T. 1769, B. R.

†<sup>2</sup> V. post, p. , *Rex v. Alderman Plumbe*, P. 1772, 12 G. 3, B. R.

|| 1 Strange, 704. [See 4 Burr. 2459.]

It is not denied that the justices vehemently pressed a motion to disfranchise the defendant for the offence charged in this indictment; which was rejected by a great majority of burgesses. Whether the motive for rejecting it, was because they thought the defendant innocent, or because they thought the motion premature and too violent, is immaterial.

Robert Selly's affidavit against the certiorari, shews it is considered as a cause against the magistrates, and that his brother ——— who made an affidavit for the defendant, listed as a soldier on that account, and declared he had rather go to the farthest part of the world, than fly in the face of a magistrate.

Upon this occasion, all the justices oppose the certiorari, and have produced affidavits to prove the defendants guilty.—They may be so: and if they are, they ought to be severely punished. But it is impossible, that under all these circumstances, the trial or judgment at Berwick should be satisfactory.

Every body in the town has already pre-engaged his opinion. The burgesses have all taken sides: the justices [863] have already declared him so heinously guilty, that he ought to be immediately disfranchised, without waiting for a trial of the indictment. I dare say they were of that opinion, without prejudice to the man, but from indignation at his guilt: and perhaps very justly; for a man may judge impartially even in his own cause. However, we must go upon general principles. If a witness in a cause has an interest, though it be small, he must be rejected: or if a juryman has declared his opinion by a former verdict, he may have done it very justly, but yet is liable to be challenged for this cause, on a subsequent trial. In the present case, it is impossible but that all the persons who would be concerned in trying this matter at Berwick, must be biassed by their preconceived opinions. I do not speak this, with the least imputation upon the magistrates of Berwick: but it is not fit that they should be judges in their own cause, and after having already gone so far as they have done.

Therefore we are, all of us, of opinion that the rule to shew cause "why writs of supersedeas to these writs of certiorari should not issue," ought to be discharged.

But unless the matter could have been tried here, a certiorari ought not to have gone: nor shall it now be used for delay. To prevent which, the prosecutors of the certiorari shall engage to appear, and take short notice of trial, and try it at the next assizes for the county of Northumberland.

I have settled the form of a suggestion to be entered upon the roll: which I will give to the Master of the Crown-Office for that purpose.

His Lordship accordingly did so: and

It was as follows—"And because the borough of Berwick is a place where the King's writ of venire facias, to summon a jury to try the said issue, doth not run; and because the burgesses of the said borough, by reason of their privileges, ought not to be put upon any jury to try the said issue out of the said borough; but the said issue ought to be tried by a jury of the county of Northumberland, which is the next adjacent county to the said borough of Berwick; which allegations of the said Henry Cowle are not denied by the said James Barrow, Esq. therefore it is commanded the Sheriff of Northumberland, that he \* cause to come, &c."

The rule now made by the Court (in consequence of [864] their present resolution) was afterwards drawn up and entered in these words, viz.

Upon mature deliberation had here in Court, it is ordered by this Court, that the rule made "that the defendants should shew cause why a writ of supersedeas should not issue to the two writs of certiorari lately issued out of this Court, to remove all and singular indictments against the defendants" be discharged.

And the said two writs of certiorari and the returns thereto being now returned and filed in this Court, it is further ordered that the said defendants do immediately appear and plead to the said indictments; and proceed to the trial of the said indictments, at the next assizes to be holden in and for the county of Northumberland. And it is further ordered, that in case the defendants shall make default or neglect to make up the records and proceed to the trial of the said indictments, at the now next assizes to be holden in and for the county of Northumberland, in such case, the

\* The entry upon the record has a clause of non omittas, (which is always inserted on the Crown side;) viz. "that he do not forbear, by reason of any liberty in his bailiwick, but that he cause to come, &c."

prosecutors shall be at liberty to make up the said records, and proceed to the trial of the same at the said next assizes in and for the county of Northumberland.

And as to the application for an attachment, for not returning the said two writs of certiorari.

It was ordered that the rule made, "that Henry Hodgson, William Compton, Fenwick Stowe, William Temple, and Samuel Burn Esquires, should shew cause why a writ of attachment should not issue against them, for their contempt," be discharged.

The indictment was afterwards tried at Newcastle.

REX *versus* BOOTIE. Wednes. 4th July, 1759. [See 6 Durn. 630.] Constable may be indicted for suffering a street-walker to escape out of his custody.

On Tuesday 19th June last, Mr. Ashhurst moved in arrest of judgment, after verdict for the King, upon an indictment against a constable, for a misdemeanor.

The charge in the indictment was, that he, being one of the constables of St. Martin's in the Fields, and being in the execution of his said office, as head of the nightly [865] watch of the said parish, did wilfully and unlawfully suffer Margaret Prince, being a loose, idle, lewd and disorderly person, taken up by Robert Miller, one of the nightly watch of the same parish, between one and two o'clock in the morning, as a common street-walker, &c. to escape out of his custody, before she could be carried before a justice of the peace, to be dealt with by the justice according to law.

The whole indictment was (in substance) thus—that one Robert Miller, being lawfully appointed one of the nightly watchmen of and for the said parish, and being in his office and place as such, performing his duty of a watchman there, at an unseasonable time, i.e. between one and two in the morning, did apprehend and take into his custody one Margaret Prince then and there being a loose, idle, lewd and disorderly person, and a common street-walker, and being then and there behaving herself riotously, and walking the streets there to pick up men, in breach of His Majesty's peace; and did then and there take, lead and convey the said Margaret Prince in his custody to a certain prison called the watch-house in the said parish, and did there deliver her in custody unto one John Bootie, who then and there was one of the constables of the said parish, and then and there being in the execution of the said office of such constable, as the head of the nightly watch of the said parish; and did then and there leave and deliver up her the said Margaret Prince in charge with the said John Bootie, so being such constable as aforesaid, and in the execution of his said office as aforesaid, and did then and there charge and request the said John Bootie so being such constable as aforesaid to keep and detain the said Margaret Prince, so being such loose, idle, lewd and disorderly person and a common street-walker walking the streets there to pick up men as aforesaid, in his custody, until the said Margaret Prince could be carried and conveyed in custody before some one of His Majesty's justices assigned to keep the peace in and for the said city and liberty, there to be dealt with by such justice according to law for her said offence and breach of the King's peace: nevertheless the defendant, so being, &c. not regarding the duty of his office, &c. unlawfully and wilfully discharged her out of his custody, before that she had been carried before any justice, &c. and would not keep or detain her in his custody for the purpose aforesaid, but wilfully suffered and permitted her to escape and go at large, &c.

Upon which indictment, the defendant having been tried; and a verdict found against him;

Mr. Ashhurst obtained a rule to shew cause why the judgment should not be arrested; upon the following

[866] Objection—That it is not charged, that the defendant knew that she was a street-walker, &c. as this indictment describes her to be: nor indeed is it positively charged "that she was one." And if she was not liable to be detained by him, he would have subjected himself to an action for false imprisonment, if he had detained her. It ought to have expressly charged "that she was so; and that she was delivered to him as such."

Mr. Norton and Mr. Stow now shewed cause against arresting the judgment.



They insisted that the expressions "being" and "so being" are sufficient allegations "that she was so; and that she was delivered to the defendant as such." And as this is after verdict, it must be taken to have been proved at the trial. It is almost impossible that he could be ignorant of it: and if he really was so he might have pleaded it.

Mr. Ashhurst and Mr. Morton, contra—The being after verdict, is no answer, in a criminal case; whatever it may be in a civil one.

Indictments must be positive and certain, on the face of them. But this indictment does not sufficiently shew that she was lawfully in the custody of the constable. 1 Hale's Hist. P. C. defines what is lawful custody.

This is no positive allegation, "that she was delivered to him as a loose, idle and disorderly person." She might in fact be a loose, idle and disorderly woman, &c. and yet not delivered to him, as such. It was at his peril to detain her, unless he was well satisfied that she was liable to be detained. \* 1 Salk. 202, *Dominus Rex v. Fell*, is in point, that the defendant is not liable for the escape of a person not committed to his custody as charged with a crime.

Mr. Norton, in reply to the cases cited, insisted that the term "being" is a sufficient averment of the fact.

Lord Mansfield and Mr. Just. Denison did not come into Court, till towards the end of the motion: they therefore remained silent.

Mr. Just. Foster—*Fell's case* was † treason: it was an indictment against him, as keeper of Newgate, for negligently suffering the escape of a person being in his custody, charged with high treason. But would not that have been sufficient ground to have indicted him for a misdemeanor? and the present case is a misdemeanor, and sufficiently charged upon the defendant.

[867] The peace of this city can never be preserved, unless watchmen are supported in doing their duty.

Mr. Just. Wilmot—I think it is a misdemeanor in the constable, to discharge an offender brought to the watch-house, by a watchman in the night, though without any positive charge. But in the present case, I think that this is a sufficient allegation of the fact of her being such a person, and of her being delivered to the defendant as such a person as she is described to be.

Per Cur. The rule "to shew cause why the judgment should not be arrested," was discharged.

#### CASE OF THE POOR PRISONERS ON THE COMMON SIDE. 1759. Bar-money does not belong to the poor debtors of the King's Bench prison.

The prisoners on the common side of the prison of this Court conceived themselves to be intitled to the High-Bar-money paid to the box, upon certain motions made in Court, (viz. for judgments, for writs of mandamus, certiorari, habeas corpus, and other original writs, every day in term; and upon all motions whatsoever, on the last day of a term; and upon all affidavits sworn in Court:) which box-money or High-Bar-money (as they termed it) amounts to a large sum in the whole term; and has been always paid to the youngest Judge's clerk, at the end of every term, by the secondary of the chief clerk's office, to be disposed of by the Judges in charity, as they shall think proper.

This money the prisoners in the King's Bench, confined on the common side, fancied to belong to them; and accordingly applied for it, by petition to the Court, as their predecessors had done about forty-eight years ago: but they were totally unable to make out their claim now; and it appeared, upon examination, that they had been equally unable to support it, at that time.

Mr. Just. Foster happened to remember that former application: and that the matter was referred to Mr. Harcourt: and he said that he was present in Court, (in 1711, 10 Ann.) when Mr. Harcourt reported the "claim of the prisoners to be without foundation;" and he had [868] himself taken a note of Mr. Harcourt's report; which note he now produced and read publicly in Court,

\* V. Mod. 414, S. C. 12 Mod. 226, S. C.

† Vide Hale's H. P. C. v. 1, pa. 234, and Hawk. P. C. v. 2, c. 19, s. 22.

Upon the whole, the Court (after having referred the matter to Mr. Athorpe, the present secondary of the Crown-Office), made the following rule, worded (by special direction) thus—

King's Bench poor prisoners.—This Court took into consideration the petition of the poor prisoners of this Court, touching the money usually paid into the box of this Court, upon motions and affidavits made in Court: which the petitioners claim, as due to them.

And Mr. Athorpe (to whom it had been referred, to examine into the matters alledged in the said petition,) having this day reported to this Court “that he hath made diligent inquiry into the premises; and that no living witness was upon such inquiry produced on the part of the petitioners, who could give evidence touching the same; and that he had carefully inspected all the books, papers, and writings which could be found relative to the premises; and that upon such inspection and inquiry, it doth not appear that the said money was ever paid to the said poor prisoners or for their use;” and Mr. Clarke, secondary on the plea-side, having this day informed the Court, “that during the time he hath been in the said office, and also during the time his late father Mr. Giles Clarke (long since deceased) was in the same office, the said money hath been constantly paid by the secondary on the plea-side, into the hands of the clerk of the junior Judge of this Court for the time being, in order to be by him paid over to the Judges of this Court, in equal shares, to be disposed of by them, for such charitable purposes as they in their discretion should think proper;” it is ordered that the said petition be rejected.

The end of Trinity term 1759, 32 & 33 Geo. 2.

[869] MICHAELMAS TERM, 32 GEO. II. B. R. 1759.

REX *versus* CORPORATION OF CARMARTHEN. Wednes. 7th Nov. 1759. Information quo warranto will not lie against a whole corporation at the relation of a private person. [S. C. 1 Black. 187.]

Mr. Serj. Nares moved (very faintly, and without pretending to hope for much success,) for an information in nature of a quo warranto against the whole corporation (as a body,) to shew by what authority they claimed to act as a corporation.

But even he himself intimated a doubt “whether such a species of information, (viz. filed by the Clerk of the Crown, under leave of the Court, at the relation of a private prosecutor,) could be within the Act of Queen Anne.” (V. 9 Ann. c. 20, § 4.)

The Court gave no direct opinion.

However, Lord Mansfield and Mr. Just. Denison seemed to be pretty clear, that this Act was calculated only against individuals usurping offices or franchises in corporations; and not against any corporation itself, as a body: and the words of the Act manifestly carry this meaning.

It was observed by them, and acknowledged by the serjeant and Mr. Aston, his colleague in this motion, that “there was no instance of any information in nature of a quo warranto being brought against any corporation as a corporation, for an usurpation upon the Crown, but by and in the name of the Attorney General, on behalf of the Crown.”

Whereupon, the council made their motions against the several individuals, “to shew by what authority they respectively claimed to exercise their particular franchises;” and obtained the ordinary rules against them, in the usual form.

[870] REX *versus* INHABITANTS OF ST. MATTHEW BETHNAL GREEN.  
Saturday, 16th Nov. 1759.

See this case at large, in the quarto-edition of my Settlement Cases, No. 153, p. 482.

GOODMAN ET AL' *versus* GOODRIGHT, Lessee of Richard Williams and Annabella his Wife. Tuesday, 20th Nov. 1759. [S. C. 1 Bl. 188.] Executory devise to the heirs of A.'s body, by a second husband on failure of issue by the first now living, too remote a contingency, and therefore void. [See 5 Durn. 25. 7 Durn. 344. 4 Ves. 4. Brown. 373. 2 Ves. jun. 212. 4 Durn. 740. Doug. 470. Salk. 226, pl. 4. Talb. 262. 18 Vin. 382, 383.]

Error from the Grand Sessions in Wales, upon a judgment there given for the plaintiff, in an ejectment brought by Richard Williams and Annabella his wife, for lands in Denbighshire; in which, the jury had, upon the trial of it there, found a special verdict, to the following effect.

That on the 4th of August 1714, Susannah Mostyn was seised in fee, of the lands in question.(a)

[874] That on the same day and year, articles of agreement were made, by deed indented, (which they find in hæc verba,) between Edward Wynn Dr. of Laws, on the first part; Margaret Wynn, mother of the said Edward, on the second part; the said Susannah Mostyn, on the third part; and Elizabeth Lloyd, on the fourth part; reciting an intended marriage between the said Edward Wynn and Anne Lloyd (then 18 years of age,) niece of the said Susannah Mostyn and Elizabeth Lloyd: whereby (amongst many other covenants not at present material) the said Susannah Mostyn, in consideration of the said marriage, covenanted for herself her heirs, &c. with the said Edward Wynn and his heirs, that she would on the solemnization of the said marriage, at the request of the said Edward Wynn and Anne Lloyd or either of them or either of their heirs, at or after such time as the said Edward Wynn should settle his estate to the uses therein mentioned, settle and convey (to the trustees therein named) all her capital messuage, &c. &c. (the lands in question,) and all other the messuages, lands, &c. of her the said Susannah Mostyn, or whereof or wherein she had any estate, in the said county of Denbigh, to hold to them and their heirs, to the use of the said Susannah Mostyn, for life; then to the said trustees, for two hundred years, upon trusts therein afternamed; and from and after the determination of that estate, then to the use of the said Edward Wynn, for life; remainder to trustees (to be nominated by her) to preserve contingent remainders, &c. remainder to the said Anne Lloyd, for life; and after the decease of the said Edward Wynn and Anne Lloyd, to such uses as are therein afternamed; which uses are afterwards declared to be to the use of the first and every other son of the body of the said Edward on the body of the said Anne to be begotten, and the heirs of the body of such first and other son lawfully issuing, according to seniority of age; and for default of such issue, to the use of the first and every other daughter of the said Edward on the body of the said Anne to be begotten, and the heirs of the body of such first and every other daughter lawfully issuing, according to seniority of age; and for default of such issue, to the use of the said Susannah Mostyn her heirs and assigns for ever.

The trust of the term of two hundred years was declared to be for the raising 500l. out of the rents or by mortgage, &c. to be paid to such person or persons, and in such manner, as the said Susannah Mostyn, by deed or will, should direct or appoint.

That the marriage was accordingly solemnized between the said Edward Wynn and Anne Lloyd.

[875] That Susannah Mostyn, after making the said articles, viz. on 1st March 1727, duly made and published her last will, &c. wherein reciting the said articles and the provisions therein made, as to her said estate in the county of Denbigh, and appointing the 500l. to be raised, and paid to her executrix, she goes on thus—"And whereas the premises so agreed to be settled by me as aforesaid, from after the death of me the said Susannah Mostyn and of the said Edward Wynn and his wife, and in default of issue of their two bodies, are limited or agreed to be limited to me and my heirs as aforesaid, now I do hereby give and devise the said messuages, lands, tenements, and hereditaments, and the absolute inheritance thereof, to the use and behoof of the heirs of the body of the said Anne, by any other husband lawfully to be begotten;

(a) The reporter appears by this case not to have been aware of the distinction in *Ferne*, 148, between a remainder contingent as to the legal sense of the word, and such remainders as though vested may nevertheless never take effect in possession.



and for want of such issue, to the use and behoof of my nephew Charles Lloyd of Drenewith in the county of Salop Esq. and of the heirs of his body lawfully issuing; and for want of such issue, to the use and behoof of my niece Catharine Longford widow, and the heirs of her body lawfully issuing; and for want of such issue, to the use and behoof of Elizabeth now the wife of George Ball, and the heirs of her body lawfully issuing; and for want of such issue, to the use and behoof of Catharine Longford spinster, youngest daughter of the said Catharine Longford widow, and the heirs of her body lawfully issuing; and for want of such issue, to the use and behoof of the right heirs of me the said Susannah Mostyn, for ever."

Susannah Mostyn, after making her said will, died seised, on 12th March 1928; leaving the said Anne Wynn her heir at law.

Edward Wynn and Anne his wife entered; and by deeds of lease and release, 1st and 2d of March 1730, convey the premises to make a tenant to the præcipe, in order to suffer a common recovery: the uses of which common recovery were to be such as should be declared by an indenture to be made by the said Edward Wynn and Anne his wife.

A common recovery was accordingly suffered, at the Great Sessions at Wrexham for the county of Denbigh: wherein the said Edward Wynn and Anne his wife were vouched, &c.

And on the 29th of May 1731, by an indenture of that date, the uses of the said recovery were declared to be, as follows, viz. to the use of the said Edward Wynn and his assigns, for life, without impeachment of waste; and after his decease, to the said Anne Wynn and her [876] assigns, for life, without impeachment of waste; then to trustees, to preserve, &c. remainder to the first and every other son of the said Edward Wynn on the body of the said Anne to be begotten and the heirs of their bodies respectively, according to seniority of age; and in default of such issue, to the first and every other daughter, in like manner; and after the determination of the several uses before limited, to such uses as they the said Edward Wynn and Anne his wife should, by any joint deed or writing, limit and appoint; and for want of such appointment to the right heirs of the said Anne, for ever.

The said Anne afterwards died, viz. on 12th July 1739, without issue of her body, leaving — her heir at law.

The said Edward Wynn continued in the receipt of the rents and profits till his death: which happened on the 9th of June 1755.

After the death of Susannah Mostyn, Charles Lloyd died: he left issue, Annabella, his only daughter and heir, then and still the wife of Richard Williams.

Richard Williams and Annabella intermarried in the life-time of the said Charles Lloyd.

Richard Williams and Annabella his wife, after the several deceases of the said Edward Wynn and Ann his wife, viz. on the 15th of June 1755, made an entry, &c. and demised, &c. to Goodright, who entered, &c. and the defendants below (claiming under the heir at law of Anne Wynn) entered upon Goodright, and ejected him.

But whether upon the whole, &c. they pray advice of the Court: and if, &c. then they find the defendants below, guilty, &c. but if, &c. then they find them not guilty, &c.

This case was twice argued; first, in Trinity term last; and again, in this term: and the Court gave their opinion, upon the next paper-day after the last argument.

Both the arguments were very diffused (especially the former,) and would be too tedious to repeat; though several nice points were discussed in them, and the reasonings of the counsel supported by a great variety of cases.

It was disputed, whether Anne Wynn took an estate-tail by implication by her aunt's will; (there being no person in esse named in it, to support the remainder to the heirs of Anne's body by a second husband:) for it was [877] urged on the behalf of the defendant in error, "that this was a devise in verbis de præsenti: (b) and that the law will not suffer a present devise to a person not in being;" and "that Charles Lloyd consequently took an immediate estate in possession, as much as if there had been no precedent devise, as this precedent one was totally and absolutely void."

(b) This was the notion anciently. See 1 Lev. 135. Salk. 226, 229. 2 Roll. Abr. 415, pl. 7. Plowd. 414. 2 Vent. 56. Durn. 232. Vin. Abr. Devise, (S. C.) 2, 12. Salk. 225, pl. 2. Vin. Abr. Devise, (A. 3) (F. G.).

Also, "whether the will is to be taken as an execution of the articles by Mrs. Mostyn ; and as a disposition of her estate according to her covenant."

Also, "whether Anne's issue by a second husband was a matter that ought to be laid quite out of the case, in the same manner as if there had been no such devise ;" since the event never happened.

Also, "whether Charles Lloyd could take at all, by this will : " and, if he could, then "in what manner." For the counsel who argued on behalf of the plaintiffs in error insisted that he could not take, either as a present or as an executory devise ; and that there was no other way by which he could take : but the counsel for the defendants in error endeavoured to shew that he might take, either way.

Cur. advis'.

Lord Mansfield now delivered the resolution of the Court.

This case, when stript of a great deal of learning which may very well be laid out of it, as not being at all essential to the determination of the present question, comes within a very narrow compass.

The whole of the case comes singly to this question—"whether Mrs. Mostyn, the testatrix, intended to give her nephew Charles Lloyd and the heirs of his body, the remainder or reversion after the death of herself and of Dr. Edward Wynn, and Anne his wife, and of the heirs of their two bodies, and also of the heirs of Anne's body by any second husband ;" or "whether she meant to give him an estate in possession." For it was admitted, that if she did not intend to give him an estate in possession, (c) the lessors of the plaintiff can have no title.

If this devise is to take effect after the death of the testatrix Mrs. Mostyn, and of Dr. Edward Wynn, and of Anne his wife, and of the heirs of their two bodies, and of the heirs of her body by any second husband ; then it can be made good, (d) only by one of these two ways ; viz. either by way of a contingent remainder, or by way of an executory devise.

[878] Now, to make it a contingent remainder, all the former estates specified in the articles must be considered as being intended to be given and devised by this will : and then it would follow, that the estates would be of one and the same nature and quality, and limited in one and the same conveyance ; and not by several distinct deeds or conveyances. (e)

And if the same kind of estate be, in the same will, limited to Anne Wynn for life, and to her issue by her first husband, it would be an estate-tail executed in Anne Wynn ; and she might suffer, and has in fact suffered a common recovery, which will bar the remainders.

But it is not necessary for us to go into the question "whether the articles and the will can be tacked together:" because, if a devise of the particular estates expressed in the articles cannot be implied by construction ; and supposing the devise "to the issue of Anne Wynn by any second husband" to be void ; the limitation "to Charles Lloyd and the heirs of his body," can not be considered as a contingent remainder.

And if it were to be considered as an executory devise, then, not being to take place till after an indefinite failure of issue of the body of Anne Wynn, it is too

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(c) The reporter must have been mistaken, for the reason mentioned in the next page.

(d) If it were a contingent remainder, then it was barred by the recovery. Salk. 110, 111. Ld. Raym. 209. 1 P. Wms. 509, 510 ; and as this was settled long before this case, the counsel who argued in support of the devise, could never put it on so weak an argument ; but their argument must have been, if the case was at all understood, as no doubt it was, that the devise was to be made good, either as a vested remainder, or as an executory devise. But the distinction known to every counsel, between a remainder vested in interest, and a remainder vested in possession, is mistaken in this, not only by using the word contingent instead of vested, several times ; but also by the two last clauses in this page, in which Ld. Mansfield is reported to have said that the counsel judiciously laboured to prove it a devise to C. L. immediately, and in argument observes it could not be the intent to exclude the issue of her favourite niece.

(e) This is a mistake : by the will it is clear that the remainder to C. L. would be a vested, and not a contingent remainder, in the case here supposed.



remote. And if it was too remote in its creation, the event cannot vary the construction: so that her actually dying without issue can make no difference.

Therefore, either way, it is clear that the lessor of the plaintiff below had no title, unless it is a present devise "to Charles Lloyd and the heirs of his body."

And therefore the counsel for the defendant in error very judiciously laboured to prove that Mrs. Mostyn meant, in this devise "to him and the heirs of his body," to devise the estate to him immediately.<sup>(f)</sup> This, they found themselves obliged to insist upon, and to endeavour to maintain.

But neither the words nor the nature of the provision Mrs. Mostyn was making, will admit of this construction. For the words do by no means import any such thing, or any thing like it; but quite the reverse. And it can never be imagined to be her intention to include all the issue of her favourite niece Anne Wynn, in order to prefer Charles Lloyd and his issue: indeed, the direct contrary plainly appears.

It is a future devise, to take place after an indefinite [879] failure of issue of the body of a former devisee: which far exceeds the allowed compass of a life or lives in being, and twenty-one years after; (which is the line now drawn, and very sensibly and rightly drawn).

The articles can not be considered as executed: they are only a covenant "that she will on the solemnization of the marriage, at the request of Edward Wynn and Anne, at or after such time as Edward Wynn should settle his estate, &c. settle and convey hers." The will does not profess to be an execution of them; nor does it mention any trustees to preserve contingent remainders agreeable to the articles.

But if the will was an execution of the articles, then Anne Wynn was tenant in tail, and might suffer the recovery. If she took nothing under the will, she is heir at law to Mrs. Mostyn. And the lessor of the plaintiff has no title.

Therefore this judgment must be reversed.

HURST AND ANOTHER *versus* EARL OF WINCHELSEA, ET AL'. 1759. [S. C. 1 Bl. 187.] An appointment under a settlement operates as a common devise, and the appointee in fee simple (if heir at law) is in by descent, and not by purchase. [3 Brown. 134.]

A special case, out of the Court of Chancery.

Case—Thomas Herbert, Esq. being seised in fee of the premises in question, made his last will and testament in writing, &c. bearing date the 17th of October 1734, in

(f) This must be a mistake: they could not argue that the testatrix meant to pass over the issue of her niece, and devise the estate immediately to C. L. &c. but they might have said that she considered her niece, and her issue by her present husband, as taken care of by the articles, and therefore she did not devise any estate to them, not thinking it necessary; but begins by devising to the use of the heirs of the body of her niece, by any other husband; and for want of such issue to C. L. in tail: now according to the 4th resolution, in Salk. 226, had there been no articles, the estate would have vested immediately in C. L. not because the testatrix meant (as here said) to devise it to him immediately, but because an immediate devise to the heirs of the body of a person living, is according to that resolution void, and therefore that devise being void, is as no devise; and the intention being that C. L. should take after a void estate, is by legal construction the same (though in fact not so,) as an intention that he should take immediately, where the whole of a testator's intention cannot take effect, yet so much as can, shall. Suppose the devise had been to a person disabled to take, with remainder to C. L. or to T. S. (who had died in the testator's life) in tail, remainder to C. L. it is clear C. L. would take immediately; therefore were the 4th resolution in Salk. 226 law, (of which, qu.) the case would be this, S. M. seised in fee-simple, devises to C. L. in tail: after a precedent void devise, C. L. must take immediately; but he would take (and the testatrix knew and meant it,) subject to the equitable estates in the articles; and the case would be no more than that S. M. stood seised in fee-simple, as a trustee for the estates in the articles, and as to the residue of the fee-simple, for her own benefit, and free from any trust.

Salk. 226, pl. 4, recites the trust and devises, and it seems that this judgment cannot be supposed consistently with the 4th resolution in Salk. 226. There is, however, great reason to doubt whether that resolution is law. See 1 Wils. 225.



these words—"I give and bequeath to my dear and beloved wife Elizabeth Herbert (after payment of my just debts) all my money, plate, jewels, household goods and furniture wheresoever, and all my goods, chattels, and personal estate, real or personal, whatsoever and wheresoever, that shall be in my possession, or I shall be any ways intitled to at the time of my decease."

"And I further give, devise, and bequeath (g) to my said dear wife and her heirs such part of all my real estate, that I have any power to dispose of by this my will. And I further give, devise, and bequeath to my said wife, out of the remaining part of my said real estate, for her better support and maintenance till my son Thomas attain the age of twenty-one years, the sum of 400l. a year. And my will is that the several bequests and devises to my said wife as aforesaid, shall not nor are intended to prejudice my said wife in her thirds or dower out of my said real estate."

[880] And he appointed her sole executrix of his will.

On the 15th day of March 1736, the testator died so seised; and left the said Elizabeth his widow; and Thomas Herbert (his only child by her) his heir at law.

Elizabeth Herbert entered upon, and enjoyed the real estates: and on the 29th April 1739, intermarried with John Powell, Esq. (her second husband). And previous thereto, by \*<sup>1</sup> indentures, dated, respectively, on the 24th and the 25th April 1739, she, by lease and release, conveyed the premises in question to trustees, &c. to the following uses; viz. of herself and her assigns for life, without impeachment of waste: then to the use of the Earls of Hertford and Winchelsea and their heirs, &c. for 200 years upon trusts since determined, and subject to the trusts aforesaid: remainder to the said Thomas Herbert her son and his assigns for life, without impeachment of waste; then to trustees to preserve contingent remainders; remainder in † tail, to the said Thomas Herbert the son, (viz. remainder to the † first and every other son and sons of the body of the said Thomas Herbert in tail male; and in default, &c. to the use and behoof of the heirs of his body generally:) and in default of such issue, to such uses and to the use and behoof of such person or persons, and for such estates, intents, and purposes, as she the said Elizabeth Herbert, by any deed or deeds to be by her duly executed in the presence of two or more witnesses, or by her last will in writing, or any writing purporting to be her will, signed and published in the presence of three or more credible witnesses, whether covert or sole, and notwithstanding her coverture, should limit or appoint: and for want of such limitation or appointment, to the use and behoof of the said Elizabeth Herbert her heirs and assigns for ever.

She died on the 8th of July 1739, in the life-time of her husband John Powell: leaving the said Thomas Herbert, the son, her only child and heir at law, being also only child and heir at law of the said Thomas Herbert deceased, her first husband.

Before her death, viz. on 8th May 1739, she, in the presence of three credible witnesses, and as the law requires for the disposition of real estates, duly made and executed her last will, or a writing purporting to be her will, which was signed, sealed, published and declared by her as and for her last will; whereby she gave several legacies to the said John Powell her husband, and others: and she \*<sup>2</sup> also gave and devised thereby as follows, viz. "I give to my dearly beloved son Thomas Herbert and his heirs and assigns for ever, all my real and per-[881]-sonal estate, plate, jewels, &c. &c. and all my writings, &c. but first subject to the payment of my debts, funeral expences, and legacies, and servants wages, and all other debts," (which she

(g) This clause made it unnecessary to send the first question, mentioned in p. 881, to be determined; for though the subsequent devise out of the remaining part of the testator's real estate of 400l. a year to the wife, till the son attained the age of twenty-one years, shews that the testator thought he had not before given the whole real estate to the wife; yet there is nothing to shew what he meant by the remaining part, and therefore it seems that this last clause is quite uncertain, and therefore not sufficient to controul an express precedent devise to the wife, of such part of the real estate as the testator had power to dispose of, that being the same as a devise to her of all his real estate: for a devise of all could extend no further than to such as he had power to dispose of.

\*<sup>1</sup> These deeds are set out at large, in the stated case; but this is the substance of them.

† This is also set out at large and in proper form, in the stated case.

\*<sup>2</sup> The whole will is set out verbatim, in the case.

thereby charges upon it). And she made her said son Thomas Herbert, and the Earl of Hertford, her executors, and gave the Earl of Hertford full power to act as guardian for her said son. On her death, the earl, as guardian to her son, and for his use and benefit, entered, and received the rents and profits to the time of the death of the said Thomas Herbert the son.

On the 25th of February 1739, Thomas Herbert the son died, an infant, intestate without issue, and unmarried; leaving Roger Powell, Esq. his heir ex parte patris; and Lucy Allen, widow, his heir ex parte matris.

On the death of the said Thomas Herbert the son, Roger Powell entered, and received the rents and profits during his life. But on 9th June 1741, Lucy Allen filed her bill against the said Roger Powell and others, praying to be let into possession: and, she afterwards dying, Edward Hurst (the father of the present plaintiffs) as her representative, exhibited his bill of revivor and supplement. Several abatements of the suit having since happened, bills of revivor and supplement were duly filed. And the present plaintiffs, William H. and Edward H. now claim the said estates under the said Lucy Allen, as she was heir to the said T. H. the son ex parte maternâ: and the present defendants Thomas Morgan, Capel Hanbury and William Powell now claim the same under the said Roger Powell now deceased, as he was heir to the said T. H. the son ex parte paternâ.

The original cause was heard on the 10th of May 1755, before Ld. Hardwicke; who directed a case to be made, and these two questions to be stated for the opinion of this Court: viz.

1st question—"Whether by the will of Thomas Herbert, the father, (husband of Elizabeth Herbert, afterwards Powell,) the estate in question, (the real estate of the said Thomas Herbert,) passed to the said Elizabeth in fee."

2d question—"Whether it descended, upon the death of Thomas Herbert, the son, to his heirs ex parte paterna; or to his heirs ex parte materna." (h)

(h) As to this 2d question and which as above observed was the only doubt in the cause, Mr. Sewell for the plaintiff, argued that if there had been nothing but the deed, the old use would have been clearly in E. H. Where a man makes a feoffment in fee, whether the use is not declared but left to result, or whether it is expressly declared to the feoffor and his heirs makes no difference; for in both cases it is the old use, and the feoffor continues seized of his old estate, Co. Lit. 12 b. 3 Lev. 406. Salk. 590. But he admitted that if the estate had been limited in default of appointment by E. H. to the use of a stranger, then the heir must have taken by the appointment, as a purchaser; but in this case, the heir does not take the estate either by the deed or by the will, for he would have taken it without them; they convey nothing, for they give nothing to him but what he had before; therefore the whole that is done had no operation at all, but is a mere nullity; and the giving him the estate subject to debts makes no difference, as appears from *Clarke v. Smith*, Salk. 241. Lutw. 793. Comy. 72. And though the instrument executed by E. H. is not strictly a will, yet it is a testamentary disposition; it must be attested as a will, 2 P. Wms. 258; it has the consequence and effects of a will, it is ambulatory and revokable, and the dispositions in it will lapse by the death of the appointees, in the life of the appointer; and so decreed in 1753, *Lady Sunderland and The Duke of Marlborough*, and he cited 8 Mod. 23, that where a copyhold is devised (being previously surrendered to the will) to the heir at law, he is in by descent. Mr. Yorke, Solicitor General, on the other side, said there were two questions; first, whether as the estate was by the devise charged with debts and legacies, the descent was not thereby broken; secondly, whether Thomas, the son, took the estate under the deed or under the appointment or will? He said he gave up the first question, as it was not now to be maintained, since the cases of *Clarke v. Smith* cited by Mr. Sewell, and *Allan v. Heber*, Stra. 1270; but as to the second point, he argued that where a feoffment is to the use of such persons and of such estates, as he shall appoint by his will, the devisee is in by the feoffment and not by the will, Co. Lit. 271 b. but not so as to vest from the time of the will; and that this holds more strongly in the present case, because it is the will of a feme covert to take effect under a power, and therefore it must operate as an appointment or not at all; and therefore he said that this case must be considered in the same light, as if the words of the will or appointment had been originally inserted in the deed itself, by way of limitation of the use of the reversion in fee to T. H. and his



The suit afterwards abating by the death of E. H. father to the present plaintiffs, they revived it. On 27th January 1758, the cause came on to be heard before the Lord Keeper: who ordered that the said former order "on hearing should be carried into execution in like manner as if Edward Hurst had been living."

[882] This case was twice argued in this Court. It was first argued (very learnedly and elaborately) by Mr. Sewell for the plaintiffs (claiming under Lucy Allen the maternal heir,) and Mr. Yorke, Solicitor General, for the defendants (claiming under Roger Powell the paternal heir,) on Tuesday 6th February 1759. The second argument was by Mr. Norton for the plaintiffs, and Mr. Perrott for the defendants, on the 13th and 20th of November 1759.

On 27th November 1759, the Judges of this Court certified their opinion, as follows—

Having heard counsel on both sides, and considered of this case, we are of opinion that the estate in question in this cause passed by the will of Thomas Herbert the father, to the said Elizabeth in fee. We are also of opinion that Thomas Herbert the son did not take the said estate, from his mother, by purchase, but by descent: (i) consequently, upon his death, it descended to his heir ex parte materna.

Mansfield. T. Denison. M. Foster. E. Wilmot.

Lord Keeper Henley having afterwards decreed accordingly, the defendants appealed to the House of Lords. But before hearing, it was compromised, by a composition as to the retrospective account of the profits of the estate; but that the decree should stand, with regard to the estate itself.

LUKE ET AL' *versus* LYDE. 1759. [S. C. 1 Black. 190.] In case of loss at sea, freight must be paid only in proportion to the goods saved, and the part of the voyage which was performed.

[Referred to, *Metcalf v. Britannia Ironworks Company*, 1876-77, 1 Q. B. D. 620; 2 Q. B. D. 427.]

A special case from the last Devonshire Assizes; reserved by Ld. Mansfield, who went that circuit, last summer.

The defendant Lyde shipped a cargo of 1501 quintals of fish, at the port of St. John in Newfoundland, on board the ship "Sarah" belonging to the plaintiffs, to be carried to Lisbon. The plaintiffs were to be paid freight, at the rate of two shillings per quintal. The original price of the said cargo was, at Newfoundland, ten shillings and six-pence sterling per quintal.

The plaintiffs had also, on board the said "Sarah," a cargo of 945 quintals of fish, which was their own property.

The ship sailed from the port of St. John, on 27th November 1756; and had proceeded seventeen days on her voyage; and was taken on the 14th of December

heirs as a future contingent use to take effect in case he survived his mother, and subject to revocation. He admitted the case of *Lady Sunderland and Duke of Marlborough* to have been determined as cited; for where a power is to be executed by will, every thing necessary to a will is implied, and therefore if the subject is a real estate, it must have three witnesses; if a personal estate, it must be proved in the Ecclesiastical Court: for the same reason, it will be ambulatory during the life of the testator or appointor; and the depositions in it will be liable to lapse by the death of the appointees in the life of the appointor, which last point was the great point determined in the case of *The Lady Sunderland and The Duke of Marlborough*; but notwithstanding this, when the appointment takes effect the appointee takes the use under the deed, and not under the will or the appointment; yet the estate passes by the deed, and the will is only declaratory of the use; therefore Thomas is in this case to be considered as taking the use out of the seisin of the trustees, under the deed, as a purchaser, and consequently the estate, by his death without issue, descended to the defendant, his personal heir. N.B. Mr. Yorke urged the distinction in Co. Lit. 271 b. which see. Vide also 2 Atk. 565, 661.

(i) See Str. 1270. 8 Vin. 349, pl. 14. Lutw. 797. Ld. Raym. 728. Cro. Eliz. 833, 919, 920. Salk. 242. Comyns, 72, all acc. and Cro. Car. 161. 2 Mod. 286, to the contrary were denied in Comy. and Salk.



[883] following, within four days sail of Lisbon, by a French ship. And the captain, the other officers, and all the crew (except one man and a boy) were taken out of the "Sarah," and put on board the French ship. The ship "Sarah" was retaken on the 17th of the same December 1756, by an English privateer: and on the 20th of December 1756, brought into the port of Biddeford in Devonshire.

The plaintiffs, having insured the ship and their part of the cargo, abandoned the same to the insurers. But the freight, which the owners were entitled to, was not insured.

The defendant had his goods of the recaptors, and paid them 5s. per quintal salvage, at the rate of 10s. per quintal value.

The fish could not be sold at all, at Biddeford, nor at any other port in England, for more than 10s. per quintal clear of all charges and expences in bringing them to such port. And the most beneficial market (in the apprehension of every person) for disposing of the said cargo of fish, was at Bilboa in Spain; to which place the defendant sent it in the March following: and there was no delay in the defendant in sending the said cargo thither. And it was sold there for 5s. 6d. per quintal, clear of the freight thither, and of all expences attending the sale there.

The freight from Biddeford to Lisbon, is higher than from Newfoundland to Lisbon.

From the time of the capture, the whole way that the ship was afterwards carried, was out of the course of her voyage to Lisbon.

The question was "whether the plaintiffs are entitled to any and what freight; and at what rate, and subject to what deduction."

Mr. Hussey, for the plaintiffs, observed (by way of preface) that the right of the owners of the ship was not so devested by the capture, as to preclude them from bringing their action for the freight.

If the capture made any alteration, the recapture put every thing in statu quo.

When the ship came into Biddeford there was a total incapacity and inability in the ship to proceed on the voyage;\* and there was an abandoning by the owners, and acceptance by the insurers. This inability to proceed was involuntary, and accidental: without any fault of the [884] owners, master, or mariners.(k)

[\* Qu. this fact? It is not stated; but from what is stated seems improbable.]

(k) Qu. For the inability immediately before mentioned was the inability of the ship when at Biddeford, and that is the inability to which this relates; and there is nothing but the abandonment stated to shew the plaintiffs might not have proceeded with their ship from Biddeford to Lisbon: and the abandonment being the plaintiffs' own act could not excuse them from carrying or offering to carry the defendant's goods to Lisbon; and without that it seems not reasonable that they should have any thing for freight, supposing they were able to have carried them in that or any other ship, and for which there are several foreign authorities at least; but this report is silent as to the cause, if any, of the inability, and the capture and recapture; and the distance of time make it improbable, unless the ship was not in proper repair. It is indeed stated that the defendant had no intent of sending their fish to Lisbon, and that they accepted them; but there are no times stated either of these facts, or of the abandonment, or of the notice to the defendants of the arrival of the ship at Biddeford; and it is suspicious that they were designedly omitted by the reporter, to give a colour to the judgment, and to excuse the plaintiffs for carrying or offering to carry the fish to Lisbon. If these facts and the times were not stated, the Court ought to have called on the counsel to make an inquiry into them, and state them by consent, or admit them; and if that was not complied with, the Court should have sent the cause back to a jury: for if the abandonment of the ship was made by the plaintiffs without any previous offer to perform the voyage and carry the defendant's goods to Lisbon: and no offer made by them to procure another, the defendant's accepting these fish, as it is artfully called by the report, might be nothing but an act of necessity, and because the plaintiffs had abandoned the ship without taking any care of the defendant's fish, which for aught appears might be left in the ship when she was abandoned: and though it is stated in page 883, that there was no delay in the defendant, yet that is contrary to what is mentioned in the same sentence immediately before, viz. that the fish were sent to Bilboa in March, and the ship arrived on the 29th December: so that there was no delay, but to what it was owing does not

There was no intention to carry the goods to Lisbon: the defendant, the owner of the fish, considered Bilboa as the better market for them; and accordingly sent them thither, and sold them there.

After premising this, he made two questions:

1st question—Whether any freight at all, is due to the plaintiffs.

2d question—If any, then what freight is due.

First—He alledged it to be the rule of the maritime law, “that freight is due, unless there be some fault in the owners or master.” If there be no fault in the owners or master, the freight might be paid, either in toto, or pro rata.

Molloy, 263, lays down the rule, that where the disability of the ship is inevitable, or accidental, without fault of the owners or master, freight is due: if the master will either mend his ship, or freight another. But if the merchant will not agree to that, then freight is due for so much as the ship hath earned. Lib. 2, c. 4, § 4.

The shipwreck of the ship does not dissolve the contract, where any goods are saved: the owners are intitled to their freight. It is so far from dissolving the contract, that it gives the master his election, whether to provide another ship, or not.

In the present case, there is nothing to prevent freight being due. Freight became due from and upon the freighters taking the goods into their possession: and continued due, by the defendants not totally abandoning them.

Second question—What freight is due to the plaintiffs.

He insisted on the whole. All the goods were delivered. The money paid for salvage will not lessen it: for they must have paid that otherwise. The deviation will not lessen it; for that was not voluntary.

The privateer who retook this ship, was intitled only to one third part for salvage: for it was not ninety-six hours under detention. Therefore, if more was paid, it was too much.

[885] Lord Mansfield—It was compounded at half; and upon this case, we must take that proportion to be right.

Mr. Hussey cited, as a foundation of his argument, the case of *Lutwidge and How v. Grey et Al* heard on the 22d of February 1736, in the House of Lords.

Lord Mansfield—The House of Lords determined upon these reasons (delivered by the Lord Chancellor Talbot,) “that the whole freight was due upon the goods sent to Bristol; because the master offered a ship to carry the goods to Glasgow, which was the port of delivery: but as the master declined carrying the other goods to Glasgow (the port of their delivery;) they determined that as to them, he ought to be paid only pro rata, viz. as much as was proportionable to his carrying them to Youghall, the place where the accident happened.” And this was all agreeable to the maritime law.(a)

Mr. Hussey—It appears by that case, that the contract is not dissolved by the involuntary accident; that the master had his election to carry them to the port of delivery in another ship; and that if he did not, he shall yet be paid pro rata itineris to the place where the accident happened.

But, at least, something is due; especially as the goods were carried to a beneficial market.

Mr. Gould, for the defendant, Mr. Lyde.

Upon computing the account of the prime cost and produce of these goods, as stated in this case, it appears that Mr. Lyde has not saved a farthing.

As to the property not being devested—The plaintiffs have abandoned the ship, and given it up absolutely, to their insurers; and never provided any other to carry

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appear otherwise than that it was not improbable from the evasive manner of stating the case, that the first cause of delay was the abandonment of the ship, and the defendants having no offer by the plaintiffs to carry them to Lisbon, nor any opportunity of sending them sooner to a foreign market, the fish being as it seems not likely to make much at home.

(a) It appears by the printed case of the appellant, who was the owner of the ship, that he gave the merchants notice of the disaster, and signified his design to send a ship immediately to transport the goods: and he did send a ship accordingly, but the merchants sent an agent who would not suffer the goods to be delivered to the master of the ship sent by the appellants, and this fact was not contradicted.

the fish to Lisbon. He mentioned the case of <sup>\*1</sup>*Goss v. Withers*, M. 1758, 32 G. 2, B. R. to shew that they were not obliged to abandon the ship.

The plaintiffs have no pretence of satisfaction. Though the mariners of this ship were taken out by the enemy, yet other mariners might have been procured. Therefore there was not a total inability to proceed.

The plaintiffs received their whole insurance upon the ship, and upon their part of the goods. And they never [886] offered nor meant to furnish another ship, to carry the fish to Lisbon: they had even given up their own cargo.

The value of the fish depended upon its being carried to Lisbon, to be there against the Lent season.

Malines *Lex Mercatoria*, fo. 98 & 21, par. 5, (transcribed by Molloy, v. lib. 2, c. 4, § 4, <sup>\*2</sup>) says, "if the master of the ship, after his ship is become disabled (without his fault) will either mend it, or freight another, to carry the goods to the destined port." And in this case, he will be entitled to freight in toto. "But if the freighter disagrees to the master's carrying them in another ship, the master shall receive his freight, in proportion to what he has already carried." This relates to accidents inevitable, and without any fault of the master.

Molloy, 259, † puts the same case, of a ship taken by the enemy, and retaken, and not otherwise incapacitated; and says that after restitution, she may proceed; and the entire freight will become due.‖

And the case of *Lutwidge and How v. Grey et al* falls in with this rule, and goes upon the same principles.

It may perhaps be said that the freighter has not an absolute right to demand his goods, and carry them himself to the destined port of delivery, and abate a rateable proportion of freight: but the master has his option, to provide another ship, and carry the goods in it, and receive the whole freight, if he chuses to do so.

But here, it is the same thing as if the goods had been sunk in the bottom of the sea: the freighter has totally lost his whole risque. It would be hard, therefore, if he were liable to pay freight for it.

Mr. Hussey in reply—Lyde was not a third person; but the contractor to pay the freight.

The plaintiff's abandoning the ship to their insurers could not destroy their right to the freight: for the freight was neither insured nor abandoned.

Mr. Gould says "the freight must be paid, and the agreement performed, if the master provides another ship to carry the goods to the destined port; but not if he does not do so, but the freighter agrees to carry them himself."

[887] But the master, though he may provide another ship, is not, at all events, absolutely obliged to it: he has his option. And the case of *Lutwidge et al v. Grey et al* shews that the master is intitled pro rata itineris, though he does not proceed on his voyage: and there he had an allowance pro rata; though he refused to carry the goods any further.(i)

Lord Mansfield said that though he was of the same opinion at the assizes as he was now; yet he was desirous to have a case made of it, in order to settle the point more deliberately, solemnly, and notoriously; as it was of so extensive a nature; and especially, as the maritime law is not the law of a particular country, but the general law of nations: "non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit."

He said, he always leaned, (even where he had himself no doubt,) to make cases for the opinion of the Court; not only for the greater satisfaction of the parties in the particular cause, but to prevent other disputes, by making the rules of the law

<sup>\*1</sup> V. ante, 683 to 698.

<sup>\*2</sup> It is s. 5, and p. 254, 255, in the 6th edition.

† 7th edit. 1722.

‖ V. lib. 2, c. 4, s. 13, p. 259, of the 6th edition.

(i) The giving freight pro rata is unjust, if the master refuses to refit his ship or provide another for carrying the goods to the destined port, and must be destructive to commerce, by making the master less active in endeavouring to transport them, and putting great difficulties on the owners of the goods, especially when they have small parcels on board, not sufficient to answer the trouble and expence of looking out for another ship.



and the ground upon which they are established certain and notorious: but he took particular care that this should not create delay or expence to the parties; and therefore he always dictated the case in Court, and saw it signed by counsel, before another cause was called; and always made it a condition in the rule, "that it should be set down to be argued within the first four days of the term." Upon the same principle, the motion "to put off the argument of this case to the next term," was refused: and the plaintiff will now have his judgment within a few days as soon as he could have entered it up if no case had been reserved: at the expence of a single argument only: and some rules of the maritime law, applicable to a variety of cases, will be better known. He said, before he entered into it particularly, he would lay down a few principles, viz.

If a freighted ship becomes accidentally disabled on its voyage (without the fault of the master,) the master has his option of two things; either to refit it, (if that can be done within convenient time;) or to hire another ship to carry the goods to the port of delivery.<sup>(k)</sup> If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. And so it was determined in the House of Lords, in that case of *Lutwidge and How v. Grey et Al*.

As to the value of the goods—it is nothing to the master of the ship, "whether the goods are spoiled or not." Provided the freighter takes them: it is enough [888] if the master has carried them; for by doing so, he has earned his freight. And the merchant shall be obliged to take all that are saved, or none: he shall not take some and abandon the rest; and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons all, he is excused freight: and he may abandon all, though they are not all lost. (I call the freighter the merchant; and the other, the master, for the clearer distinction.)

Now here is a capture without any fault of the master<sup>(l)</sup> and then a recapture. The merchant does not abandon, but takes the goods: and does not require the master to carry them to Lisbon, the port of delivery. Indeed, the master could not carry them in the same ship: for it was disabled;<sup>(m)</sup> and was itself abandoned to the insurers of it: and he would not desire to find another; because the freight was higher from Biddeford to Lisbon, than from Newfoundland to Lisbon.

There can be no doubt but that some freight is due, for the goods were not abandoned by the freighter; but received by him of the recaptor.<sup>(n)</sup>

The question will be, "what freight?"

The answer is "a rateable freight:" i.e. *pro rata itineris*.

If the master has his election to provide another ship, to carry the goods to the port of delivery; and the merchant does not even desire him to do so; the master is still intitled to a proportion, *pro rata* of the former part of the voyage.

I take the proportion of the salvage here, to be half of the whole cargo; upon the state of the case as here agreed upon. And it is reasonable that the half here paid to the recaptor shall be considered as lost; for the recaptor was not obliged to agree to a valuation; but he might have had the goods actually sold, if he had so pleased, and taken half the produce: and therefore the half of them are as much lost, as if they remained in the enemy's hands. So that half the goods must be considered as lost; and half as saved.

Here, the master had come seventeen days of his voyage, and was within four

(k) This makes that an authority against this judgment; as that reason does not hold in this case.

(l) No point was made of this, and therefore it is to be presumed that the master was in no fault.

(m) Qu. How? if only by abandonment, it is nothing to the purpose.

(n) This reason makes against the judgment, because it shews it was better for the master to lose the whole freight than to be at the expence of carrying the defendant's fish to Lisbon; and it is giving a reason for his refusal, which is inconsistent with the only colourable ground for the judgment, which is the defendant's pretended acceptance of the fish, and desire of sending them not to Lisbon, but to Bilbao; and as far as I can conjecture, that was the truth of the case, that he did refuse; and what Lord Mansfield here says amounts to a strong presumption of it, as it shews that a refusal though attended with a total loss of freight was better for him than a performance; and thereby earning the freight.

days of the destined port, when the accident happened. Therefore he ought to be paid his freight for  $\frac{1}{2}$  parts of the full voyage, for that half of the cargo which was saved.

[889] I find by the ancientest laws in the world (the Rhodian laws,) that the master shall have a rateable proportion, where he is in no fault.\* And Consolato del Mere, a Spanish book, is also agreeable thereto. Ever since the laws of Oleron, it has been settled thus. In the Usages and Customs of the Sea, (a French book,) with observations thereon, the fourth article of the laws of Oleron is, "that if a vessel be rendered unfit to proceed in her voyage, and the mariners save as much of the lading as possibly they can; if the merchants require their goods of the master, he may deliver them, if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage: but if the master can readily repair his ship, he may do it; or if he pleases, he may freight another ship to perform his voyage." Amongst the observations thereon, the first is "that this law does not relate to a total and entire loss, but only to salvage; or rather, not to the shipwreck, but to the disabling of a ship, so that she can not proceed in her voyage without refitting: in which case, the merchants may have their goods again, paying the freight in proportion to the way the ship made."†

The observation adds further—"That if the master can, in a little time, refit his vessel and render her fit to continue her voyage; (that is, if he can do it in three days time at the most, according to the Hansetown laws;) or if he will himself take freight for the merchandize, aboard another ship bound for the same port to which he was bound, he may do it: (o) and, if the accident did not happen him by any fault of his, then the freight shall be paid him." The thirty-seventh article of the laws of Wisbuy is to the very same purport.

Roccus de Navibus et Naulo, in note 81st says—"Declara hoc dictum. Ubi nauta munere vebendi in parte sit functus, quia tunc pro parte itineris quo merces inventæ sint, vecturam deberi æquitas suadet; et pro eâ rata mercedis solutio fieri debet. Ita Paul de Castro, &c." (Then a string of authorities follows) (p) "et probat Johannes de Evia, &c.; qui hoc extendit in casu quo merces fuerint deperditæ (totally lost) unâ cum navi, et certa pars ipsarum mercium postea fuerit salvata et recuperata; tunc naulum deberi pro rata mercium recuperatarum, et pro rata itineris usque ad locum in quo casus adversus acciderat, fundat, &c." (And then he goes on with authorities.) "Item declara, quod si dominus seu magister navis solverit mercatori pretium mercium deperditarum, tunc tenetur mercator ad solutionem nauli; quia merces habentur ac si salvatæ fuissent."

[890] In another book entitled the Ordinance of Lewis the 14th, established in 1681, (collected and compiled under the authority of M. Colbert) the same rules are laid down; particularly in the 18th, 19th, 21st and 22d articles.—Art. 18th directs, that no freight shall be due, for goods lost by shipwreck, or taken by pirates or enemies. Art. 19th is, that if the ship and goods be ransomed, the master shall be paid his freight, to the place where they were taken: and he shall be paid his whole freight, if he conduct them to the place agreed on; he contributing towards the ransom. (Art. 20th settles the rate of contribution.) Art. 21st, the master shall likewise be paid the freight of goods saved from shipwreck: (q) he conducting them to the place appointed. Art. 22d, if he cannot find a ship to carry thither the goods preserved, he shall only be paid his freight in proportion to what he has performed of the voyage.

And the case in the House of Lords between *Lutwidge and How v. Gray et Al* is also in point; and was well considered there: and Ld. Talbot gave the reasons of the judgment of the House, at length.

\* V. artic. 27, 32, 42.

† Wisbuy, artic. 33. The Emperor Charles 5th Ord. art. 40.

(o) This depends on the form of the policy, 1 Brownl. 21.

(p) They are all really but one; for all before Johannes de Evia are copied from each other.

(q) But which, if he abandons his ship as he did in this case, and might have found another (as he certainly might at Biddeford, where he abandoned his own) but never once attempted or offered to do it.

Therefore in the present case, a rateable proportion of freight ought to be paid for half the goods.

It is quite immaterial what the merchant made of the goods afterwards; for the master hath nothing at all to do with the goodness or badness of the market: nor indeed can that be properly known till after the freight is paid; for the master is not bound to deliver the goods, till after he is paid his freight. No sort of notice was taken of that matter, in the case of *Lutwidge and How v. Gray* in the House of Lords: and yet there the tobacco was damaged very greatly; even so much that a great part of it was burnt at the scales, at Glasgow.

Therefore the verdict must be for 60l. 14s. which upon computation amounts to the rateable proportion of the freight; being  $\frac{17}{21}$  of 75l. and half of 150l.

Consequently the verdict which was for 70l. must be set right, and made 60l. 14s. Per Cur.—Let the postea be delivered to the plaintiff.

[891] MORISSET *versus* KING. Friday, 23d Nov. 1759. Bond in a penalty conditioned for performance of articles of partnership, held not such a contract as can be adjudged by the Court to be usurious.

This was an action of debt on bond, in the penalty of 200l. conditioned for the due performance of certain articles: which articles recited that Mary Morisset had lent Daniel King the sum of 100l. to be repaid to her at the end of four years without interest; but in consideration that the said Daniel King his executors and administrators should find and provide for Mary Dubois, daughter of the said Mary Morisset (the obligee,) meat and drink in the house where he dwelt or should dwell, for four years, if the said Mary Dubois should so long live; and that she should, during the said term, board with him, and that she should be co-partner with Mary King, wife of the said Daniel King, in the business of a milliner: and should, all that time, bear one moiety of the losses, charges (except house-keeping) shop-rent, and materials necessary for carrying on the trade, (which the said Daniel King did agree to provide;) and they should be partners, and each do their utmost to carry on the trade; and should equally divide the profits; and also that the said Daniel King should lodge \*<sup>1</sup> the said Mary Morisset, she paying him 10l. a year. And at the end of the four years, Daniel King was to repay the 100l. and in case of the death of the said Mary Dubois, to pay the principal together with lawful interest for the 100l. to the said Mary Morisset.

The defendant after having demanded and had oyer of the condition of this bond and of the articles therein recited, pleads “that this was a corrupt agreement;” with an averment “that the board of Mary Morisset (the mother) was worth 20l. a year; and the board of Mary Dubois (the daughter) was worth 10l. a year.”

To this plea, the plaintiff demurs.

The only question was whether this was an usurious contract, within the statute of 12 Ann. stat. 2, c. 16. Which makes void all bonds, contracts, and assurances, where more than 5l. per cent. per annum is directly or indirectly taken for any loan.

Mr. Aspinall argued, as counsel for the plaintiff; and Mr. Wedderburn, for the defendant.

The Court were extremely clear that this case cannot be within the Statute of Usury.

[892] Lord Mansfield observed, that it is impossible to say that King might not receive so much advantage by this partnership, as to be worth the consideration. It might be a very advantageous bargain to King: here might be recommendation, skill, labour, or other benefits arising to him from it.

He mentioned the case of *Mr. Hubert*, who entered into a private secret partnership with Nelson, who drew him into a bankruptcy thereby. So here, the plaintiff's daughter might have been drawn into a bankruptcy, by means of this agreement: which would have been more severe to her, perhaps, than the penalty of this Statute of Usury would be.

\*<sup>1</sup> Mr. Just. Foster and Mr. Just. Wilmot concurred with the Chief Justice. They said, it did not explicitly appear whether this was a prudent agreement or not: but

[\*<sup>1</sup> It seems it should be board.]

\*<sup>2</sup> Mr. Just. Denison was absent.



it might be beneficial to King upon the whole : at least, it was not such a contract as could be adjudged by the Court to be usurious within the statute.

Judgment for the plaintiff.

REX *versus* MASTER AND WARDENS OF THE COMPANY OF SURGEONS IN LONDON.

Saturday, 24th Nov. 1759. Understanding Latin is a previous qualification to being even put apprentice to a London surgeon.

This was a cause that stood in the Crown paper, upon a return to a mandamus directed to the Master and Wardens of the Company of Surgeons of London ; reciting a custom in the said city, " that every freeman of the said city, using and exercising the art, science, or mystery of surgery within the said city, hath a right, in respect thereof, to have and take apprentices, of the age of 14 years or upwards, to be educated and instructed in the said art, science, or mystery, for the space of seven years ; which said apprentices have been used and accustomed to be admitted and bound in the presence or with the consent of the master and wardens or some of them ; " and reciting that Richard Guy, a freeman of the said city, and also one of the freemen of the said Company of Surgeons of the said city, being desirous of taking Melmoth Guy, his son, aged 15 years to be his apprentice for the term of seven years, to be educated and instructed in the said art, science, or mystery of surgery, had often offered the said Melmoth Guy to be admitted and bound, before the said master and wardens or some of them, his said apprentice for the term of seven years, in the said art, science, or mystery, according to the said custom ; and that the said Melmoth Guy had also often offered himself to them or some of them, to be admitted and bound before them or some of them, an [893] apprentice to the said Richard Guy for the said term, in the said art, science, or mystery ; and that the said master and wardens had not permitted the said Melmoth Guy to be bound apprentice to the said Richard Guy, for the term of seven years, before them or any of them, but have altogether refused and still refuse so to do ; and commanding them immediately and without delay, in due manner to permit the said Melmoth Guy to be admitted and bound, before them or some of them, an apprentice to the said Richard Guy, for the term aforesaid, in the said art, science, or mystery, according to the said custom, or signify cause to the contrary.

The return of the master and wardens admits the whole of the custom and facts, to be as they are alledged in the writ. But they further certify and return, that long before the said Richard Guy offered his said son Melmoth or the said Melmoth offered himself to them or any of them, to be admitted and bound before them or any of them, an apprentice for the said term of seven years, in the said art, science, or mystery, of surgery, according to the custom aforesaid ; and after the making of a certain Act of Parliament intituled " An Act for Making the Surgeons of London, and the Barbers of London, two Separate and Distinct Corporations ; " to wit, on the 7th day of April in the year of our Lord 1748, at Stationers-Hall in London aforesaid ; John Freke, then and there being master of the said Company of Surgeons, and William Pyle and Legard Sparham, then being two of the governors of the said Company of Surgeons, before that time duly elected, chosen, appointed, and sworn into their said respective offices ; and also John Ranby, Esq. Cæsar Hawkins, Esq. William Petty, Esq. Joseph Sandford, William Cheselden, Esq. James Hicks, Peter Sainthill, Noah Roul, John Westbrook, William Singleton, James Phillips, Joseph Webb, Mark Hawkins, Christopher Fullagar, Edward Nourse, John Girle Esq. and John Townsend, being then and there nine and more of the members of the court of assistants of the said Company of Surgeons, before that time duly elected, chosen, appointed, and sworn to be of the said court of assistants, did hold a court and assembly, at Stationers-Hall London aforesaid, in order to treat and consult about and concerning the rule, order, state and government of the said Company of Surgeons ; and that the said John Freke, so being then and there master of the said Company of Surgeons, and the said William Pyle and Legard Sparham, so being then and there two of the said governors of the said Company of Surgeons, and the said John Ranby Esq. Cæsar Hawkins Esq. &c. &c. &c. so being then and there nine and more of the members of the said court of assistants of that company, being all then and there duly assembled as aforesaid, did then and there according to the form of the statute in that case made and provided, make, ordain, constitute, and establish a

certain bye-law [894] and ordinance, for the regulation, government, and advantage, of the said Company of Surgeons, in the words following, to wit, item, it is ordained "that no member of the said company shall take any person into his service, as his apprentice, to be instructed in the art or science of surgery, for any shorter time than seven years; which person shall understand the Latin tongue; his ability wherein shall, before his being bound, be tried by the governors or one of them. And every freeman of this company or foreign brother shall, within one month next after his entertainment of any person in order to being his apprentice, present such person before their governors or two of them, at a court to be by them held; and there bind such person to him before the said governors, by indenture; upon pain of forfeiting 20l. of lawful money: and the clerk of the said company shall not bind any person who has not been so represented and examined; upon pain of forfeiting the sum of 10l. of lawful money and being liable to be removed from his said office. And no apprentice shall be turned over from one master to another, but at a court in the presence of the master and wardens or one of them: and one guinea, and no more shall be paid for the same."

Which said ordinance or bye-law, so made as aforesaid, after the making thereof as aforesaid, and long before the said Richard Guy had offered the said Melmoth, or the said Melmoth had offered himself to be admitted and bound before them or any of them, an apprentice to the said Richard Guy, for the term of seven years, in the said art, science, or mystery of surgery, according to the custom aforesaid, to wit, on the 9th day of the same April in the said year of our Lord 1748, was examined, approved, and allowed by the Right Honourable Philip Lord Hardwicke, the then Lord Chancellor of Great Britain, and by Sir William Lee Knt. the then Lord Chief Justice of His Majesty's Court of King's Bench, and Sir John Willes Knt. the then Lord Chief Justice of His Majesty's Court of Common Bench, according to the form of the statute in that case made and provided.

They further return that the said ordinance or bye-law, so made, examined, approved, and allowed as aforesaid, hath ever since the making, examination, approbation, and allowance thereof as aforesaid, been, and now is in full force and effect, and in no wise annulled, revoked, or vacated.

They then return that after the making examination, approbation, and allowance of the said ordinance or bye-law as aforesaid, and before the issuing of this writ, to wit, on the 3d of May in the year of our Lord 1759, at a cer-[895]-tain court then holden at Surgeons Hall in the Old Bailey London, by Mark Hawkins then master, and Christopher Fullager and Edward Nourse then Governors of the said Company of Surgeons, (they the said Mark Hawkins Christopher Fullager and Edward Nourse, having before that time been duly elected, chosen, appointed, and sworn, into their said respective offices, according to the form of the statute in that case made and provided,) came the said Richard Guy before the said court, and offered and presented his said son Melmoth; and the said Melmoth did then and there offer himself to the said master and governors then being at that court, to be admitted and bound before them, apprentice to the said Richard Guy, for the term of seven years, in the said art, science, or mystery of surgery; and that the said Melmoth Guy, being so offered and presented as aforesaid, was then and there examined touching his knowledge in the Latin tongue; and his ability therein, in pursuance of the ordinance or bye-law aforesaid, was then and there fairly, candidly, and impartially tried by the said Edward Nourse, he the said Edward being then and there one of the governors of the said Company of Surgeons: and that the said Melmoth Guy, upon such his examination, and upon his ability in the Latin tongue being so as aforesaid tried by the said Edward Nourse (so being one of the governors or wardens of the said company as aforesaid,) was found, not to understand the Latin tongue, but to be wholly ignorant thereof; and was then and there so adjudged and declared to be, by the said Edward Nourse, on such trial.—Wherefore the said court could not consent, but did then and there refuse to permit the said Melmoth Guy to be admitted and bound an apprentice to the said Richard Guy, for the term of seven years, in the said art, science, or mystery of surgery, according to the custom aforesaid, until such time as the said Melmoth should understand the Latin tongue, as by the aforesaid ordinance or bye-law is in that behalf required.

They further return expressly and positively, that the said Melmoth Guy, when he was so presented and offered as aforesaid, before the aforesaid Master and Governors

or Wardens of the said Company of Surgeons, at the said court, by them held for the purpose herein before in that behalf mentioned, did not understand the Latin tongue: but was utterly ignorant of the same: and that the said Melmoth Guy hath not, at any time before or since his being so examined and tried as to his ability in the Latin tongue as aforesaid offer himself or been presented to the said company or governors thereof, or any of them for the time being, to be tried as to his ability in the Latin tongue.

And therefore they cannot permit the said Melmoth [896] Guy to be admitted and bound before them an apprentice to the said Richard Guy for the said term of seven years, in the said art, science, or mystery of surgery, according to the custom aforesaid, as by the writ they are commanded.

Mr. Field pro Rege objected, and argued "that this was an insufficient return:" for that the bye-law is a bad one, being made in restraint of a natural general and common right.

The first restriction of the common right that every person has of learning and exercising any art in any place, except where it happens to be restrained by custom, is the Act of 5 Eliz. c. 4.

The City of London have indeed, by custom, a power over the youth of their city, and a power of excluding foreigners from exercising trades within their city.

11 Rep. 53, *Taylor's of Ipswich case*, shews the general law to be, that a person ought not to be restrained in his lawful mystery.

Private companies can not make laws contrary to the general law or to the customs of great cities: though great cities and towns may do so. This distinction is mentioned in 6 Mod. 123,\* *Cuddon v. Estwick*. And he cited the case of *The City of London v. Vanacker*, in 1 Ld. Raym. 496, where Holt Ch.J. said that "if the bye-law was for the benefit of the city, it would be good."

This bye-law, therefore, is not good, without a particular custom to support it: for it restrains a common-law right.

The return does not aver that the understanding the Latin tongue is a necessary qualification of a surgeon: and their art may certainly be performed without it. At least, it is no objection to a young person's being put out to learn the art; whatever it might be to the admission of a man to practise it.

Besides, "understanding the Latin tongue," is a very indefinite and vague expression: and a very different idea of it would be conceived by different persons: as by Dr. Bentley (for instance) and by a † warden of the Surgeons Company.

Bad consequences too, may arise from this bye-law: and if so, it shall not prevail. Godbolt, 254, S. C. with that of *The Taylors of Ipswich*, (there called *The Cloth-workers of Ipswich case*).

If the bye-law is bad, this young man's not understanding Latin will not cure or help it. However, the bye-law does not expressly forbid such a person to be admitted; it is not mandatory only directory.

[897] Mr. Serjeant Hewitt contra, was rising up, to speak in support of the return.

But Lord Mansfield said it was too plain to argue.

Whereupon, per Cur. Return allowed.

REX versus INHABITANTS OF PRESTON NEAR FAVERSHAM. Monday, 26th Nov. 1759.  
[See Bull. 114. 1 Bl. Rep. 192. Doug. 672.]

See this case at large, in the quarto-edition of Settlement Cases, No. 154, p. 486.

[899] COLLINS versus GIBBS. Tuesday, 27th Nov. 1759. [See 4 Durn. 471.]  
Condition precedent must be averred to be performed, or that the plaintiff was ready to perform it.

Mr. Burland had moved, on Thursday last, in arrest of judgment, after a judgment by default, and a writ of inquiry executed, in an action upon the case on assumpsit.

\* V. 1 Salk. 193, S. C.

† N.B. Mr. Nourse was, in fact, a very good scholar.



His objection was the want of an averment of performance of what he insisted to be a condition precedent.

The question was, whether it was a condition precedent, or not.

It was an action upon the case, wherein the plaintiff, having first recited the dependency of a former action brought by the defendant against him, and a compromise thereof, upon an agreement for the payment of the costs of it by the present defendant to the present plaintiff, on the now plaintiff's giving him a general release; lays the defendant's promise to pay him his demand in the present action to have been made, "in consideration that the said William (the now plaintiff) at the special instance and request of the said John (the now defendant) would execute to the said John a general release, to bear date on the 27th day of July in the year afore-said," (which was the day before the agreement,) "and to be filled up in the common and usual form of general releases: he the said John (the present defendant) undertook and faithfully promised the said William (the present plaintiff,) to pay him all the costs and expences that he the said William had been at in defending the said suit, feeling counsel, subpoenaing witnesses, journies, and all other charges and demands in the said suit whatsoever; as soon as a bill of such costs could be prepared and produced to him the said John."

Then the plaintiff avers his costs and expences in the said suit to have been 21l. 3s. 7d. And that a bill of such costs and expences was prepared, and produced to the defendant; whereof he had notice. But the said defendant, &c. &c.

[900] Mr. Burland urged, that the plaintiff ought to have averred "that he had given or tendered to the defendant a general release executed:" for that his giving such a release appeared to be a condition precedent; the defendant's promise being made in consideration that he would do so. In proof of which he cited Hobart, 106, Ro. Rep. 1 Ld. Raym. 662, *Thorp v. Thorp*.

Mr. Dunning contra, cited 1 Salk. 29, *Roe v. Haugh* in Cam' Seac': where the Judges held that they ought to do what they could to help the declaration. (Which case he acknowledged to be after a verdict.)

Mr. Burland replied that that was after a verdict: this is only after a judgment by default.

The release would be no bar to the demand, in the present case; because it is agreed that it should bear date the day before the agreement; so that the cause of action was subsequent to it, and therefore could not be barred by it.

The plaintiff made no promise "to execute the release." Therefore we have no other method to oblige him to it. The payment of the money is to be "on his executing it."

Lord Mansfield—The release is to be given "at the special instance and request of John" (the now defendant:) but perhaps he may never request it. We will see if it can be made good by construction.

Cur. advis'.

Lord Mansfield now delivered the resolution of the Court.

This is a motion made by the defendant in arrest of a judgment by default: so that it comes before the Court, exactly as if it had been upon demurrer; and is not like the cases of objections to judgments after verdict.

The plaintiff has not averred performance of what was to be done on his part; nor shewn that he was ready to perform it.

Therefore we are all of opinion, that it can not be made good as laid in the declaration: and the true distinction as to supplying such defects, is whether the objection be made after a verdict, or not.

Therefore the judgment must be arrested.

[901] Whereupon Mr. Dunning moved to amend, upon payment of costs; by inserting such an averment, (as he said) the fact really was. Which was opposed by Mr. Burland; as being too late, after judgment was arrested; and as having never been done.

Lord Mansfield—As it is doubtful whether this can be done or not; and as it is certain that the difference between paying costs to amend, and beginning afresh, is very trifling in this case, it is better to let the rule be as it was pronounced: and accordingly—let the judgment be arrested.

Per Cur. Judgment arrested.

THE \* INSOLVENT DEBTORS CASE: or YOUNG *versus* DIEGO AIMES. Wednes. 28th Nov. 1759. [4 Bur. 2526.] Stat. 32 G. 2, c. 28, s. 13, construed equitably for the benefit of insolvent debtors.

The Court declared that as the † Act of 32 G. 2, c. 28, for relief of debtors with respect to the imprisonment of their persons, &c. which did not † commence till the 15th of June 1759, (being the first day of Trinity term 1759) could not, undoubtedly, mean to leave, between the expiration of the former Act and the commencement of this, a chasm of fourteen days, to the prejudice and disadvantage of insolvent debtors, (for whose relief it was calculated,) they thought they ought to construe this Act equitably, for the benefit and relief of such insolvent debtors and prisoners; especially as the words of it are "that the prisoner may exhibit his petition before the end of the first term which shall be next after he shall be charged in execution." And therefore they thought themselves at liberty to construe it, and did accordingly declare their construction of it to be, "that Trinity term 1759, ought to be considered as the term in which such prisoners were charged in execution; and consequently, that they or such of them as were precluded by the expiration of that Act, from completing their discharge under it, had the present Michaelmas term, for the first term next after their being charged in execution; at any time before the end of which, they might petition." By which construction, the Court took care that these debtors should not suffer any inconvenience, merely by such undesigned expiration of an Act made for their relief, and undoubtedly meant (they said) to be continued on without any intermediate chasm.

[902] REX *versus* INHABITANTS OF FULHAM.

This case is abridged, in the Table: and it may be seen at large, in the quarto edition of my Settlement-Cases, page 488, No. 155.

The end of Michaelmas term 1759.

[904] HILARY TERM, 33 GEO. 2, B. R. 1760.

GARDINER *versus* CROASDALE. Friday, 25th Jan. 1760. [S. C. 1 Black. 198. Sayer's L. of Dam. 45. See also Doug. 704 b.] On an action against insurers for a total loss of ship, plaintiff may recover for a partial loss.

This case came before the Court, upon a question reserved by Lord Mansfield at Nisi Prius at Guildhall, upon an action upon the case, on a policy of insurance.

The insurance was made upon one fourth part of the ship "Encouragement," and of its cargo, from Greenland to London, free from average under a certain value, from the ice.

The plaintiff declared upon a total loss of the ship: the declaration expressly stated a total loss of it; and the damages were laid for a total loss.

But the evidence only proved an average or partial loss; it was not attempted to prove a total one; and it was only shewn that the ship had received some damage, (scarce more than 50l. would have repaired).

The defendant's counsel objected at the trial, "that this evidence did not maintain the plaintiff's declaration:" and they represented the practice to have been on their side; viz. "That proof of a partial loss was not sufficient to support a declaration for a total loss."

A verdict was taken for 20l. as for an average loss: but it was agreed on both sides, that this verdict should be subject to the opinion of this Court, "whether it was maintainable in point of law." If the Court should be of opinion "that it was," then the plaintiff was to have judgment: but if the Court should be of opinion "that it was not," then the plaintiff was to be non-suited.

[905] It was now urged by the defendant's counsel, that this action is in the nature of a special action upon the case; and the plaintiff rests his case upon a total loss of the ship: it is not laid as a consequence of the events set forth in the declara-

\* V. ante, 799.

† Sect. 13.

tion ; but he has made this the gist of his action. The damages, they said, must be taken, upon this record to have arisen from a total loss ; and the jury are obliged to give damages agreeably to the plaintiff's own express allegation ; and cannot take into their consideration any damages that are not alledged. And here is no allegation at all of any average-damage. They denied that any thing was put in issue, upon the non-assumpsit pleaded, but a total loss, which the plaintiff has alledged and the defendant has denied ; and they said that the defence upon an average loss was, or at least might be, quite different from the defence upon a total loss. They added, that if the defendant had chosen to suffer judgment to go by default, it must have been taken, upon this record, that he had acknowledged it to be a total loss : and the damages must have been assessed against him accordingly.

They said this was not like a case of *Walker v. The Royal Exchange Assurance Company*, in 1746, at Nisi Prius, before Ld. Ch. J. Lee : which was an action of covenant upon a policy of insurance, for 800l. on the ship "Argyle" from to Viana. The breach assigned was, that before the ship's arrival at Viana, "she was taken by enemies, and thereby totally lost." The defendant alledged "that she left her convoy improperly ; that she was retaken by an English man of war : that she was thereupon sold ; that seven eighths of the value was paid to the re-taker ; that the rest of the purchase-money was left at Oporto, in the hands of the English consul." And the defendant's counsel objected "that upon these circumstances, the ship was not totally lost." It was answered, on the plaintiff's part, "that the objection would not hold : for that notwithstanding the re-capture, it was a total loss by the capture." Whereas in the present case, here is only a partial loss : so that the two cases do not resemble each other.

They cited the case of *Hambleton v. Veere*, 2 Saund. 169, as being more apposite to the present case. They also cited 2 Strange, 1250, *Dean v. Dieker*, to prove that a re-capture does not hinder its being a total loss ; when it had once become so by the capture.

The Court were clearly of opinion with the plaintiff, even without hearing his counsel.

[906] Lord Mansfield—At the trial, it appeared to me, and so the jury thought, that the present case could not be considered as a total loss. The defendant's counsel objected, (as they do now,) "that the jury could not take a partial loss into their consideration, upon an express declaration for a total loss ;" and I understood from them, "that the practice supported their objection."

Mr. Norton, who was counsel for the plaintiff at the trial, then argued to the contrary, upon principles : and he also cited the case of *Walker v. The Royal Exchange Assurance Company*. (But that case does not prove much ; because that was a total loss.) I was satisfied upon the principles ; provided the practice did not interfere with them : which I was then told it did.

I chose to put it in such a shape that the opinion of the Court might be had, without delay or expence.

No hardship was done to the defendant, upon the quantum of the damages found : for the plaintiff took a great deal less than it clearly appeared upon the evidence that the loss amounted to.

I cannot hear of any such determination as can support the objection that has been made by the defendant's counsel.

Therefore it stands singly upon principles. And upon principles, it is extremely clear that the plaintiff may, upon this declaration, recover damages as for a partial loss.

This is an action upon the case : which is a liberal action. And a plaintiff may recover less than the grounds of his declaration support ; though not more. This is agreeable to justice, and consistent with his demand.

Here are two grounds of the plaintiff's declaration ; viz. the policy, and the damage to the ship.

As to its being a total loss, or a partial loss, that is a question more applicable to the quantity of the damages, than to the ground of the action. The ground of the action is the same whether the loss be partial, or total : both are perils within the policy.

As to the defendant's not coming prepared to defend a partial loss—this indeed would be an objection, if it was true. But the defendant does, in truth, come prepared to shew "that either no damages had happened at all ; [907] or, at least, that



damages have not happened to such a degree as the plaintiff has alledged in his declaration," or "that he did not sign the policy."

As to the effects of a judgment by default—the defendant could not have been hurt by a judgment by default. For the plaintiff could not have recovered, even upon a writ of inquiry, any greater damages than the plaintiff could prove, to the jury sworn to assess them, "that he had actually suffered."

If the present objection was to prevail, it would introduce the addition of unnecessary counts in declarations, and an enormous swelling of the records of the Court. It is more convenient to lay the case short, than prolix.

There is no proof of any practice contrary to the principles. It was the apprehension of such contrary practice, that was the only occasion of my having any doubt at the trial. I am now fully satisfied that the plaintiff may recover either the whole, or less, than he has laid. And therefore this verdict ought, in my opinion, to stand. In an ejectment for more, the plaintiff may recover less : it is every day's practice.

Mr. Just. Denison concurred, and thought it a very plain case. It is an action for damages for the loss of the ship. Now, in an action for damages, the plaintiff is to recover his damages, according to his proof, pro tanto : but he is not, in an action for damages, obliged to prove all that he has alledged. If it had been an action of covenant for pulling down a house, would not the plaintiff be intitled to recover damages for pulling down half the house, provided he had proved that the defendant did it ? This is no variance of the evidence from the declaration : the evidence tends, in a certain degree, to the proof of what is alledged in the declaration. It is not necessary to lay two counts in such a declaration as this.

Mr. Just. Foster concurred in the opinion "that the verdict ought to stand."

Mr. Just. Wilmot also concurred. He said that in actions for damages, the plaintiff may recover for all, or for any part : the damages are severable, and may be given pro tanto. Here, damages are laid for a total loss ; which is only the measure of the damages : and the plaintiff proves a partial loss ; which only affects the measure of the damages, but is no variance from the allegations contained in the declaration.

[908] And if this had been a judgment by default, yet the plaintiff could not, even in that case, have recovered damages for any more loss than he was able to prove under the writ of inquiry of damages.

And as to the defendant's not having sufficient notice that he should come prepared to defend against a partial loss—I think he has sufficient notice to come thus prepared ; for he ought to come prepared to prove "that no damage at all happened." If any at all happened, he will be liable, pro tanto, if it be proved.

Per Cur. unanimously,

Let the postea be delivered to the plaintiff.

REX *versus* BENJAMIN BURGESS. Saturday, 26th Jan. 1760. Foot ways through Richmond gate and through East-Sheen across Richmond Park established, but not for carriages or horse people.

#### A Trial at Bar.

Indictment for a nuisance in obstructing an ancient and common highway leading from Richmond, through and over Richmond-Hill, and from thence through and over Richmond New Park, to Coomb-Neville, for all the King's subjects, with their horses, to go, return, pass, and ride at their free will and pleasure.

Note—The \* former trial at Bar was for obstructing an ancient and common highway for carriages, horsemen, and foot-passengers ; which was laid jointly, viz. as a common highway for all these.

An indictment was afterwards found for obstructing a foot-way : which was not defended ; (being † given up by the then Attorney-General Lord Mansfield).

These two last-mentioned indictments (as well as the present one) related to Richmond-Hill gate.

Another indictment was afterwards found against Martha Gray keeper of the East-Sheen gate : and was tried.

\* On 13th Nov. 1754.

† On 28th May 1756.

The second trial (which was at Kingston Assizes, before † Mr. Just. Foster) was for a foot-way only, through the park, at East-Sheen gate: and the gate-keeper was convicted.

This was for a horse-way only, and the way was described to lead through Richmond gate.

[909] Upon the first trial, it seemed clear beyond all possibility of doubt, (and so the Attorney-General now acknowledged,) "that there was an indisputable right for foot passengers, and that there had always been ladders at certain gates:" but the right of passing and repassing with carriages or on horse-back was very weakly supported at that time, and most strongly contradicted by a great over-balance of more credible evidence.

Upon the present trial, the pretence of claim to the horse-way was so ill supported by evidence on the part of the prosecutors, and so clearly shewn to be ill-founded, and imaginary, by the strongest evidence on the other side, which was fully proved "that fifty, sixty, and seventy years ago, there were locks upon all the gates; that no persons could pass on horseback, or with wheeled carriages, without keys or permission of the ranger or his substitutes; and that there had always been a fence-month, during which season no one at all could even make use of the keys which the ranger had given them, to be used at all other times but that month:" that the Court, and jury, and audience, and also the prosecutors own counsel were convinced that the prosecutors had failed in their evidence; and, accordingly, the jury themselves declared voluntarily, and without being asked their sentiments, "that they were quite satisfied with the evidence which had been already given on the part of the defendant."

Whereupon the defendant's counsel rested the matter here; although they had forty-five more witnesses still remaining un-examined, and it was thought needless for them to sum up their evidence, or to say any thing more upon the subject.

The jury therefore, without hearing any remarks or reply or summing up the evidence at all, and without going from the Bar, or having the least doubt or hesitation,

Acquitted the defendant.

N.B. Soon after the trial at Surry Assizes for a nuisance in obstructing the foot-way, whereof the then defendant Martha Gray, gate-keeper at East-Sheen gate was convicted as aforesaid, very convenient ladders were erected, at those gates to which the two former convictions extended, and where there had anciently been ladders, till Sir Robert Walpole (then ranger) took them away; viz. at Richmond gate, and at East-Sheen gate.

[910] REX *versus* INHABITANTS OF HITCHAM. Thursday, 31st Jan. 1760.

See this case at large, in the quarto-edition of my Settlement-Cases, p. 489, No. 156, and p. 504, No. 161.

[912] STRONG, Clerk, *versus* TEATT, Lessee of Mervyn et Al'. Friday, 1st Feb. 1769. [S. C. 1 Bl. 200.] Words may be supplied to restrain the generality of a devise (so as to except a reversion) if the intent of the testator can be collected from other parts of his will.

[Applied, *Roe v. Reade*, 1799, 8 T. R. 122; *Welby v. Welby*, 1813, 2 V. & B. 195. Distinguished, *Crowe v. Noble*, 1824, Smith & Batty, 36. Not applied, *Ford v. Ford*, 1848, 6 Hare 494; *In re Bellis's Trusts*, 1877, 5 Ch. D. 508.]

The six lessors of the plaintiff, in Ireland, were Mervyn Fanning, Arthur Mervyn, Henry Carey, Wesley Harman, Eleanor Irvine, or Irvin, and Anne Mervyn: but only three of the six demises, viz. those of Wesley Harman, of Eleanor Irvine, and of Anne Mervyn, (whb all claim by virtue of the devises to the testator's daughters,) were material.

This was a writ of error, brought upon a judgment given by the Court of King's Bench, in Ireland, for the plaintiff in ejectment.

The ejectment was brought for lands in the county of Tyrone ; and upon the trial, a special verdict was found.

The special verdict first states a long pedigree of the family of the Mervyns ; and also several deeds, not necessary to be here taken notice of, (as no question at all arises upon them).

Then it finds, that Audley Mervyn, Esq. and Henry his son, on the marriage of the said Henry with Mrs. Mary Tichburn, executed deeds of lease and release dated the 21st and 22d of December 1711 : and that, in pursuance thereof, a fine was levied, and a recovery suffered, whereby the manor of Arlestown in Tyrone, (of which the premises in question are part,) was settled, in strict settlement, on the said Audley (the father) for life ; then on the said Henry (his son) for life ; then on the first and other sons of Henry, &c. and the issue of that marriage (in common form,) with several terms, powers, and provisoes ; with the reversion in fee to the said Audley, the father. (Which marriage took effect ; but there was no issue of it.)

That Audley Mervyn had issue, besides the said Henry (his eldest son,) three other sons, viz. Audley, James, and Theophilus ; and four daughters, viz. Lucy, (who, in her father's life-time, married with Wentworth Harman,) Eleanor, (one of the lessors of the plaintiff, and who afterwards married with Christopher Irwin, who has been many years dead,) Anne (one of the lessors of the plaintiff, who married James Mervyn, otherwise Richardson, long since dead,) and Jane.

[913] That the said Audley the elder, being seised as the law requires, of the said lands and tenements, on the 15th of June 1717, duly made and published his last will and testament, in writing ; whereby, after reciting "that he was desirous to make the best provision in his power, for the support of his children and the peace and settlement of his family," he devised as follows ; viz. "And as to the worldly estate wherewith it has pleased God to bless me, I give and bequeath the same, in manner following. I give and bequeath to my dearly beloved wife Olivia, to her proper use and benefit, all my plate, and household goods and furniture of what kind soever, and also my coach and horses, and their harnesses, and three saddle-horses. I also constitute and appoint my dear wife sole executrix of this my last will and testament ; and do give and bequeath unto her all the rest and residue of my personal estate, of what kind soever. And I do hereby will and require my said executrix, as soon as she conveniently can, after my death, to sell all the rest of my horses and all my stock of cattle ; and to apply the money arising by such sale, and all such debts as are or shall at the time of my death be due to me, (particularly the sum of 1100l. due to me by judgment affecting the estate of Richard, late Earl of Bellamont, the sum of 1000l. due to me by my son Henry Mervyn, and a debt of 1000l. or 1200l. due to me by Hugh Mervyn,) and also all arrear of rents which are or shall become due unto me, to the payment and discharge of such sums of money as shall be due by me, to any person or persons at the time of my death. And to the intent that all my debts may be honestly and truly paid and discharged.—

"I do hereby give and devise to my said dear wife Olivia and her heirs, all that and those the towns, lands and tenements, &c. &c. (specifying them by their particular denominations ;) all which lands and tenements are situate, lying and being in the county of Tyrone ; as also the town and lands of, &c. all which last mentioned lands are situate, lying and being in the barony of Duleek, and county of Meath ; and also all other the lands, tenements and hereditaments in the said counties of Tyrone and Meath, or either of them, whereof I am seised in fee simple, or of which any other person is seised in trust for me ; together with their and every of their appurtenances ; to the use, intent and purpose that my said dear wife shall take and receive out of the said lands, as an addition to her jointure, one annuity or yearly rent charge of 100l. per annum, during her natural life, to her own proper use and benefit : and to this further use and purpose, that my said wife may, by sale of such of the said lands hereby to her devised, raise so much money as may be sufficient to pay off and discharge such of the said debts, as shall not be paid off and discharged out of my personal estate. [914] And as to so much part of the said lands and tenements as shall remain unsold, to the use following, (subject nevertheless to the payment of the said sum of 100l. per annum to my said dear wife during her natural life ;) viz. to the use of my son Audley Mervyn, for and during his natural life ; and from and after his death, to the use of his first and every other son and sons severally and successively, and to the heirs male of their several and respective bodies ; and for want of such



issue, to the use of my son James, for and during his natural life ; and from and after his death, to the use of his first and every other son, and sons severally and successively, and to the heirs male of their several and respective bodies ; and for want of such issue, to the use of my son Theophilus, for and during his natural life ; and from and after his death, to the use of his first and every other son and sons severally and successively, and the heirs male of their several and respective bodies : and for want of such issue, to the use of my son Henry, for and during his natural life : and from and after his death, to the use of his first and every other son and sons, severally and successively, and the heirs male of their several and respective bodies ; and for want of such issue, to the use of each and every of my daughters and the heirs of their several bodies, as tenants in common, and not as jointenants ; and for want of such issue, to Mervyn Archdall and Henry Carey, my nephews, and their heirs.

" And it is my further will and intention, and I do hereby devise, that if it shall so happen, that my sons Henry and Audley shall both of them die without issue male, in the life-time of my son James, whereby the estate settled upon my son Henry, upon his marriage, shall descend, come, or remain unto my said son James, that then and in such case, my said son James shall not take any interest or estate in the lands and tenements hereinbefore devised unto him ; but that the same shall remain and go over to my son Theophilus, according to such interest and estate as is hereinbefore to him devised for want of issue male of my said son James.

" And I will and devise that my executrix shall have full power and authority, by her last will and testament in writing, to charge or incumber all or any of my lands and tenements herein mentioned, with such portions and provisions for all or any of my daughters, as she shall think reasonable.

" And it is my further will and intention, that whoever of my sons shall be seised of an estate or use for life in the said lands, shall have power to commit waste ; as also to settle a jointure on any woman he shall marry, in proportion to her fortune ; and likewise to make leases for one, two or three lives or twenty-one years, at the highest rent that can be had for a solvent tenant.

[915] " And whereas, by the settlement made upon the marriage of my son Henry, I have power to charge the estate settled on my said son with the sum of 2500l. for the portions of my younger children, I do hereby will and direct my executrix, immediately after my death to receive the said sum of 2500l. for the use of my younger children, and to apply the interest thereof to their education and maintenance, in such manner as she shall think fit, and to dispose of the surplus thereof in manner following, that is to say, to my sons James and Theophilus and my daughters Eleanor, Anne, and Jane, the sum of 500l. each, at such time as he or she shall marry or attain the age of twenty-one years, (which shall first happen :) and in case any of my said sons or daughters shall die unmarried and before the age of twenty-one years, I will that my said executrix shall divide among the survivors of my said sons James and Theophilus, and my said daughters Eleanor, Anne and Jane, the sum of 500l. designed for him or her so dying, in such manner as she shall think fitting.

" And I also will and devise, that in case my several lands herein mentioned, or any of them shall by virtue of this my last will, remain and come to my said son Henry, that my said executrix shall have power and authority to charge and incumber the same with any sum not exceeding the sum of 5000l. sterling, for the use and advantage of such of my daughters as shall be then alive and unmarried, as an addition to their portions."

The jury find that the said Audley the elder, at the time of making the said will, and at his death, was seised in fee, in possession, of the lands devised by express denominations in his said will, as in his said will ; and likewise seised in fee, in possession, at the same time, of the lands of Gortmore, in the county of Tyrone, of about 200 acres ; and that the lands in Tyrone expressly devised by the said will, (including the value of Gortmore,) were of the yearly value of 500l. and that the estate settled by the deed of the 22d of December 1711, was in the year 1720 or 1721, of the yearly value of 1800l.

That the said Audley Mervyn died on the 17th of June 1717, seised as the law requires, of the lands and premises comprised in the said settlement of the 22d of December 1711 ; of which, the lands and premises in question are part. And upon his the said Audley the elder's death, his eldest son and heir at law, Henry, became seised thereof as the law requires ; and being so seised, he the said Henry, by lease

and release of 29th and 30th of September 1729, in consideration of 1500*l.* paid, granted and released the premises in question, to John Strong, [916] clerk, his heirs and assigns; which said John Strong entered, and continued the possession during his life. On the 9th of March 1744, John Strong died seised: and on his death, James Strong, his eldest son and heir, entered, and continued the quiet possession till the 11th of June 1756.

Olivia Mervyn, who was wife and widow to Audley the father, died in the year 1720.

James Mervyn, son of Audley the elder, died in 1726, unmarried, and without issue.

Jane Mervyn died in 1725, unmarried, and without issue.

Theophilus Mervyn died in 1736, unmarried, and without issue.

Lucy Harman died in 1737; leaving Wesley Harman, one of the lessors of the plaintiff, her eldest son and heir.

Mary, the wife of Henry Mervyn, died in 1735, having never had issue by the said Henry.

Audley the younger, died in 1746, unmarried, and without issue.

Henry, the eldest son (there called Henry the younger,) died on the 1st of February 1747, having never had issue.

Mervyn Archdall, in the will mentioned, died in 1727.

Henry Carey survived him; and died in September 1756.

Hugh Mervyn, son of Sir Audley Mervyn, died in 1727, leaving the said Arthur Mervyn, one of the lessors of the plaintiff, his eldest son and heir.

Then the special verdict finds that the lessors of the plaintiff, before making the leases in the declaration mentioned, entered and were seised, and then made the several demises in the declaration, &c. &c.

But whether, upon the whole matter aforesaid, the defendant James Strong be guilty of the trespass, &c. the jurors know not, &c. &c.

The Court of King's Bench in Ireland gave judgment for the plaintiff in the ejectment.

[917] The whole estate which depended upon the title set up by the lessors of the plaintiff, was of very great value. The cause had depended a great many years, and had been argued a great many times, in Ireland.

The Court there held "that the reversion in fee of the lands, comprised in the settlement of 1711, passed by the will;" and "that the uses were legal estates executed, subject to a charge for the payment of the testator's debts (if any there were,) and to a power in Olivia to sell for that purpose; and were good at law, though devised after an indefinite payment of such of the testator's debts as should not be discharged by his personal estate."

This case was first argued in Michaelmas term last, by Mr. Perrot for the plaintiff in error, and Mr. Winn for the defendants in error; but more fully, a second time, on Tuesday last, the 29th of January 1760, by Mr. Knowler for the plaintiff in error, and Mr. Norton for the defendants in error; the Court having refused repeated applications to put off the argument till the next term. It was argued very elaborately, upon the question "whether the lessors of the plaintiff in the ejectment had any legal estate;" the counsel for defendant in the ejectment insisting "that Olivia took the legal fee;" which descended (they said) to Henry her eldest son and heir, and was by him conveyed to the father of the defendant in ejectment: or if she did not, "that the devises thereof after payment of debts generally, were executory and too remote."

This point concluded to a nonsuit at law only; and to turn the plaintiffs round to try another kind of remedy.

The final merits and question of right depended upon the construction of the will.

It was adjourned, upon the last argument, (for want of time to go through with it,) to the Friday next following. On which day, Mr. Knowler was beginning to make his reply: but

Lord Mansfield said, they need not give him the trouble of a reply.

The questions are two; viz. (1st.) Whether the reversion be within the devise; and if it be, (2dly.) Whether it is a good devise to the lessors of the plaintiff.

[918] If the first be against the lessors of the plaintiff, the second is immaterial.



Upon the first, we are quite clear, "that the judgment is wrong:" and therefore it is not necessary to give any opinion upon the other.

The points of law have been argued with a great deal of skill and learning; and much has been said upon the subject of them, very well worth attention: but as the case stands, it is not necessary for us to enter into them; and I give no sort of opinion upon them. However, thus much I will mention, for the sake of those who heard the argument; viz. that this case is not like the cases that have been cited; and particularly, not like to that of *Bagshaw v. Spenser*. That was not to the trustees and their heirs "to the use of them and their heirs" (as Mr. Norton cited it:) but to them and their heirs and assigns, "upon trust that they and the survivors and survivor of them should, out of the rents and profits, or by sale or mortgage, raise enough to pay all the testator's debts, &c. and after those debts, &c. should be paid, then to trustees for a term of 500 years; then to trustees to the use of his nephew Thomas Bagshaw (as to one moiety) for life, without impeachment of waste; remainder to trustees (by name) to preserve contingent remainders; remainder to the heirs of the body of Thomas, in strict settlement; remainder to Benjamin Bagshaw for life; then to trustees to preserve contingent remainders; and after the decease of Benjamin, then to the heirs of his body lawfully begotten." Great debts were due from the testator: and money was raised to pay them.

Thomas Bagshaw died without issue: and Benjamin entered, and supposed himself tenant in tail in possession; and being so in possession, the said Benjamin Bagshaw suffered a common recovery; and then devised to his wife.

A bill was brought by the wife (claiming under the recovery,) to carry the trusts into execution; and for a conveyance in fee: and there was a decree at the Rolls "to carry them into execution accordingly."

The litigation was between the remainder-man, and the devisee of Benjamin: and the question was "whether Benjamin Bagshaw was tenant for life, or in tail." And the Master of the Rolls took it to be an estate tail in Benjamin Bagshaw. The plaintiff claimed under the common recovery suffered by Benjamin: the defendants, under the will of Benjamin Ashton, the original devisor. Neither party doubted of its being a trust; the dispute was about the estate devised to Benjamin Bagshaw; "whether it was for life, or in tail."

[919] But my Lord Chancellor started a doubt, "whether the devise to Benjamin Bagshaw was a trust: or whether it was a use executed." And if it had come out to have been a use executed, then the authority in the case of *Coulson v. Coulson*, and the certificate given by this Court in that case, would have stood in the way; and he would have sent it back to be reconsidered by this Court. But if it was a trust, then it fell under different considerations.

There, the trustees and their heirs and the survivor of them were directed to do three things: and what they were to do, was of such a nature, that they must necessarily have a descendible estate in them, to answer the end of the trust. But there arose a decisive dilemma; which put an end of its being a question. The plaintiff claimed under the common recovery. But the testator's debts were not paid at the time of suffering it. It was argued on behalf of the plaintiff, "that Benjamin Bagshaw took by executory devise after the debts should be paid; and that there was no danger of a perpetuity." But it was allowed that there was a legal estate in the trustees, till the debts were paid.

Now, if the legal estate had not taken effect in possession in Benjamin Bagshaw, then there was no good tenant to the præcipe. But if it was an equitable estate, then an equitable tenant to the præcipe would have done. Therefore they were obliged to maintain it to be a trust: for if they had insisted on the authority of *Coulson v. Coulson*, there the common recovery was a bad one.

So that that case of *Bagshaw and Spenser* was not applicable to the present case now before us.

I thought it not improper to say thus much, as to the cases that have been cited: but I give no sort of opinion upon the present case, as to this point. It might be worth considering too, "whether this be not a double contingency;" viz. "If there should be debts, then my wife to have the estate for payment of them: if no debts, then, those in remainder to take." However, here it does not appear that there were any debts.



As to the nice points of law, and the form of the remedy—It is not necessary to give any opinion, if the plaintiff has no fundamental right to recover.

Now, as to the fundamental right of the plaintiff, the case is shortly this—

[920] His Lordship then summarily stated the facts found by the special verdict, and particularly the settlement in December 1711; the circumstances of the family; the will: and the general clause on which the question arises: and then proceeded, to the effect following.

The question, is “whether, by this sweeping residuary clause, the testator intended to devise the reversion of the estate settled on the marriage of his eldest son Henry, with Mary Tichburn by the settlement of December 1711.”

The generality of the expression, “and also all other the lands, tenements and hereditaments in the said counties of Tyrone and Meath or either of them, whereof I am seised in fee simple, or of which any other person is seised in trust for me; together with their and every of their appurtenances;” if unrestrained and unqualified by other words, would carry all the testator’s estate in possession, reversion or remainder.

But these general words may, by other words and expressions in the will, be restrained to any or either of these: and it is the same thing, whether it be directly expressed, or clearly and plainly to be collected from the will.

Now here the plain expressions in this will, which are fully sufficient to shew, that the testator did not intend to devise the reversion of this settled estate. One instance is, the clause “that if Henry and Audley should both of them die without issue male in the life-time of James, then James should not take any interest or estate in the lands and tenements therein before devised to him; but that the same should remain and go over to Theophilus.”(k)

Every part of this clause is inconsistent with any supposition that he meant to devise the reversion of the lands in settlement. And there is another clause which manifests the same intention: viz. “that if all or any of his lands should by virtue of his will remain and come to his son Henry, that then his executrix should have power and authority to charge and incumber the same with any sum not exceeding the sum of 5000l.” So that he supposed every thing mentioned in and devised by his will might come to Henry. But the reversion of the settled estate after the death of Henry, never could come to Henry. From whence it follows, that the testator did not intend this reversion to be included in his will.

[921] And there are powers given by his will, “to which ever of his sons should be seised of an estate or use for life in the said lands, to commit waste, to settle jointures, and to make leases:” which powers are, in their nature, applicable to possessions and not to reversions; and are referred, by the express words of the will, (viz. “in the said lands,”) to lands only, as what he meant to devise. And they could never take effect at all in Henry (who was one of the sons:) for he had them before, and did not want any further authority to exercise them.

If Henry had had no issue male by his first wife Mary Tichburn; and had had issue male by a second wife; the son by the second wife could never have taken any thing; though he would have been grandson of the testator by his eldest son, and heir of the family: so that the heir of the family would have stood totally disinherited. And yet the reason why Henry and his issue were, by this will postponed to the younger brothers, appears plainly to be, “because they were much better provided for:” and the testator understood and supposed that the lands were so settled, that all the issue male of Henry should have the estate, in their turns.

Suppose Henry and Audley the younger both dead without issue male; then James must, upon the construction of the reversion’s passing by the will, forfeit every thing; not only the lands settled, but also the lands devised; and so would not have a

(k) This argument is fully answered and fairly turned to the direct contrary to that, which is here attempted to be proved by it, in page 6, of the appellant’s printed case: however the judgment was offered by the unanimous opinion of the Judges, as mentioned post, 922, 923. And upon the whole, the case in 3 P. Wms. 56, seems to be a much stronger case than the present, for restraining the general devise in that case to the estate in possession, though the reversion was there decreed to pass: the principle however on which this case is founded is clearly right; but the question is whether the application of it to this particular case was warranted by the will or not, and the reasons in the appellant’s case seem to be very strong against it.

farthing; but the whole estate must go over, and pass by him. For the reversion of the settled lands being in such case fallen in, by the death of Henry without issue of his first marriage, the whole settled estate must go over to Theophilus, under such a construction of the will, and by the express words of it, he could take no interest in any of the rest.

If the question had arisen between the issue male of Henry, which he might have happened to have by a second wife; could it possibly be imagined to have been intended by the testator, that in such a case, Henry's sons by a second wife should be totally disinherited? and yet they must have been so, if the reversion of the settled estate passed by this devise.

If Audley had died without issue male, whilst there were sons or male descendants of Henry by a second marriage, in being; can it be imagined that the testator ever intended that James and his issue male should take the settled estate, in exclusion of the eldest branch of the family? And yet he would have done so, after Henry's death without issue of his first marriage, if the reversion of it passed by the will.

[922] Or if there had been no issue at all of either Henry or Audley: can it be imagined that he intended to disinherit James?

The consequence is too manifest to bear an argument; if it be but attended to, what absurdities must follow from construing the reversion to pass. The testator manifestly puts the devised estate in opposition to the settled estate. He plainly means to devise only his lands in possession: and he directs that if ever James shall come to the possession of the settled estate, the devised lands shall then go over to Theophilus. And the construction cannot be varied by the event: we must construe it just in the same manner, as if Henry had left children by a second marriage: or the settled estate had fallen to James.

It is plain that the testator did not intend to devise the reversion of the lands comprised in the settlement made upon the marriage of Henry. Probably, he himself, or the person who drew his will, did not imagine that he had any interest in or power over those settled lands. But it is plain, at least, that he meant and had then in contemplation, only the lands whereof he was seised in fee in possession.

He described several lands nominatim; and others, as well as he then could: but as he could not be minute and particular in such description, it was thought proper to add general words. The lands he meant to devise, were either in the county of Tyrone, or of Meath; but, it being then uncertain to him, in which county they lay, he says "in them or either of them:" but still, the whole description is local; and locality has been construed to mean lands only. Here, the description is tied up to lands: the former part of the devise specifies them particularly by name; and the general sweeping words are only descriptive of land; "all other the lands, tenements, and hereditaments in the said counties, &c." If it had been intended to have carried estates, the drawer of the will would have added, "and all his estates whereof he or any person in trust for him, were seised in fee, in possession, remainder, or reversion;" that is, he would have thrown in a sweeping clause, to carry estates in the lands, as well as the lands themselves.

An annuity is given to Olivia, payable out of the said lands devised: and there are powers given to which ever of his sons should be seised of an estate or use for life in the said lands, to commit waste, settle jointures, and to make leases; which powers (as I before observed) are applicable to possessions only.

[923] But these minute and critical observations serve only to weaken the argument: since there are, in this will, sufficient general words, which expressly and clearly shew that the testator had no intention to include the reversion of the settled estate in his will, as much as if he had used particular words and expressions to declare it directly and explicitly.

In the case of *Coryton v. Hellier*, the testator omitted to add the words "if he shall so long live," to the estate which he gave to his son for 99 years: and yet Lord Hardwicke construed it, that it must mean not an absolute term of ninety-nine years, but an estate for ninety-nine years qualified by that restriction, "if he should so long live;" because it so appeared upon the face of the will considered in all its parts and taken all together.

But this case is stronger; because it appears clearly upon the very words of the whole will taken together, that there can be no doubt of the testator's intention "that the reversion of the settled estate should not be included in it: but only the lands

which he had in possession." And this makes an end of the question, upon the fundamental merits of the case.

Mr. Just. Denison, having been absent during the argument, declined giving any opinion; but seemed satisfied with what Lord Mansfield had said.

Mr. Just. Foster said he had made some observations upon the will; but Lord Mansfield had gone through it so fully, that he needed only to declare his entire concurrence in the same opinion.

Mr. Just. Wilmot also entirely concurred; and wondered how any one could entertain any doubt about it; it being as clear, he said, upon the whole tenor and complexion of the will, as the strongest express negative clause could have made it.

Per Cur. Judgment reversed.

A writ of error was brought in the House of Lords: and their Lordships confined the counsel, to speak to the construction of the will, first,

After hearing that question argued, their Lordships asked the opinion of the Judges; who were all unanimous "that the reversion was not intended to pass;" and thereupon, their [924] Lordships, on the 7th of May 1760, unanimously affirmed the judgment of reversal.

As neither the Court of King's Bench, nor the House of Lords took into consideration the points of law upon which the lessors of the plaintiff "having or not having a good legal estate" depended, it would have been to no purpose to report the reasonings used at the Bar, upon those points.

Note. By the Court's having refused to adjourn the argument of this verdict, the final judgment of the House of Lords was obtained so soon: and a cause which held a great many years in Ireland, went through the Court of King's Bench and the House of Lords here, within the space of about six months.

STOTESBURY *versus* SMITH. 1760. [S. C. 1 Black. 204.] Promise of a bribe to a bailiff to take bail, is illegal, and will not maintain an action on assumpsit.

This was a writ of error upon a judgment given in Whitechapel Court, for the plaintiff there.

The declaration states that one Joshua Redshaw had sued out a *capias* from the Court of Common Pleas, against one Cooper Stanton; and that a writ issued accordingly against the said Cooper Stanton, directed to the Sheriff of Middlesex, &c. returnable, &c. and that before the return of the said writ, a warrant was issued by the sheriff, directed to Miles Smith one of his bailiffs (the plaintiff below) to arrest the said Cooper Stanton; by virtue whereof, the said Miles Smith did arrest the said Cooper Stanton.

That the said Cooper Stanton being so in custody of the said Miles Smith, the said Stotesbury (the now plaintiff in error) undertook and promised to Smith, in consideration that the said Miles Smith would accept of the said Stotesbury and of one Anthony Rippon to be and become bail for the said Cooper Stanton, "that he the said Stotesbury would well and faithfully pay to the said Miles Smith the sum of six guineas and a half, when and as soon as the said Cooper Stanton should pay the sum of fifteen guineas to him the said Stotesbury."

Then Smith, in his declaration, avers, that he took the said bail, accordingly, for Stanton, viz. the said Antony Rippon and Stotesbury; and that Cooper Stanton had paid to the said Stotesbury the sum of fifteen guineas; but that Stotesbury had not paid the six guineas and a half to him the said Miles Smith, according to his said promise and undertaking.

There was another count in the declaration for 99s. had [925] and received by the defendant Stotesbury, for the use of the plaintiff Smith.

Upon non assumpsit pleaded, a general verdict was given for the plaintiff below; and entire damages for 99s. and a judgment thereupon: and upon that judgment this writ of error was brought.

Mr. Gould, who was counsel for the plaintiff in error, objected, "that the contract is founded upon an illegal consideration: and consequently, as the damages are entire, if one of the counts be bad, it is bad for the whole."

Now this contract is in the nature of an extortion: it was a consideration required by Smith, for doing what the duty of his office obliged him to do. He was obliged



to accept bail without any reward or gratuity : and any promise "to give either," is an illegal consideration, and quasi extortion. The cases of *Bridge v. Cage*, Cro. Jac. 103, and *Badow v. Salter*, Sir William Jones, 65, are both of them in point to prove this.

Wherefore he prayed that the judgment might be reversed.

Mr. Aspinall contra, for the defendant in error—It is objected that this contract was unlawful, "because the officer was to have this money for doing what was his duty to have done without it."

But at common law, the officer was not obliged to admit him to bail. And the stat. of 23 H. 6, c. 10, which obliges him to do it upon reasonable sureties, is a private Act of Parliament, and cannot be taken advantage of, without being particularly pleaded. In proof of which he cited a case which is expressly so in point ; namely, *Benson v. Welby*, 2 Saund. 154 : where the Court unanimously agreed it to be a settled point, "that this is a private statute, and that they could not take notice of it unless specially pleaded."

If the officer was not obliged to admit Stanton to bail, then there might be a sufficient reason why Stotesbury might have an interest in having the custody of the prisoner. In the case of *Barkly and Gibbs v. Kemstow*, Cro. Eliz. 123, the consideration of the defendant's promise to keep the prisoner safely, was holden a good one ; though it was the gaoler's duty.

[926] It does not appear that Stotesbury was a proper person to be bail : and if not, then the officer was liable to suffer for accepting him ; and consequently had reason to require an indemnification.

But on this plea, the consideration must be taken to be legal after verdict. *Battersey's case* in Winch, 48, proves this. For, as the defendant might there have given the unlawful imprisonment in evidence, if in fact, it had been unlawful ; so here, if the contract had been illegal, they might have proved it upon the trial, to have been so.

Mr. Gould's cases were plain extortion ; because there the officer took money for doing what was his duty : whereas here, it was not his duty to take bail ; at least, the Court can not take it to be so, unless the statute had been pleaded.

Mr. Gould in reply—Its being after verdict will not help it : because it is extortion upon the face of the declaration.

The 23 H. 8, c. 10, cannot be considered as a private Act which the Court cannot take notice of, unless pleaded : it is a general law ; and the officer was obliged to let Stanton to bail. The Act was declaratory of the common law.

Mr. Aspinall's cases are only promises "to idemnify : " this is a reward ; which is extortion.

Lord Mansfield—The man who was arrested, and gave the fifteen guineas to procure the bail, is injured by both these contending parties : they have both acted wrong towards him.

But though both parties are equally faulty, in *pari delicto potior est conditio defendentis*. A Court of Justice ought not to relieve a plaintiff, upon a ground of action immoral or illegal.

Where a person is arrested for debt, either the officer is not obliged to admit him to bail at all ; or he is obliged to admit him to bail, as of duty ; or he may use his discretion. Now, in any of these cases, it is oppression to take money, for doing what he ought to do ; even though it be the mere using his discretion, "whether he should admit him to bail or not."

Therefore, it is not necessary to meddle with any questions about the Stat. of 23 H. 6.

[927] There is no pretence for our presuming the consideration to be legal, because it is after a verdict ; whatever we might do, in a matter that stood indifferent. For here it does not stand indifferent : it is fully stated upon the face of the declaration ; and manifestly appears to us to be illegal.

Mr. Just. Denison was of the same opinion, "that this was an illegal consideration ;" and said, he never saw such a demand stated in a Court of Justice. The officer would have been liable to an attachment for this fact, if he had been complained of for it.

As to the verdict, that can never be a reason for presuming the consideration to be legal ; when it is fully stated in the declaration, and appears manifestly to be illegal.

As to the stat. of 23 H. 6, c. 10, it was made to prevent the oppressions of sheriffs and bailiffs; and obliges them to let persons arrested by them, out of prison upon reasonable sureties of sufficient persons. But at common law, the defendant was to be let to bail in such an action as this.

However, be the bailiff's duty as it may, yet it is certainly oppressive to take money for doing it. If this was to be permitted, it would introduce such a scene of oppression and injustice, as would be insufferable.

Mr. Gould's cases, cited from Cro. Jac. and Sir William Jones, shew the caution of Courts of Justice, not to endure the oppression of officers of justice: and this case is ten times worse than the case of the promise made to the special bailiff, in Sir William Jones, 65.

Mr. Just. Foster concurred in thinking that it would be a great inlet to oppression, if such a consideration as this, should be established as legal.

The case is not oppressive merely with respect to the friends of the person in custody, or others indifferent to him: but, even an enemy to the defendant may, by these means, get him into his hands, merely in order to surrender him when he is become bail for him.

We should have punished this officer for such a piece of behaviour, if a complaint had been made to us against him for it; and shall we help and assist him to obtain the end of it, and carry it into a complete execution in a Court of Justice? surely, not.

[928] Mr. Just. Wilmot said he thought this to be a most shameful and scandalous action.

It would be a strange thing, if we should assist him in establishing a contract grounded upon a consideration, for which he would have been punished by this Court, if he had been indicted for extortion, or complained of by way of motion for an attachment.

As to his not being obliged to admit the man to bail—the 23 H. 6, c. 10, is so far indeed a private law, that it must be pleaded in cases arising immediately and directly upon it: but I will take notice judicially, that an officer is obliged to admit a man to bail, in such an action as this, if good and sufficient and unexceptionable bail be offered him. It is his duty to do it. And it is the principle of the common law, "that an officer ought not to take money for doing his duty." It is his duty to take good and sufficient bail; though he is not obliged to accept insufficient.

But such a contract as this is, upon a promise made to the officer, by one of the bail, "that if the officer would accept of himself and one Antony Rippon as bail for the man, he, in consideration of this, would pay him six guineas and a half when the man should pay him fif-[929]teen;" (whereby it manifestly appears to be agreed upon amongst them, that Stanton was to give Stotesbury fifteen guineas, to become bail for him; and Stotesbury, when he should receive the fifteen guineas, was to give the officer six guineas and a half out of it;) is grounded upon a consideration, which is manifestly illegal. Therefore the judgment ought to be reversed.

Per Cur. Judgment reversed.

REX *versus* INHABITANTS OF WEYHILL. Wednes. 6th Feb. 1760.  
[S. C. 1 Black. 206.]

See this case at large, in the quarto-edition of my Settlement Cases, p. 491, No. 157.

[930] REX *versus* SPRAGG AND ANOTHER. Saturday, 9th Feb. 1760. [S. C. 1 Black. 209.] When conviction is removed by certiorari, no motion can be in arrest of judgment, unless the defendant be personally present.

The defendants had been convicted of a conspiracy to charge a person with a capital felony: and the record of conviction had been removed up hither by certiorari; but not the persons of the defendants. And Mr. Serj. Davy being ready on behalf of the defendants, to move in arrest of judgment;

Mr. Gould, pro Rege, objected to his going on with the motion; for that the defendants ought to be personally present. And he cited the case of *Rex v. Elizabeth Nichols*, (2 Strange, 1227) which was exactly the same offence as this; and it was

agreed "that after conviction, the personal presence of the defendant is necessary upon such a motion as this."

Serj. Davy, for the defendants, attempted to explain away this rule; and urged that the defendants were safe in [931] custody already, and therefore amenable to the justice of the Court; and offered that the defendants' clerk in Court should undertake to bring the defendants up, at the defendants' own expence, in case the objection should not prevail.

But the secondary of the Crown-Office, being appealed to, alledged "that the rule was as Mr. Gould had asserted."

The Court held this to be a fixed and invariable rule of practice in this Court, "that the defendants must after conviction of such an offence as this, be present in Court, if they would move in arrest of judgment."

Serj. Davy finding the opinion of the Court and the allegation of the secondary of the Crown-Office to be so directly against him, as to the absolute necessity of the personal presence of the defendants, prayed a habeas corpus to bring up their bodies; which was granted: and he \* afterwards renewed his motion, and had the defendants in Court.

Note—This case of a conviction differs from that of a special verdict; where the presumption of innocence may be supposed to continue, and therefore the personal presence of the defendant is not necessary at the argument of it.

FOXCROFT ET AL' Assignees of William Satterthwaite, a Bankrupt, *versus* DEVONSHIRE & AL'. Monday, 11th Feb. 1760. [S. C. 1 Black. 193.] If a man lends money to a tradesman knowing him to be insolvent, this is not fraudulent against the assignees under a commission of bankruptcy, supposing no act of bankruptcy was committed at the time the money was advanced. [See 8 Durnf. 203.]

This matter came before the Court, upon a motion for a new trial, on the ground of a misdirection by the Judge who tried the cause.

It was an action upon the case, upon an indebitatus assumpsit, brought by the plaintiffs against the defendants, for monies had and received by the defendants, to the use of the plaintiffs as assignees of the bankrupt. (l) To which, the defendants pleaded the general issue "that they did not undertake, &c." and issue was joined thereon.

The cause was tried at the Lancaster Assizes, before Mr. Justice Noel. A verdict was found for the plaintiffs: and the Judge declared himself satisfied (m) with the verdict.

It was admitted at the trial, on the part of the defendants, "that Satterthwaite was a trader:" the debt of the petitioning creditor was also admitted; and so were the commission, and the assignment. But they disputed the act of bankruptcy supposed to have been committed by Satterthwaite.

[932] The action was brought for money arising from the sale of goods consigned by Satterthwaite to the defendants as factors for him, (which they had long been,) and sold by them as such: which money was admitted to be in the hands of the defendants, and amounted to 5314l. 17s. 9½d.

The defendants, on the other hand, had paid several sums of money upon Satterthwaite's draughts, and otherwise, to his use and upon his account.

The plaintiffs, at the trial, proved some secret acts of bankruptcy, by his being denied to his creditors about Christmas 1751: after which, he appeared again publicly as usual, till about the month of August following; (as was proved on part of the defendants). In August 1752, he totally stopt payment: and thereupon, the commission was taken out. These secret acts of bankruptcy, at Christmas 1751, overreached the consignment to the defendants, the sale, and the time when the money was advanced by them to the use and order of the bankrupt. And the counsel for

\* V. post, p. 993.

(l) Though the argument in this case supposes no act of bankruptcy to have been committed, yet the fact was contrary in this case, as appears by the state of it.

(m) But it appears post, 942, that upon Lord Mansfield's talking to him, he changed his opinion.



the plaintiffs produced a series of \* letters from the defendants to Satterthwaite, which fully proved, as they alledged, "that the defendants were privy to his insolvency at the time when they advanced the money to his use and order."

The counsel for the defendants would, at the trial, have entered into the two following points; viz. 1st. Whether the defendants were not intitled, as factors for Satterthwaite, to retain the general balance of their account: 2dly. Whether they were not within the protection of the statute of 19 G. 2, c. 31, § 1. Which, after reciting "that bankrupts frequently commit secret acts of bankruptcy unknown to their creditors and other persons with whom, in the course of trade, they have dealings and transactions; and after the committing thereof, continue to appear publicly and carry on their trade and dealings, &c." And after reciting "that the permitting such secret acts of bankruptcy to avoid and defeat payments really and bonâ fide made in the cases and under the circumstances before mentioned, where the persons receiving the same had not notice of or were privy to such person's having committed any act of bankruptcy, would be a great discouragement to trade and commerce, and a prejudice to credit in general;" enacts that no person who shall be really and bonâ fide a creditor of any bankrupt for or in respect of any bill or bills of exchange really and bonâ fide drawn, negotiated or accepted by such bankrupt, in the usual and ordinary course of trade and dealing, shall be liable to [933] refund or repay to the assignees of such bankrupt's estate, any money which before the suing forth of such commission was really and bonâ fide and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice "that he is become a bankrupt or that he is in insolvent circumstances."

But the counsel for the plaintiffs objected "that this transaction of the defendants was fraudulent; for that they plainly knew and were apprized that Satterthwaite was insolvent at the time when the effects came to their hands."

The jury were of this opinion; and gave a verdict for the plaintiffs, for the whole money, except commission and charges for the sale.

This previous point concerning the fraud having been strongly insisted upon by the counsel for the plaintiffs, at the trial, the counsel for the defendants were thereby precluded from entering into other points which they thought to be material for their clients, and which they said they were otherwise ready to have entered into at that time. Upon this preclusion they grounded their present motion for a new trial: for they alledged that the jury had founded their verdict upon wrong conclusions drawn from the evidence, and upon a mistake of the law; and that the defendants had been unjustly precluded from entering into the two preceding points, or any thing else that might have been material to their defence.

And they now insisted, 1st. That the defendants had a general lien, as factors, upon the bankrupt's goods consigned to them; 2dly. That they were purchasers of them for a valuable consideration, without notice that Satterthwaite was become a bankrupt or in insolvent circumstances; 3dly. That in this action (upon an indebitatus assumpsit,) it is not in the power of the assignees, to affirm the contract in part, and deny it in part; but if they affirm it in part, they affirm it in toto. Now here, they do affirm it in part; they affirm part of their conduct, as factors: therefore they can not disaffirm the rest of their conduct as factors.

They said that the present verdict would not stand in their way; because fraud is a conclusion of law, from facts: and therefore the Court, and not the jury, are the proper judges "what facts do import fraud," and "what facts do not import fraud." And they denied that the letters or any part of the facts given in evidence were at all unfair: at least, it could never be said, "that they supported a conclusion of fraud."

[934] This case was argued on Thursday 24th of January last, by Mr. Norton for the plaintiffs, who shewed cause against setting aside the verdict and granting a new trial upon payment of costs; and by Mr. Winn *contra*, for the defendants, who had moved for a new trial.

The Court having taken time to consider it—

Lord Mansfield now delivered their resolution.

This matter came before the Court, upon a motion for a new trial, on the ground of a misdirection by the Judge who tried the cause.

\* See these letters verbatim, post, p. 938, 939.

It was an action upon the case upon an indebitatus assumpsit, for monies had and received by the defendants, to the use of the plaintiffs as assignees of the bankrupt. The defendants pleaded the general issue. And the cause was tried at Lancaster Assizes, before Mr. Just. Noel.

It was admitted at the trial, that Satterthwaite the bankrupt was a trader: and the debt of the petitioning creditor, the commission and the assignment were likewise all admitted.

The action was brought for monies arising from the sale of goods which had been consigned by the bankrupt to the defendants as factors for him, and sold by them as such; which money was admitted to be in the defendants hands, and amounted to 5314l. 17s. 9½d.

It appeared that the defendants had paid several sums of money to Satterthwaite's use, upon bills drawn upon them by him, and otherwise.

The plaintiffs (the assignees under the commission) proved some secret acts of bankruptcy to have been committed by Satterthwaite about Christmas 1751: namely, his being denied to his creditors. On the other side, it was proved that he soon appeared again publicly as usual; and continued to do so, till about the month of August following, (1752). But in August 1752 he stopt payment: and thereupon, the commission was taken out.

These secret acts of bankruptcy committed at Christmas 1751, over-reached the consignment of the goods, the sale of them, the receipt of the monies for which they were sold, and likewise the time when the defendants advanced the monies to the use and order of the bankrupt.

[935] It was insisted by the counsel for the defendants, that from the nature of the present action, an indebitatus assumpsit, the defendants, being factors, ought to be allowed not only for their commission and all charges and expences, but also whatever money they had paid on account of bills drawn upon them by Satterthwaite; and that the plaintiffs in this action could only recover the balance of the general account.

The counsel for the plaintiffs admitted that the defendants were intitled to be allowed their commission and all charges and expences, as factors; but not the bills of exchange drawn by Satterthwaite, which they had paid subsequent to the acts of bankruptcy.

This question was agreed to be reserved, (if it should be necessary to have recourse to it,) as a point for the future consideration and determination of the Judge who tried the cause.

But the counsel for the plaintiffs insisted on a preliminary point; viz. "that the defendants were guilty of a fraud, in paying these bills of exchange drawn upon them by the bankrupt:" which preliminary point of fraud was sufficient to destroy any right that the defendants might otherwise claim (supposing the transaction had not been fraudulent,) to an allowance of the money paid in discharge of them; and, consequently, to preclude them from entering at all into the question abovementioned. For if it should be admitted on the part of the plaintiffs, "that this action of indebitatus assumpsit affirmed the contract," yet if their payment of the bills was fraudulent, it would at once put an end to their claim of an allowance of the money as fraudulently paid. They granted that in case the defendants should appear not to have been guilty of any fraud, but to have paid the bills fairly and honestly, they would then have a right to enter into the point reserved (as above) for future consideration: but they insisted, that upon supposition that in a common case, this sort of action would confirm the contract, so as to make the consignment, sale, and payment of the bills to be considered as before any act of bankruptcy committed; and consequently, that the defendants would be intitled to retain what they had paid upon the bills; (for every thing that could be alledged by the defendants, must, *pro hac vice*, be admitted, upon a previous bar to their going into the question;) yet the bar of fraud would destroy any demand they could have upon that account.

And the fraud which they charged upon the defendants was this, "that they were privy to Satterthwaite's insolvency at the time when they advanced the monies to discharge his bills." (n)

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(n) This is not a fair state of the argument in proof of fraud, the fraud was in accepting the consignment, which (as appears at the bottom of the last page) was



[936] Upon this preliminary point only, of fraud, it was left to the jury: and upon this point only, they found their verdict. Upon hearing all the evidence, they were of opinion "that the transaction was fraudulent on the part of the defendants:" and they gave a verdict for the plaintiffs, for the whole money; deducting only the commission due to the defendants, and the expences of the sale of the goods.

Though the ground of the verdict should be wrong, yet if it clearly appeared to us now, "that upon the whole, no injustice had been done to the defendant;" or if it clearly appeared to us now, "that the plaintiffs, by another form of action, could recover all they have got by this verdict;" we think the Court ought not to grant a new trial. But if injustice be done to the defendants by the present verdict; and if it be not certain and clear "that the plaintiffs might have equal redress, and recover as much by another form of action;" then we ought to grant a new trial.(o)

Two points have been argued, and urged on the part of the plaintiffs.—

1st. That clearly the defendants were not to be allowed to retain for the bills: because (1st.) They were not paid till after an act of bankruptcy; (2dly.) This action (of *indebitatus assumpsit*) only admits the sale of the goods, and nothing else but the agency of the defendants in that single respect; and (3dly.) If it admitted every thing, so as to put the assignees in the very condition the bankrupt would have been, had he brought this action, yet a factor has no lien for items of a \* general account, (his being confined to his commission and expences about the particular goods).

These points have not been at all considered in this action: and therefore it is enough, if they are doubtful. They went off upon the preliminary question of the fraud being taken up and pursued; and were never afterwards taken into any further consideration, at the trial.

We are not clear, that this action of *indebitatus assumpsit* does not affirm the power of the bankrupt and the contract, throughout the whole transaction.(p) Where such an action is brought by assignees of a bankrupt's effects against a vendee of goods, it affirms the sale, and also the payment to the bankrupt of any part of the price. It is agreed here, that it admits the consequence of the defendant being factors; and allows a lien for commission and expences.

"That a factor has also a lien upon goods consigned, (whilst they remain in possession,) for items of a general account with his principal," has been † solemnly deter-[937]-mined. However, the present case differs from the case of *Krutzer v.*

after several acts of bankruptcy: the accepting the consignment was the same as receiving their debt, which receiving was over-reached by the acts of bankruptcy, and was an attempt to gain an illegal preference over the other creditors, and a fraud upon them; and as the defendant knew the bankrupt's insolvency and distress, the case was out of the protection of 19 Geo. 2; and as the case was out of that statute, it seems clear that the verdict was right, for the property of the goods consigned, was by a legal relation of the assignment by the commissioners to the petitioners, the assignees, vested in the plaintiffs, as from the time of the act of bankruptcy.

(o) It is stated in page 932, that there were secret acts of bankruptcy at Christmas 1751, which over-reached the consignment to the defendants; and as the property vests in the assignees from the time of the act of bankruptcy, it seems clear that the assignees might in trover have recovered the value of the goods consigned to the defendants, after the act of bankruptcy; as in that action it seems clear that the defendants would not have been protected either by 1 Jac. 1, c. 15, s. 15, or 19 G. 2 (1 Atk. 128) or any other stat.; and therefore upon Lord Mansfield's own admission, it seems clear that a new trial ought not to have been granted.

\* V. ante, 494.

(p) The Court speak doubtfully as to this point, and do not attempt an answer to the second of the above three reasons urged for the plaintiffs; and it would have been necessary for them to have given it an answer, had they founded their opinion on this point of agency or affirmance of the contract, by bringing this kind of action; yet, without this reason, the whole of Lord Mansfield's argument appears to be inconclusive, as is hereafter shewn.

† In the case of *Krutzer v. Wilcocks*. [S. C. cited more fully, 1 Bur. 494. S. C. Amb. 252. Vide also 2 Atk. 623. 1 Atk. 228, 235. 2 Vern. 117, 254. See also S. P. and as it seems to be S. C. 5 New Abr. 250. 13 Vin. 5. See also 3 Bosanq. 498.]



*Wilcocks*, where it was so determined. For there, the factor remained in possession of the goods: but here the goods have been sold, and turned into money. In such a case, there never was a doubt but that mutual items of account might be set off: the demand and recovery can only be for the balance. Therefore it is impossible to say, that the question the defendants would have made upon this point, had they been permitted, may not be very material. And if it might have been material to their defence, they have a right to have it tried and considered.

2dly. Another matter gone into at the trial, and urged by the counsel for the plaintiffs, was, "that in an action of trover, the plaintiffs might certainly recover the value of the goods, without making any allowance."

Mr. Winn convinced me, that it would depend upon a variety of circumstances, (some of which, he offered to lay before us by affidavit,) which were not gone into at the trial, because the counsel for the defendants were stopped and cut short, by the preliminary bar of the fraud, which was alone sufficient to invalidate their claims as upon a fair transaction.

I do not choose to say more particularly what may possibly assist the defendants in an action of trover; because I would not prejudice the matter: it is enough to say, "it does not sufficiently appear to us, that they could make no defence to an action of trover" (p).

This makes it necessary to examine the ground of the verdict, which proceeded from the direction given.

I will admit "that the evidence proved the fact and every conclusion deducible from it;" but I cannot think that the fact so proved, or conclusion so drawn, amounts to that offence which the law calls fraud, to avoid the debt. And in examining this matter, we must remember, that *pro hac vice*, the whole transaction is admitted to be before any act of bankruptcy.

Mr. Norton rightly said, "that fraud is sometimes mere matter of fact; and sometimes, the conclusion of law from facts."

So is high treason. Levying war is mere matter of fact: compassing the death of the King is a legal conclusion from facts. So it is, almost, as to every other offence.

[938] Fraud often is a mere fact; as when it depends (as on a policy of insurance, for instance,) upon what the party said or did; or it may be, and often is a question of law.

Suppose a creditor, knowing a trader likely to break, conceal it from the knowledge of the other creditors, till he gets, even by threats of legal process, payment of his debt before any direct act of bankruptcy; and the assignees should insist this was a fraud, and that he should refund: this is a matter of law: and the law would say "that this was not fraudulent."

Suppose a man *bonâ fide*, lends money to a trader, upon a mortgage, after an act of bankruptcy, without notice; and then, knowing of the commission of bankruptcy and assignment, gets in an old term, even for little or no consideration; and the assignees bring an ejectment; and it becomes a question "whether this be a fraud, or not;" this is a matter of law: and the law will say "it is no fraud;" for the mortgagee had a right to do this.

The evidence of fraud in this case, as stated by the report are the following letters—The first is dated, Bristol, 5th May 1752, signed "Devonshire and Reeve," and directed to William Satterthwaite. "We wish you had been open, and told us in time, how your affairs stood—it appears to us very evidently, you have risked your reputation and credit on the faith of those S. Do but consider where you must have been in point of reputation, had we done otherwise than we did—it is now over; and we will not do any thing that should lessen your credit—therefore ship not an ounce of goods more, till your affairs are settled."

The next letter is dated Bristol 15th May 1752, signed "Devonshire and Reeve," and directed to William Satterthwaite merchant in Bristol; and contains the following passage—"We can not help being uneasy to think you have drawn on us again for 120l. Really you will make us let your bills go back protested, in spite of our inclinations. We will pay this; but take notice—don't draw another: we friendly hint it."

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(1) But it seems clear that they could not, as mentioned in the MS. note in the last page.

The next letter is dated 25th June 1752, signed and directed as above; and is thus—"William Satterthwaite,\*<sup>1</sup> esteemed friend—we really fear these proceedings will greatly hurt your credit in the eyes of every judicious person; it is very natural to think, that will be the consequence. For our part, we would make a thousand shifts, rather than trifle with our reputation, as you do with yours—it is a matter well worth your serious consideration."

[939] "P.S. Inclosed, we return you Liebenrood's draft 150l. which with one shilling postage, place to our credit. This is such a thing we never did before, nor ever will again."

The next letter is dated 27th June 1752, signed as before, and directed to William Satterthwaite. After referring to the last, it goes on thus—"In this last letter, † thee mentionest nothing of remitting for Liebenrood's bill, which thee ordered us to send for from London four days before due, (which we did, and returned thee in our last,) though thee promised us faithfully to remit for the same, last 6th day was a week: and having had sundry letters that take no notice thereof, we can not help thinking and saying that thee trifles with thy creditors and us. We are so much in want of money as thee *caust* possibly be; and had we thought, thee would have treated us in this manner, we would not have advanced one quarter of the sum, to be allowed 10l. per cent. The disappointment to us gives more uneasiness than all the profits of a year's trade will do us."

The next letter is dated 14th July the same year, and signed as before; and is as follows—"William Satterthwaite, esteemed friend, so much for your affairs in and under our care; which shall be managed with all care frugality.

"But what next we say, appears to us in a very odd light—For Edward Wilcox has been with us, and says you have made over our goods on the 'Sarah and Martha.' If true, gives us such ideas that we dare not put pen to paper to say our sentiments. If you send us any more bills—if ever we do return a bill, we will return your's."

The next letter is the 28th July, the same year, signed as before, and is as follows—"William Satterthwaite,—the 'Sarah and Martha,' your ‡ths. The 'Carolina,' how much? tell us; for you must secure us, by a bill of sale of each,—that is your parts—unless you send here some security.—Say, your father Moss—join in a bond, or some good man. Claimants will be made upon us, for their proportions of cargoes we have sold: as Touchetts did of the rice. We are willing to stand by you as far as we can with prudence: but an undoubted counter-security we must have—we dread the consequences of these repeated strokes—we very much suspect, you have not the money—we must have your affairs cleared up. Whatever you are, we are almost broken-hearted, to see how you are going on, and have of late. And what will be the consequence, if you are worth 3000l.? we know, and have seen the consequence elsewhere."

[940] Some vague suspicions beside, have been mentioned at the Bar, by the counsel for the plaintiffs: as, that they were all of them Quakers, and endeavouring to play into each other's hands, to the prejudice of Satterthwaite's other creditors; that Satterthwaite had broke before; that all the bills were after May; (which the other side denies).

But as I proceed upon allowing the evidence to prove the conclusions contended for, it is only necessary to examine what those conclusions are. The report says, that "a false credit was given the bankrupt:" i.e. he would have broke openly, unless they had lent him money. The counsel for the plaintiffs say, the defendants lent him money, to keep him from failing till his ships and goods might come home, consigned to themselves, or even to the bankrupt's own hands: whereas if a commission had issued before that time, the assignees would have had them.

It was left to the jury, that if they believed, from the evidence, that the defendants knew or understood \*<sup>2</sup> the bankrupt's circumstances to be insolvent at the time they paid his bills; they might find against them, upon the ground of fraud. And they found in the affirmative.

Had the question turned upon the validity of a payment made after an act of bankruptcy committed, within the \*<sup>3</sup> Act of 19 G. 2, c. 32, (which was one of the points made at the trial,) the direction would have been quite agreeable to the terms

\*<sup>1</sup> They were Quakers.

\*<sup>2</sup> [Qu. 2 Durn. 116, 121.]

† V. the note in last letter.

\*<sup>3</sup> Vide § 1.

of that Act. But, as the question was, "whether, supposing the whole transaction before any act of bankruptcy committed,<sup>(q)</sup> the defendants were to be excluded from claiming satisfaction for the money they had advanced upon Satterthwaite's bills, by reason of their fraud in advancing it;"—we are all of opinion "that the direction was a mistake."

It is no fraud, for a factor, knowing the circumstances of his principal to be desperate, and believing that he must break unless he can procure credit, to advance money upon his bills, to save him from an immediate failure. On the contrary, it is an honourable, friendly, and generous act. No prejudice can arise but to the lender himself. He may lose the whole, or the greatest part of the money so advanced: but the principal's estate, if he breaks, is by so much a gainer; or some particular creditors, to whom this money has been paid, are gainers. If, by this assistance, the principal has the good luck to stand his ground, he and all his creditors are benefited: but none of his creditors can suffer by the advancement of money to their debtor. Many beneficial instances of this kind have saved the most considerable houses from ruin.

[941] If the factor trusts that effects of his principal will come over from abroad consigned to him, by which means he may acquire a lien upon them for his reimbursement, the factor's conduct is a little more prudent: but still it is free from all colour of fraud. It is the usual method of dealing between principals and factors in good credit; the latter advance money upon the faith of consignments: but when a factor, knowing his principal to be in great distress, and in immediate danger of failing, advances money upon the faith "that effects beyond sea will come over consigned to him," he acts meritoriously.

The richest man in trade may be ruined, while his effects are abroad, and not in his own power, to answer immediate demands upon him; (which was the case of *The Woodwards*, who could not save themselves from failing, though they had sufficient to pay 30s. in the pound). But the factor may actually save him by this assistance, till they come home: and yet the factor himself runs a great risque, and trusts to a precarious security. For the goods may in fact be consigned originally to another; or the consignment to him may be countermanded; they may be sold; they may be mortgaged, or burnt, or lost, and never come into his possession so as to give him any lien: and it appears by the letters that have been read, that in this very case, Satterthwaite unworthily made over to the other persons part of the goods to which the defendants had trusted to their security.

A mortgage of ships abroad, or of cargoes upon the high seas, by a trader, to any body, is good, notwithstanding the clause in \* 21 Jac. 1, c. 19, though possession has not been actually delivered: for a bill of sale is all the possession that can be delivered till the ship comes home.

There scarce happens a bankruptcy in which it does not appear that a fictitious credit has been acquired by drawing and redrawing bills of exchange, and by accepting and indorsing promissory notes: yet there never was a doubt, but that the persons lending their names, by which to render themselves at last liable, may come in as creditors. The case of a man who has actually paid his money to support the credit of another, is infinitely stronger than that of lending a name only, without advancing any money at all.

There cannot be a greater paradox, than that a man should be guilty of a fraud, in lending his money with no other prospect but the chance of being repaid it.

[942] A notion "that lending money to traders, knowing them to be in dubious, tottering, or distressed circumstances, upon mortgages or liens, is fraudulent; and consequently the contract void in case a bankruptcy ensues;" would throw all mercantile dealing into inextricable confusion. Men lend their money to traders upon mortgages

(q) This is a mistake, for it is expressly stated in p. 932, (and the like is repeated by Lord Mansfield in p. 934,) that secret act of bankruptcy committed at Christmas 1751, over-reached the consignment to the defendants, the sale and the time when the money was advanced by them to the use and order of the bankrupt: so that any question what might have been the case, supposing the whole transaction to have been before any act of bankruptcy committed, is nothing at all to the purpose.

\* Sect. 11th. [1 Atk. 160, 170.]



or consignments of goods ; because they suspect their circumstances, and will not run the risque of their general credit.

Though we have been all clearly of opinion, "that no conclusion attempted to be drawn from the evidence in this case, allowing it to be true, amounted in point of law to the offence of fraud, and a forfeiture of the debt on that account ;" yet I have so great a regard to the authority of my brother Noel, (whose knowledge and experience is as great, and his opinion of as much weight, as any man's, both in Courts of Law and Equity,) that I was desirous to talk the matter fully over with him ; which I have done.

He says, the point upon which the defendant's case is now put, and which was reserved for his opinion, if it should be necessary, was not explained, or understood at the trial as it is now : and the question of fraud was intangled, by not distinguishing this case from that of a factor having goods in his possession consigned to him before an act of bankruptcy ; and after knowledge of an act of bankruptcy, advancing money to the bankrupt, with a view of covering the effects and playing them into his own hands, in opposition to the bankrupt's assignees.

But in this case, where the factors did not know of the act of bankruptcy, he is now fully convinced that the facts did not amount to fraud, and that the jury should have been so told ; and concurs in opinion, that there should be a new trial.

If we should not grant it, the precedent \* of *Villain v. Hyde* must be followed : where a bill in Chancery was brought by the defendant at law in an action upon an indebitatus assumpsit, because allowances, which ought in justice to have been made to him at the trial, were not made. Lord Hardwicke was, in that case, under great difficulties how to proceed, upon such a ground, to give [943] relief in equity : but the strong justice of the case prevailed upon him to shew such a disposition, as induced the assignees to consent to the allowance, and make a satisfaction agreeable to the real justice of the case.

We are all of opinion that the rule be made absolute for a new trial : but the new trial must be upon payment of costs.

Rule made absolute, for a new trial,

Upon payment of costs.(d)

N.B. The assignees acquiesced ; and never tried the matter again, in this action, nor brought any other.

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\* Or *Billon v. Hyde and Michell*, 1 Atkyns, 126, S. C. and 1 Vez. 326. [And by that report it appears that Lord Hardwicke's arguments for relieving the plaintiffs were founded chiefly on the nature of the action, and on the Statute 19 Geo. 2, and that case seems material ; but then it is not consistent with Lord Mansfield's admission in p. 936.]

(d) This case does not appear to have been argued or determined on its true grounds, though the determination was right. The only question between the parties was, as mentioned in page 935, and as appears by other parts of the case, whether "the defendants ought not to have been allowed what they had paid to the bankrupt or to his order or for his use ; though the same was paid after an act of bankruptcy committed ?" Now it seems clear that in this action they ought to have had such allowance by the statute 1 Jac. 1, c. 15, s. 14, notwithstanding the word hereby used in that clause (as to which, though of no great credit, see 3 Keb. 230. Freem. 249, Dav. Law of Bankrupts, 381, though the contrary is said in 1 Vern. 94, and Dav. cites the case of *Tribe v. Webber*). The defendant therefore seems to have been within the protection of the clause above referred to in 1 Jac. 1, though that Act was not referred to in the argument of this case ; for it did not appear that they knew or understood that S. was a bankrupt at the time they made the payment : so that what is said by Lord Mansfield is material to shew there was no fraud ; for had there been any, that must, on principles of common law and justice, have turned the case against them ; but still there not being fraud was not alone sufficient to entitle them to set aside the verdict, though in general the assignees are intitled to avoid all acts subsequent to the act of bankruptcy, except where the case is within 1 Jac. 1, or 19 Geo. 2, which last extends only to the creditors (not the debtors) of bankrupts ; and therefore that Act could have no relation to this case any further than to cover what was due from the bankrupt to the defendant before the consignment and sale ; and except where an innocent person dealing with a tradesman who has committed

REX *versus* TURKEY COMPANY. 1760. The affirmation of a Quaker intitles him to admission into the Turkey Company without taking the oath prescribed by the Act 26 G. 2, c. 46.

Mr. Norton moved, on Wednesday last, for a mandamus to admit Mr. Isaac Rogers into their Company; he having tendered 20l. as the Act directs, and to make his affirmation pursuant to the directions of the late Act of Parliament made relating to that Company, 26 G. 2, c. 18.

The only reason of his being refused was, that he declined to take the oath prescribed by that Act. Whereas Mr. Norton alledged, that as Mr. Rogers was a Quaker, his affirmation was sufficient: for which, he cited the statute of 22 G. 2, c. 46,\* "for allowing Quakers to make an affirmation, in cases where an oath is or shall be required."

Mr. Harvey offering now to shew cause—

It was agreed by the Court and counsel on both sides, that this was a proper matter to come before the Court by way of return to a mandamus, rather than upon the motion. Wherefore the

Rule for a mandamus was made absolute. V. post, p. 999.

The end of Hilary term, 1760.

[944] EASTER TERM, 33 GEO. II. B. R. 1760.

FLETCHER *versus* HENNINGTON. Friday, 2d May 1760. [S. C. 1 Black. 210.]  
Solvit ante diem not an immaterial plea in debt on bond.

This was an action of debt, on a bond conditioned for payment of money on or before such a day. The defendant (having prayed oyer of the condition) pleaded payment at a day before the particular day specified for payment of it. The plaintiff demurred to this plea, as offering an immaterial issue. The defendant joined in demurrer.

Mr. Howard (who was counsel for the plaintiff) prayed judgment for the plaintiff: as this issue might be quite immaterial, if found for the plaintiff; so that the plaintiff could not have judgment upon such a finding: (though indeed it would be a material one, if found for the defendant; as payment before the day would be payment at the day). The defendant ought to have pleaded it as payment at the day; for payment before the day is, in point of law, payment at the day.

Mr. Aspinall contra, for the defendant, admitted that this reasoning would hold

a secret act of bankruptcy, can by some means, get the law on his side; which if he can do, equity will under such circumstances never interfere to deprive him of any legal advantage except in such cases as are within 19 Geo. 2. Upon the whole all that part of Lord Mansfield's argument that follows from the note in page 941, seems very insufficient, for the reasons already mentioned; what has already been taken notice of in the note in page 936, seems to be the only part of his argument that can warrant the opinion of the Court; and yet it was not on that part which the Court appear to have laid much stress, for the sentence there begins, we are not clear; and what is there mentioned is, it is true, a distinct ground from what has been already mentioned, for supporting the opinion of the Court if it could be maintained, which seems very doubtful; and accordingly the Court appear to have thought it so by the expression, we are not clear, &c. and if the Court had founded their opinion on the point of agency and affirmation of contract, they ought, and consequently would have given an answer to the second of the three reasons urged in the same page (936,) on the part of the plaintiff.

But it seems, for the reasons given in page 936, in n. joined with the admission of Lord Mansfield there, that the verdict, as it is there observed, ought not to have been set aside; though abstracted from that admission, the case was, as already observed, rightly determined by the Court: but the determination does certainly seem to be inconsistent with that admission, and as that admission appears to be right, the determination must have been wrong, notwithstanding it was acquiesced in by the plaintiff's assignees.

\* V. § penult. & ult.

in cases of money made payable, by the condition, at and upon a fixed certain day : but the case, he said, was quite different, where the money is made payable at or before such a day ; which is the present case. To prove which, he cited the case of *\* Tryon v. Carter*, M. 8 G. 2, B. R. where Lord Hardwicke laid down the rule of pleading to an action of debt upon bond with a special condition to be, "that wher-ever the defendant pleads a performance of the condition, the plaintiff must assign an absolute breach : though this be not necessary where he pleads a collateral matter (as a release)." And the Court agreed to this distinction ; and said that the proper method, in cases where the money is [945] made payable "at or before such a day," was to plead, as is done here, (if the fact was so,) "that it was paid at such precedent day." And then, if the plaintiff disputes the reality of any payment at all, he may reply "that it was not paid at the particular day mentioned in the plea, nor at any time before or after that day : " and this will bring the point to the material and proper issue, "whether it has been ever paid at all, or not."

They held, consequently, that the plaintiff, in the present case, ought to have replied, and not to have demurred.

Whereupon, Mr. Howard prayed a day or two's time, to move to withdraw his demurrer, and reply to the defendant's plea,

Which was granted.

REX *versus* INHABITANTS OF CHRISTCHURCH. Saturday, 3d May 1760.  
[S. C. 1 Black. 214.]

See this case at large, in the quarto-edition of my Settlement-Cases, No. 158, p. 494.

[950] JOHNSON AND ANOTHER, Assignees of Hargreaves, a Bankrupt, *versus* SMITH, Widow, Executrix of Thomas Smith, her late Husband. Tuesday, 6th May 1760. Latitat is the true commencement of actions brought by bill of Middlesex within the meaning of the Statute of Limitations. [S. C. 1 Black. 207, 215, and vide 3 Wils. 466. 3 Burr. 1429. 5 Burr. 2587, 2588. 5 Durn. 322.]

Hil. 33 G. 2, Rot'lo. 24.

This was an action upon the case upon assumpsit, brought by the assignees of the bankrupt's estate and effects, for 200l. for goods sold and delivered by the bankrupt (before his becoming so) to the defendant's testator, in his life-time.

It came before the Court, upon a demurrer to the defendant's rejoinder : and it is necessary to state the pleadings particularly ; because a great part of the argument turned upon them.

The action was laid in Lancashire : and there was nothing extraordinary in the declaration. It was a common and usual declaration, containing several counts. The first count was—For that whereas the defendant's testator Thomas Smith, in his life-time, before the said Richard Hargreaves became a bankrupt, to wit, on the first day of January, in the year of our Lord 1753, at Preston, in the said county, was indebted to the said Richard Hargreaves in 200l. of lawful money of Great Britain, for divers goods, wares, and merchandizes by the said Richard Hargreaves before that time sold and delivered to the said Thomas at his special instance and request ; and being so indebted, he the said Thomas in consideration thereof, afterwards in his life-time, to wit, on the same day and year aforesaid, at Preston, aforesaid, undertook and to the said Richard Hargreaves before he became a bankrupt, then and there faithfully promised to pay to him the said 200l. when he the said Thomas should be afterwards thereunto requested ; and whereas &c. (this count is upon a promise to pay what they were reasonably worth, and an averment of their being worth 200l.). Nevertheless the said Thomas, in his lifetime, and the said Mary (the defendant) since his decease, hath not, nor hath either of them paid, &c. There were two other like counts, differing only in this, that they laid the promise to be on 1st March 1756 ; and charged the debt to be due, and the promises made to the assignees, (not to Hargreaves himself).

\* There is an imperfect note of this case in 2 Str. 94.



The defendant having leave to plead several pleas, first pleads "that her testator did not, in his life-time, undertake and promise, in manner and form, &c." And upon this issue is joined.

[951] And for further plea, she says, "that the said Thomas Smith did not promise or undertake in manner and form as the said William Johnson and Richard Leigh have above complained against her, at any time within six years next before the day of exhibiting the aforesaid bill of the said William Johnson and Richard Leigh."

And for further plea, as to the two first promises mentioned in the declaration, she pleads a set off.

The plaintiffs reply as to the defendant's second plea in bar, "that after the making of the said several promises and undertakings in the said bill mentioned, and after the said Richard Hargreaves became a bankrupt, and also after the decease of the said Thomas Smith, and within six years next after the making of the said several promises in the said bill mentioned, to wit, on the 28th day of November in the 32d year of the reign of our lord the now King, they the said William Johnson and Richard Leigh, for the obtaining and recovery of their damages by reason of the non-performance of the promises and undertakings in the said bill mentioned, sued out of the Court of our said lord the King before the King himself, (the said Court then being at Westminster in the county of Middlesex,) against the said Mary, a certain writ of our said lord the King called a latitat, directed to the then Sheriffs of the City of York; by which said writ, our said lord the King commanded the said sheriffs that they should take the said Mary, in the said writ called Mary Smith, widow and executrix of Thomas Smith, her late husband, deceased, and John Doe, if they might be found in their bailiwick, and safely keep them, so that the said sheriffs might have their bodies before our said lord the King at Westminster on Tuesday next after the octaves of St. Hilary then next following, to answer the said William Johnson and Richard Leigh assignees of the debts, goods and effects which were of the said Richard Hargreaves, a bankrupt, in a plea of trespass; and that the said sheriffs should have then there that writ: which said writ they the said W. J. and R. L. as assignees in form aforesaid, sued out against the said Mary as executrix as aforesaid, with intent that the said Mary might be personally served with a copy thereof, according to the form of the statute in such case made and provided, and that the said Mary might appear at the return of the said writ in the said Court here, at the suit of the said W. J. and R. L., and that the said W. J. and R. L. as assignees in form aforesaid might thereupon exhibit their bill in the said Court here, against the said Mary as being executrix as aforesaid, for the obtaining and recovery of their damages by occasion of the non-[952]-performance of the several promises and undertakings in the said bill mentioned, according to the custom of the said Court here. At which said Tuesday next after the octaves of St. Hilary, the said W. J. and R. L. as assignees in form aforesaid, came by their attorney aforesaid; and the said Mary likewise came by the said T. H. her attorney, and appeared in the same Court here at the suit of the said W. J. and R. L. according to the exigency of the said writ and the custom of the said Court here: and thereupon the said W. J. and R. L. as assignees in form aforesaid, according to their aforesaid intention, in the term of St. Hilary, in the 32d year of the reign of our said lord the now King, exhibited their aforesaid bill in the said Court of our said lord the King, before the King himself, against the said Mary as being executrix in form aforesaid, for the obtaining and recovery of their damages by occasion of the non-performance of the several promises and undertakings in the said bill mentioned." And the said W. J. and R. L. further say, "that the said Thomas Smith in his life-time, within six years next before the suing out of the said writ called a latitat, did undertake and promise, in manner and form as the said W. J. and R. L. have above complained against the said Mary." And this the said W. J. and R. L. are ready to verify: whereof they pray judgment, and their damages by reason of the non-performance of the aforesaid promises and undertakings to be adjudged to them, &c.

And as to the last plea in bar to the two first counts "they reply that Hargreaves was not indebted in manner and form as the defendant has in that plea alledged: " upon which, issue is joined.

And the said Mary, as to the aforesaid replication of the said Wm. J. and Rd. L. to the plea of the said Mary secondly above pleaded in bar, says, "that by the course and custom of the Court of our lord the King here, a writ of latitat sued out after the

end of any term is supposed to have issued out of the said Court here within the term then preceding." But the said Mary further says "that the said writ of latitat in the aforesaid replication mentioned was really and truly sued out of the said Court here, by them the said William and Richard, after the said 28th day of November in the same replication mentioned, (being the last day of Michaelmas term in the said 32d year of the reign of our said lord the King,) that is to say, on the eighth day of December in that year; and on the same day and year, was signed according to the form of the statute in such case made and provided; and that the said Thomas Smith did not promise or undertake, in manner and form as the said William and Richard have [953] above complained, at any time within six years next before the said eighth day of December, on which day the said writ of latitat was so really and in truth sued out as aforesaid:" and this the said Mary is ready to verify. Wherefore she prays judgment whether the said William and Richard ought to have or maintain their aforesaid action against her.

To this rejoinder the plaintiffs demur, generally: and the defendant joins in demurrer.

This demurrer was argued, on Tuesday 5th February 1760, by the two counsel who had signed the pleadings; viz. by Mr. Serj. Poole for the plaintiffs, and Mr. Yates for the defendant.

The only question was, "whether the truth of the fact could, in this case, be averred contrary to the fiction of law."

Mr. Serj. Poole, for the plaintiffs, argued that the rejoinder was a bad one, for two reasons.

1st. It is averring against the record.

2dly. It is contrary to, and destructive of the practice of this Court; and tends to destroy the writ of latitat itself; for the writ would be a nullity, if tested in vacation.

First—It is an averment against the record. For the teste of the writ is a matter of record. 1 Siderf. 271, *Baily v. Bunning*. 1 Mod. 188, *Farrer v. Brooks*, *Administrator of Jo. Brooks*. Cro. Car. 264, *Watts v. Baker*. 1 Ro. Abr. 538. Title Court, letter M. pl. 4, S. C. 1 Sid. 53, *Dacy v. Clinch*. Style, 156, *Coles v. Sibsye*. Carthew, 233, *Culliford v. Blandford*. Sir T. Jones, 150, *Walburgh v. Saltonstall*. 1 Lutw. 333, *Aldworth v. Hutchinson*.

In Pas. 5 G. 2, C. B., the case of *Jones v. Burnet* was an assumpsit against the defendant, brought by the plaintiff as indorsee of a promissory note, by an attachment of privilege. The defendant pleaded "that the attachment issued on the 12th of February, and that the note was not indorsed till after that day." The replication was "that reverà the writ was sued out in the vacation, &c. on such a day, though tested on the 12th day of February; and that the note was indorsed before that day." And on demurrer, the replication was held bad. This is a case in point: for it was "that reverà it was sued out in vacation-time, viz. on such a day, &c."

The only cases where this has been attempted in this Court are the two following; viz. *Hoare v. Yates*, P. 5 G. 2, B. R. usq; Tr. 7, 8, and M. 8 G. 2. But no judgment [954] was given in that case; it having been, at last, ended between the parties. It was upon a bill of Middlesex, which has no teste: but this is on a latitat, "which has a teste." The other case was that of *Metcalf v. Boroughs*, M. 14 G. 2, B. R. S. P. (a) But this case, though solemnly argued, was never determined: it was to have been argued a second time, but never came on any more.

In proof of the second position, he cited the case of \* *Eastwick v. Cook*, P. 2 G. 2, B. R. 1 Saund. 298. *Greene v. Jones*, 1 Siderf. 304. *Mandamus pur Sturling*, al Moniers, 2 Salk. 700, *Shirley v. Wright*.

These cases are in point, to prove "that a latitat really tested in vacation would be void." And if the plaintiff should have a verdict and judgment upon such an issue as this, it would be a nullity and erroneous. And if the rejoinder be proper, the plaintiff must be obliged to surrejoin accordingly: which would be nugatory.

(a) From a MS. note of this case it appears that the cause was adjourned, only on the pleadings, and that Lee, C.J. held that if the teste had been pleaded there could be no averment against it; but it is otherwise as to the suing out, which was what was pleaded in that case.

\* V. Fitz-Gibbon, 66.

K. B. xxvi.—21\*



Suppose upon a fine, (where the writ of covenant always bears teste before the dedimus,) it should be averred "that in fact the writ of covenant did not issue till after the dedimus." This would, if it were to be permitted, set aside all the land securities in the kingdom. So, in the case of recoveries, any such averment of the process issuing, in fact, in vacation-time would be bad. By law, no process can issue but in term-time in any case whatever. This method of pleading might be extended to all cases, if it were to be allowed in any.

And the defendant is estopped from averring this fact: for the objection arises from one who is party and privy to the suit; which differs from cases of averments by strangers, who are entitled to many privileges which privies can not claim.

Mr. Yates, contra, for the defendant.

This is an action on several promises made by the defendant's testator: to which, she pleads non assumpsit infra sex annos of the time of exhibiting the bill. The plaintiffs reply "that the plaintiff sued out a latitat tested on the 28th of November." The defendant rejoins "that in fact the latitat was issued out on the 8th of December; and that the defendant's testator did not promise within six years of that day." To which rejoinder, the plaintiffs have demurred.

[955] This point depends upon the construction of the Statute of Limitations; and the question is, what is a commencement or suing of the action, within that statute; and whether the defendant be at liberty to aver the real and true day, on which the latitat in fact issued.

Mr. Serj. objects "that this is averring against the record: that it would be destructive of the practice of the Court, and even of the very writ itself;" and "that the defendant, being party and privy to the suit, is estopped from averring this fact."

It may be observed, in the first place, that no teste of this writ is expressly shewn; nor is there even a reference "prout patet per recordum:" the plaintiff only alledges "that he sued out a latitat tested on the 28th of November."

However, what we deny is the fact "that the writ issued on the 28th of November." The very issuing of the writ at all, may be denied: much more, the time of issuing it, or the day upon which it issued. We say "that in fact it did not issue till the 8th of December." This fact we aver, and rely upon.

And the true time of taking out the latitat may be averred, contrary to the nominal teste: the plaintiff may declare so: and the jury may find so. This was determined in the case of *Walburgh v. Saltonstall*, 1 Vent. 362, 363.

The suing out the writ is a matter of fact; an act done by the plaintiff: and the Court will not intend "that this latitat was really sued out and issued in term," merely because it is tested in term-time; especially when the fact appears upon the record to be otherwise. And the fact does so appear upon the record: for the demurrer admits "that the writ was, in fact, sued out and issued out of term."

And there is nothing to preclude the defendant from shewing and averring this fact: here is no estoppel at all, because the truth is apparent upon the same record. Co Lit. 352 a. b. lays down the rules of estoppels: and the 8th rule is expressly so. The case of *Kemp v. Godal* in 1 Salk. 277, settles the difference about estoppels; and lays it down, "that where the estoppel appears upon the record, the other side may demur." 1 Lutw. 329, 333, 334, *Aldworth v. Hutchinson* was the same point; and it is there observed "that if that judgment was given upon the reason of an estoppel, a covenant might be in judgment of law broken, where in fact, it was not broken."

[956] But even supposing the teste to have been formerly and expressly shewn, yet the time when a latitat issued, is traversable, and may be averred different from the teste. The case of *Bilton v. Johnson and Long*, in 2 Keb. 173, 198, and *Raymond* 161, is a resolution in point, most express and strong. The case of *Chancy v. Rutter*, 3 Keb. 213, was a subsequent determination of the same point, accordingly; and upon the authority of the former case, and of *Bennet and Pilkin's case*. The case of *Lazall v. Dyer*, 2 Salk. 650, is strong in point: where the Court held a writ tested of a preceding term, though legally a proceeding of that term, yet not to be so in fact. And 1 Ro. Abr. 552, Letter F. Pl. 4, 5, is to the same effect, and distinguishes between the purchase of the writ, and the date of it.

The case of *Man v. Adams*, in 1 Siderf. 432, was an action of debt against an executor; who pleaded plene administravit; and there was a replication of "assets die exhibitionis billæ, scilicet the 23d of October." The Court saved to the defendant, upon evidence, the time of the coming in of the bill.



The Stamp-Act requires the officer who signs the latitat to set down the day and year of signing the writ. Now the officer could never be convicted of a neglect of his duty, if no averment could be made contrary to the teste. Therefore there are cases where this may be done.

The next consideration is, "whether this be a case, where it may or ought to be done."

As to the case of *Watts v. Baker*, in Cro. Car. 264, it concludes nothing to the present case. The time of suing out the writ could not be in question in that case: for the very arrest itself was prior to the tender of amends.

The cases of *Dacy v. Clinch*, 1 Sid. 53, and *Coles v. Sibsey*, in Style, 156, and *Culliford v. Blandford*, in Carthew, 233, are only that suing out a latitat within six years "will save the statute:" they prove nothing more.

In the case of *Metcalf v. Burroughs*, the return was set forth; and the record referred to. As to the case of *Aldworth v. Hutchinson*, 1 Lutw. 333, there was no final [957] judgment, nor any cause shewn; and the reporter's own note upon the judgment nisi, is against it.

The case of *Jones v. Burnet* differs from this case: and there the plaintiff contradicted his own writ. He might have brought his action sooner too. And that was an attachment of privilege: this is a latitat.

In the case of <sup>\*1</sup>*Walburgh v. Saltonstall*, Holt only argued as counsel: he did not speak as a Judge. Therefore what he there said, was no authority at all: especially, as the Court determined against him.

The cases of *Baily v. Bunning*, and *Farrer v. Brooks*, were questions on common law points: this is on the construction of an Act of Parliament. And the fictitious relation of the teste ought not to clash with the intention of the Legislature, in the construction of an Act of Parliament. Much less shall the fictitious relations of law overturn the intention of the Legislature in a statute made for the security of the subject, and to prevent stale demands from being set up.

The case of *Green v. Rivett*, in Salk. 421, and 422, particularly mentions this statute as being to be favoured; "because the security of all men depends upon it."

The words of the statute are "commenced and sued within six years, and not after:" therefore the plaintiff can not enlarge the time to six years and four months. The word "sued," is as strong as if it had been "actually sued:" and it is confined to "not after" the six years. So that the plaintiff was actually barred by the statute, before he sued this writ. And fiction shall not elude the statute, when the plaintiff was already barred by it. These fictions do not always prevail: and they shall never prevail so as to work a wrong. The cases of *Bilton v. Johnson and Long*; and *Chancy v. Rutter*; and 1 Ro. Abr. 552; and *Man v. Adams*, all prove this.

It has been urged, "that this rejoinder would destroy the latitat itself, by making it a nullity, and erroneous." But this writ was, in fact, originally a nullity, within the meaning of this statute; as being sued in vacation, after the six years were expired. However, here the averment is essential to the merits of the case, and the provision of the statute. If the writ was in fact sued out, after the six years expired: it is immaterial, whether it be a nullity or not, in point of legal form: for the time of suing out, must here be taken in the true substantial sense of the words.

[958] He alledged that the justice of the present case was on his client's side; and relied upon his observation abovementioned, that this rejoinder pursues the very words of the statute, which is a beneficial law, and ought to be favoured.

Mr. Serj. Poole, in reply. It appears upon the face of the record, "that the teste and suing out of this writ was in term-time." For it is necessarily to be presumed that the writ must have actually issued on the day when it was tested, which must be in term-time. And it is here, in this replication, alledged in the common way of setting it out in pleading.

The estoppel here appears upon the record itself; and therefore it need not be pleaded by a party to the record.

As to the case of *Bilton v. Johnson and Others*, in 2 Keble, 173, and 198, and in Raymond, 161. That may safely be admitted to be law: for that is the case of a stranger: (for the defendant, the <sup>\*2</sup>sheriff's bailiff, was a stranger to the original action;) and it was for the furtherance of justice, and to prevent frauds. But that

<sup>\*1</sup> V. 2 Jones, 149. 1 Ventr. 362. Skinn. 32.

<sup>\*2</sup> V. 2 Keb. 173.

case does not prove "that it may be done by parties and privies." *Harrison's case*, cited in 3 Keb. 213, 214, in the case of *Chancy v. Rutter*, expressly takes the distinction between strangers, and parties or privies; and says "that a stranger is not concluded; but the party is." The case of *Pigot v. Rogers*, Cro. Jac. 561, was also the case of a stranger; not of a party or privy.

As to the Stamp-Act, and the Statute of Frauds—The former only relates to the officer; it does not affect the present doctrine. The latter relates only to purchasers: the judgment is the same as it was before, with regard to all other persons.

As to construing the Statute of Limitations according to the intention—The "commencing a suit," and "suing out process," (the two expressions used in the statute,) must mean the very same thing: and this must be determined by the teste of the process sued out, as a commencement of the suit.

Lord Mansfield—This is the seventh or eighth time that this question has been argued at the Bar; therefore there needs no further argument. We will consider of it.

Cur. advis'.

Lord Mansfield now delivered the solemn resolution of the Court; (having first stated the pleadings very particularly; in which he said a great part of the argument consisted).

[959] This demurrer can only be supported upon one of these two grounds; either (1st.) That the fact averred is not relevant; or (2dly.) Supposing it relevant, that proof cannot be received, to shew the truth.

The first depends upon the construction of the Statute of Limitations \* 21 Jac. 1, c. 16.

Now there never was a plainer proposition, conceived in plainer English words, than the rule laid down by this Act of Parliament; it enacts "that all actions upon the case (other than such accounts as concern the trade of merchandize between merchant and merchant, their factors and servants) shall be commenced and sued within six years next after the cause of such actions or suit, and not after."

The statute is negative, and prohibits that which must be the act of the party. Be the form as it may, the suing, commencing or bringing an action, must be by some act of the party: and that is the thing prohibited, after the expiration of the limited time.

The preceding Act of Limitation, 32 H. 8, c. 2, computes the prescription, from the time run before the † teste of the writs therein mentioned: but, because that would not be a true criterion of the time of commencing suits within the provisions of this statute of 21 Jac. 1, c. 16, the Legislature has, in the latter, (which professes to be made for quieting of mens estates and avoiding of suits,) purposely avoided mentioning the teste of writs, the exhibiting bills, the arresting, the holding to bail, summoning, serving or any other form of process; but leaves to every Court, to say "what act of the party commences the suit;" and, after the limited time, forbids that being done. The moment the six years expire, the prohibition attaches: the Legislature says "he shall not sue after that time." If the time expired in June, and he takes out his first process in October; that act done by him in October is prohibited and against the law; for the statute says he shall not sue after. If by antedating the writ, he does sue after; then this effect of the antedate is directly contrary to both the words and meaning of the Act of Parliament.

No answer has ever been given to this, but by supposing that the statute to prolong time, as to suits in the King's Bench, as far as the course of that Court, of antedating writs, would carry it.

[960] This begs the question, against demonstration. The words are general: the reason of the law is general, and incompatible with this exception.

Why bar the bringing suits by original, and not by every other writ? Why shut the door of every concurrent jurisdiction throughout the kingdom, while the Court of King's Bench was left open? What should be the period, was at first arbitrary and indifferent: but when it is once fixed it must equally bar, in every Court; otherwise, it is no limitation of actions, nor avoidance of suits.

The course "of ante-dating writs sued out in the vacation, and supposing them to be of the precedent term," affords no colour for implying such an exception. The



Legislature might have said that after six years a writ "should not be sued out in the vacation, though bearing teste before the end of the six years." If taking out the writ be that first step by which the party brings or commences his suit, the Legislature has said, "that after six years he shall not take out the writ." The statute considers the time when the suit is really brought: and can by no possibility be implied to refer to the retrospective teste of the writ, by the course of this Court.

If so plain a thing can be made plainer, there happens to be a clause in the Act, which is decisive \*1—"Sufficient amends may be tendered for an involuntary trespass, before the action brought." Apply the argument to this clause, and the provision will be thus;—"To prevent frivolous and vexatious suits, there may be a tender of sufficient amends, before the action brought; but by an implied reference to the course of the Court of King's Bench, the party may, after the tender, bring his action with an ante-date, which shall over-reach and defeat the tender." And so the implied reference repeals the express text.

It happens most unfortunately too, for this hypothesis "of an implied reference to the artificial commencement of an action by the course of this Court," that if it was admitted, the suing out a latitat would not save the running of the statute. The bill here is as an original writ; and the want of it equally cured, after a verdict: it is the first process upon record; and by the course of this Court, the commencement of the action. The form of pleading the Statute of Limitation shews that: it is "ante impetrationem brevis," in the one case; "ante exhibitionem billæ," in the other.

[961] It was not settled till many years after the statute "that the plaintiff might reply a latitat sued out within the six years." In the case of \*2 *Coles v. Sibbye*, in 1649, it came before the Court; and the point was adjourned. But in Mich. 13 C. 2, in the case of *Dacy v. Clinch*; † and lately, in M. 21 G. 2, *Henderson v. Whitaker et Al*: it was determined "that the plaintiff may reply a latitat." There could be no doubt but that exhibiting the bill was bringing the action; and therefore the plea "that six years had run before exhibiting the bill," was certainly good: but the latitat was held (and rightly held) to save the bar, within the reason and equity of the case. The statute did not intend to bar, unless the party had acquiesced six years. But he who sued out a latitat, to bring the defendant into custody that he might declare against him, did not acquiesce, within the true meaning of the Act; though, artificially, the bill is, upon the record, the first step. The day he sued out the latitat, he might have taken out an original: and any construction of the statute, to make it bar one form of suing, while others were open, was nugatory and contrary to its true intent. But to bring it within the equity of the law, the latitat must be taken out with intent to declare in that action, and must be continued to filing of the bill.

When the replication of a latitat came to be allowed to save the bar and prevent the running of the statute, because suing out a latitat was, in real truth, an act of diligence in the party, and the first step towards recovering his demand by the action depending, (though in a strict legal sense, by the course of this Court, such action is not deemed to be brought till the bill is filed;) it would be most extraordinary and most unequitable, not to allow this equity to be rebutted by the defendant, by shewing, "that in real truth the time was run before the plaintiff took any step." He was actually barred, before he sued out the latitat: though in form, by the course of this Court, as the action is supposed to be brought later, the latitat is supposed to be taken out earlier, than the real truth.

Very unequal would that interpretation be, which should construe the same words, for the plaintiff, according to the real substantial truth of the thing, in opposition to legal forms; and against the defendant, according to legal notions and forms, contrary to real truth: more especially when the law, \*3 from the nature of it, ought to be taken liberally in favour of defendants.

The limitation of suits is founded in public convenience; and attended with so much utility, that Courts of Equity adopt this statute as a positive rule, and apply it, by parity of reason, to cases not within it.

[962] This very cause, between parties who (on both sides) are strangers to the whole transaction, shews the wisdom of some limitation.

\*1 The 5th clause.

\*2 Style, 156, M. 1649, Banc. Sup.

† 1 Siderfin, 53. [See also 3 Durn. 663.]

[\*3 Qu. if consistent with.]



Therefore we are all clearly of opinion, that, within the true meaning of the Act of Parliament, six years having expired before the latitat was in fact taken out, is sufficient to rebut the matter of the plaintiff's replication; which alledges, that although the suit was not brought within the six years, according to the course and legal notions of this Court, yet, in fact, it was brought within the time, by suing out the latitat. Which brings me to the

Second point—Whether the party may be permitted to shew that the latitat was taken out after the six years expired.

If the teste of a latitat was conclusive, wrong must necessarily be done, in many other cases as well as the present; and great inconvenience and absurdity would follow. No man, whose cause of action arose in the vacation, could sue out this process till the next term: which would be an injury to plaintiffs, and defeat the very end for which this practice was introduced. The defendant might be arrested long before the writ: he might be sued after he had made a legal tender; which would be a manifest injury to defendants.

But the Court would not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing: and they have (for 150 years) uniformly held, "that where it became material to distinguish, they would consider the day when the writ was taken out, as the substance; and the teste, as the form."

In the case of *\*Pigot v. Rogers*, it was held that a latitat bearing date before the bond upon which the action was brought, but returnable after, was right; because, says the Court, "the process always bears teste the last day of the term before." So in 3 Keb. 213, an obligation "not to prosecute before a limited time," was holden not to be broken by a latitat taken out after the time, though it was tested before: the reason given is, "because the latitat is not suable with any other teste than of the preceding term."

Where the arrest is before the actual suing out of the writ, it has been often determined "that it cannot be justified; and that the day when it issued may be averred, notwithstanding the teste is before the arrest."

[963] The case of *† Bilton v. Johnson and Others*, was trespass and false imprisonment in London. The defendant pleads that J. S. sued forth a writ of latitat, the last day of Trinity term, directed to the Sheriff of R. and by virtue of that, the sheriff of the said county made a warrant to the defendant, whereupon he took the plaintiff; (which is the same imprisonment;) absque hoc that he is guilty in London, vel aliter, vel alio modo. The plaintiff replies "that the said writ was in truth prosecuted after the imprisonment, to wit, on the 9th of August." Upon this, the defendant demurs. And it was not adjudged for the plaintiff; "because although the teste of the writ is upon record, and the plaintiff cannot aver against it, yet here will be great inconveniences if the plaintiff cannot set forth the very time when it was purchased; and the relation of the date to the last day of the preceding term is only calculated to prevent fraud, but not to justify a tort." And in the same case, *Ld. Ch. J. Kelynge* is *†* reported to have said "that the time when a latitat issued forth is traversable, and may be averred otherwise than according to the teste:" which was agreed by the whole Court; "for a relation shall not work a wrong." "If a man be taken in the vacation by warrant without writ, and a latitat be procured tested in the preceding term, it shall not discharge the wrong done after the teste, and before the actual taking out of the writ; but the plaintiff may take issue, when it was prosecuted in truth."

In the case of *|| Hanway v. Merrey*, it was holden, that though a latitat may be taken out before the cause of action, yet the party can not be arrested upon it till after:" and in that case, the Court discharged the arrest.

In the case of *\*2 Chauncy v. Rutter*, in trespass and false imprisonment, the defendant justified by arrest on a latitat: the plaintiff replied, "that the writ was taken out after the arrest;" to which replication, the defendant demurred: et per Curiam, "the ante-date of the writ will not suffice, if the proceeding be after."

\*1 H. 17 J. 1. Cro. Jac. 561. [See 1 Bosanq. 343.]

† P. 19 C. 2. Raym. 161, and 2 Keble, 198.

† 2 Keble, 198.

|| P. 21 C. 2. 1 Ventr. 28.

\*2 M. 25 C. 2. 3 Keble, 213.

So, as to tenders—In the case of <sup>†1</sup>*Watts v. Baker*, it was holden “that a tender came too late after an arrest upon a latitat.” But the ground of that case implies, that if a tender was made before the latitat taken out in fact; the retrospective teste of the writ, (which might be even before the cause of action,) could not deprive the defendant of the benefit of that tender.

In an action upon the case, where it is necessary to state the taking out a latitat, the party may declare “that it was sued out such a day in the vacation, bearing [964] teste of the last day of the preceding term:” or, if the teste only be stated in the declaration, and the question should turn upon the precise day when it was taken out, the jury may find it. And this was \* adjudged, so long ago as the reign of Charles the Second. The declaration alledged the latitat to be sued out of the Court on the 21st of January; the jury had found that the teste of it was on the 28th of November, being the last day of the preceding term; but that it was indeed sued out of the Court on the 21st of January, as the plaintiff had declared. The declaration was held to be good, because it was according to the truth of the fact, though the teste of a latitat must be of the preceding term.

In the <sup>†2</sup> same case, reported in <sup>†1</sup> 1 Vent. 362, it is stated that a special verdict was found, “that the latitat bore teste the 28th of November, 32 Car. 2, but was really taken out the 21st of January following.” Holt, who was counsel for the defendant, argued that by law it must be deemed to be taken out the 28th of November, when the teste is. Ld. Ch. J. Pemberton is reported to have given the rule in the following words—“We know, the course of this Court is, to teste latitats taken out in the vacation, as of the term preceding: and the course of a Court is the law of a Court. The plaintiff might have declared, that he sued out a latitat the 21st of January, tested the 28th November preceding: and if he be not estopped to declare so, surely the jury may find the whole matter.” And so judgment was given for the plaintiff.

Numberless are the Acts of Parliament in the Statute-Book, which give actions “so as the suit be brought or commenced within one, two, three, or four months, or some longer time, and not afterwards:” and many give actions to the party aggrieved, to be brought within two, three, or four months; and if the party aggrieved do not sue within that time, then to a common informer.

Notwithstanding the doubt in the case of *|| Culliford v. Blandford*, it is now settled “that a latitat is a good commencement of a penal action;” and was so holden in this Court, in H. 22 G. 2, in the case of *† Bridges, qui tam v. Knapton*.

If the teste of a latitat was to be conclusive as to the time of suing, the time given by the Legislature might be enlarged to double or triple the number of months. After expiration of the time given to the party aggrieved, the common informer might take out a writ: and then the party aggrieved might defeat his right, after it had attached, by taking out a latitat with an ante-date. By this mere form or fiction of law, (which for good purposes gives the latitat an ante-date, merely as a matter of [965] form,) penal statutes would be rendered more penal; and men would be subject to penalties, to which by law, according to the truth of the case, they are not liable.

The plaintiff who sues upon any of these Acts (which are very numerous) must take out the writ, in fact, within the time: the teste of the writ will not be sufficient. The act done by him, in commencing the suit within the limited time, is in the nature of a condition precedent, to intitle him to maintain that action.

If the Legislature had not taken for granted, “that the true time of suing out a writ might be shewn, in opposition to the teste,” it would have been absurd to have limited the time to one, two, or three months, followed by the negative words “and not afterwards;” or, in default of the party aggrieved suing within such time, to give an immediate right to a common informer: and yet this is the form in which such Acts are penned, from the beginning to the end of the Statute Book.

<sup>†1</sup> Tr. 8 Car. 1. Cro. Car. 264.

\* H. 33, 34 C. 2, *Walburgh v. Salstonstal*; Sir T. Jones, 149, and 1 Ventris, 362.

<sup>†2</sup> This is another argument of it, three terms later than that in Sir T. Jones.

*||* 4 Mod. 129. Tr. 4 W. & M. 1692, in B. R.

<sup>†</sup> I find the same point solemnly determined in another case, in the very term next preceding, viz. *Hardman, qui tam, &c. v. Whitaker, &c.* 8 Al. M. 1748, 22 G. 2, B. R.

The Act of 23 H. 6,<sup>\*1</sup> gives a penalty of 40l. to the burgess chosen and not returned, so as he sue for the same within three months; or to any other person, who, in default of him so chosen, shall sue for the same.

Suppose latitats were taken out, upon this Act, by the party aggrieved, and also many other persons, in the long vacation, all bearing date the last day of Trinity term; how could it be determined "who had a right to sue," but by shewing the true times when the writs were respectively prosecuted?

The 9 Ann. c. 14, gives an action to the person losing 10l. at play, to be brought within three months; and if he do not sue within that time, then to any body else. There are a multitude of modern Acts, down to the present session of Parliament, penned exactly in the same way.

I have been told, that at Nisi Prius it has often been ruled, in snits upon such statutes, "that the true time of taking out the writ may be shewn, notwithstanding the teste."

The very penning of 8 G. 1, c. 19, is absolutely inconsistent with the notion of the teste being conclusive; because it says, "the suit shall be brought before the end of the next term:" which this doctrine will construe to mean "after the end of the next term."

[966] But there is one Act in the Statute-Book, which alone would be decisive, "that the true time of suing out the writ may be shewn:" and that is the 5 W. & M. c. 21, § 4,<sup>\*2</sup> where, (for preventing abuses by arresting persons without legal process,) the officer is required to enter the very day when the writ is signed. But if the very day could never be shewn in pleading, or evidence, it would have been most absurd to have provided a record from which it might appear. The statute does not enact that the teste shall not be conclusive; but takes it for granted, that it is not.

It was due to the great and long litigation which this question has borne in Westminster-Hall, to consider carefully every thing that has been said, and look into every case or authority, that has been quoted on the other side.—I have done so: and, upon the most minute examination, am not able to find any principle of law, determination, or authority, which contradicts the proposition I have endeavoured to prove, viz. "that where the true time of suing out a latitat is material, it may be shewn, notwithstanding the teste."

The arguments against allowing such an averment, are drawn from rules and cases, the reason of which is not the same, though they bear a seeming similitude in sound.

No conclusion can be drawn from rules established in the case of a writ which ought to bear date the day it is sued out, and which may be quashed upon motion, for irregularity, if it be ante-dated.

I allow the maxim laid down in † Plowden, and many other books, "that no man shall be allowed to plead or prove that such a writ was sued out on a different day from that on which it bears date." Plowden gives the reason; "because contradicting the teste tends to discredit some judicial or other officer of record."

But this only goes to the mode of redress: the false date does not finally conclude the party. His redress is in a summary way, by application to the Court out of which the writ issues. And therefore in the Court of Exchequer, in the case of *The King v. Mann*, upon an extent, the Court inclined to disallow the plea; and set aside the writ upon motion, because it was ante-dated.

But an averment "that a latitat tested the last day of the precedent term, issued in the vacation, does not tend to discredit the officer:" for, by law, it may so issue, [967] and ought to be so ante-dated. It can not be set aside upon motion for irregularity; because it is right. The averment does not contradict the record: because, taking the course of this Court together with the teste of the writ, it stands indifferent whether the writ was sued out the last day of term, or in the vacation. And there is the difference between such a writ as this, and those that are intended by Plowden.

The reason why no body shall be permitted to aver "that a judgment was signed after the first day of the term," or "that a fieri facias was taken out in the vacation,"

<sup>\*1</sup> C. 15.

<sup>\*2</sup> It is sect. 46 in the original printed statute. And it is repeated in the 9, 10 W. 3, c. 25, s. 42.

† Plowd. 491 b. 492 a.

|| 2 Strange, 749.



is, because the fact is not relevant : the legal consequences do not depend upon the truth of the fact, on what day the judgment was completed, or the writ of fieri facias actually taken out ; but upon the rule of law, "that they shall be deemed complete, and bind to all intents and purposes, by relation."

The moment the law said, "judgments should bind purchasers only from the signing," it followed, that, in the case of purchasers, the time of signing might be shewn.

If, to invalidate the writ, there was an averment "that it issued on a day in the vacation ;" there the inference would hold from the case of a judgment, or fieri facias : and, to be sure, such an averment could not be allowed ; because to that purpose, the fact is not relevant ; for by law, a latitat may issue in the vacation, tested the last day of the precedent term.

Authorities, "that a latitat is void, if it bears teste out of term," (which is the case of *\*Buckridge v. Wright*,) prove nothing to the present purpose ; because it is equally certain that it may be purchased out of term, provided the teste be formal.

The case of †<sup>1</sup> *Jones, an Attorney, v. Burnet*, upon a writ of privilege, is not applicable. The Court there held the replication to be insufficient, but abated the writ : and the ground they went upon, was, that it appeared on the plaintiff's own shewing, "that his writ bore date before his cause of action, though in fact taken out after." But they considered that writ as in the nature of an original, and therefore abateable, if it bear date before the cause of action.

Now the direct contrary is the established law in the case of a latitat ; for it may bear date before, if really prosecuted after the cause of action.

The case of ‡ *Aldworth v. Hutchinson* has been much relied upon, though it was never argued again : judgment [968] nisi is said to have been given for the plaintiff ; and no cause shewn. But no judgment is entered upon the roll. And there might be a very good reason to give judgment for the plaintiff, upon the true construction of the covenant. The †<sup>2</sup> words might very fairly take in all process as of that term ; especially a judicial writ, which must proceed upon a ground prior to the end of the term. The reporter, supposing the time of suing out the scire facias to be material, passes a strong censure upon the judgment, if it stopt the party from shewing the truth. For he says, "If such be the ground, then, in judgment of law a covenant may be broken, when in reality and truth it never was broken : quod nota." And it would be well worth nothing indeed : for no proposition could be more unjust.

Upon the argument in this cause, it was said "that *Ld. Hardwicke*, in the case of *Hoare v. Yates*, was of opinion against the averment ; and that *Mr. J. Lee* came over to that opinion ; and that his Lordship was ready to have given judgment, when he was told the parties had agreed."

I cannot form an opinion upon a point of law, which would not be shaken by so great an authority. But his Lordship has been so good as to let me have his notes of the two arguments, in that case, before him. There is no notice taken in his Lordship's own notes, of what might fall from himself : and it does not appear from his Lordship's notes of what *Mr. Just. Lee* said, that he changed his opinion. His Lordship says, he believes he had not formed a conclusive judgment in his own mind ; and that he certainly had made no preparation towards delivering it in Court. And he has been pleased to tell me, that he inclined to the opinions of *Mr. Just. Page* and *Mr. Just. Lee*, (who were for admitting the averment in the defendant's rejoinder,) against the opinion of *Mr. Just. Probyn*, who thought it could not be admitted, by law.

And we are all most clearly of opinion, "that the averment in the defendant's rejoinder ought, by law, to be admitted." Consequently the demurrer must be overruled ; and

Judgment for the defendant.

\* H. 12 G. 1, in B. R.

†<sup>1</sup> P. 5 G. 2, in C. B.

‡ 1 Lutw. 329, 333.

†<sup>2</sup> V. 1 Lutw. 331. "Ita quod tal' secta, actio, processus, querela, perturbatio, clameum, vel demand' contingerent incipi, &c. per vel ante finem termini Sci' Mich' tunc prox' sequen."

[969] MARTIN, EX DIMISS. HENRY WESTON, *versus* MOWLIN.(a) Thursday, 8th May, 1760. Mortgage is a charge upon the land, and whatever words in a will would give the money, will carry the land along with it.

[Distinguished, *Woodhouse v. Meredith*, 1816, 1 Mer. 458. Considered, *Duffield v. Elwes*, 1827, 1 Bli. N. S. 541.]

This was a special case from Dorsetshire Assizes, upon an ejectment brought for the recovery of a close of pasture, of 12 acres, called New Close, parcel of the manor of Wyke Regis and Ellwell in the county of Dorset. On "not guilty" pleaded, and issue thereon, the cause came on to be tried: and a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case.

It appeared that the premises are copyhold of inheritance, holden of the said manor; and that on 29th April 1691, one Andrew Buckler and Rachel his wife did duly make a surrender of the premises, to Henry Weston, in the words following.

Then the case sets forth the surrender, in hæc verba: which is to the use of the said Henry Weston in fee; who was, at the same Court admitted accordingly; under a proviso and agreement "that if the aforesaid Andrew Buckler and Rachel his wife or either of them, or the heirs, executors, and assigns of either of them should pay or cause to be paid to the said Henry Weston his heirs, executors, or assigns, the sum of 5l. 10s. upon the 29th day of October then next, and the full sum of 225l. 10s. at or upon the 29th of April 1692, then the said Henry Weston his heirs or assigns should upon the request and at the costs of the said Andrew and Rachel or one of them, surrender into the hands of the lord and farmers of the said manor, the premises aforesaid with the appurtenances, to the use and behoof of the said Andrew, for the term of his life; and after his decease, to the use and behoof of the said Rachel for the term of her life; and after the decease of them and both of them, to the use and behoof of the heirs of the bodies of them, begotten or to be begotten; and for default of such issue, then to the use and behoof of the right heirs of the said Andrew for ever, according to the custom of the said manor. But if the said Andrew and Rachel their heirs or assigns should make default in payment of the several sums aforesaid, or any of them, according to the tenor and true intention of this condition, that then this present surrender shall remain to the said Henry Weston his heirs and assigns for ever, in force and effect as aforesaid."

That by virtue thereof, the said Henry Weston did enter into possession thereof, and was in possession at the time of his death, which happened on the 6th of April 1705.

[970] That the said sum was not paid according to the condition of the said surrender: and it appeared that the equity of redemption of the premises was not foreclosed or released during the life of the said Henry Weston.

It further appeared that the said Henry Weston, on the 22d of July, 1699, surrendered the premises and divers other copyhold estates in the same manor, in the words following, "Ad hanc curiam venit Johannes Gray unus customar' tenen' istius manerij, et hic in plenâ curia, virtute cujusdam scripti vocat' a letter of attorney ei direct', et autoritate per idem scriptum concess' sub manu et sigillo Henrici Weston, al' customar' tenen' manerij prædict' geren' dat die et anno supradict', et in nomine et ex parte ipsius Henrici Weston, sursum reddidit in manus dominorum et firmar' manerij prædict', un le gentleman's land vocat' lane house, &c. &c. &c. (describing several parcels lying within the said manor,) acceciam un' claus' pasturæ de novo inclusum continen' per estimationem duodecim acras, &c. &c. (describing the premises in question,) necnon totum statum jus titulum interesse clam' et demand' quæcunque prædict' Henrici Weston tam in lege quam in æquitate de et in præmissis prædict' et qualibet inde parte et parcella; ad opus et usum prædicti Henrici Weston pro termino vite suæ; et post ejus decessum, ad opus et usum talis personæ sive personarum cui vel quibus, et pro tali statu sive statibus qual' ipse prædictus Henricus Weston, perultimam voluntatem suam aut per aliquod aliud scriptum sub manu et sigillo prædicti Henrici Weston, dabit, devisabit, limitabit, declarabit, sive appunctuabit; et pro defectu talis donationis, devisamenti, limitationis, declarationis, sive appunctuationis, ad opus et usum rectorum hæredum ipsius Henrici Weston in perpetuum,

(a) This is too clear a case to deserve a report, see 3 Wils. 466. 5 Durn. 653, 654.



secundum consuetudinem manerij prædict. Super quo, ad istam eandem curiam venit prædictus Henricus Weston, et cepit de dominis et firmar' prædictis præmissa prædicta superius sursum reddita cum omnibus et singulis eorum pertin', habend' et tenend' omnia et singula præmissa prædicta cum suis pertin', præfato Henrico Weston pro termino vitæ suæ; et post ejus decessum, tali personæ sive personis cui vel quibus, et pro tali statu sive statibus qual' ipse prædictus Henricus Weston, per ultimam voluntatem suam aut per aliquod scriptum sub manu et sigillo suis, dabit, devisabit, limitabit, declarabit sive appunctuabit, prout superius limitatur; et pro defectu inde, rectis hæredibus ipsius Henrici Weston in perpetuum, secundum consuetudinem manerij prædicti; subject' tamen separalibus conditionibus in quibusdam copijs rotulorum cur' manerij præd' mentionat', quarum separal' dat' sunt prout sequen', viz. un' geren' Dat. 24to. die [971] Januarij 1682; alter' geren' dat' 17 die Octobris 1689; et un' al' geren' dat' 29 die Aprilis 1691; per antiq' redd' inde per annum, ac per omnia al' onera opera cons' sectas et servitia inde prius debita et de jure consueta. Et pro tali statu et ingressu, &c. prædictus Henricus Weston dat', &c. et sic admissus est inde tenens, fecitque, &c."

That the premises in the last mentioned surrender called by the name of "one close of pasture newly inclosed, containing by estimation twelve acres," are the premises in question; and the same as were contained in the said first mentioned surrender.

On the 30th of September 1701, (the said Andrew Buckler being then dead, and the said Rachel his widow living,) the said Henry Weston made and published his last will, in writing; and thereby devised in the words following—"As to my worldly estate, I dispose thereof as followeth. And first I give to my son William Weston the sum of 200l. of lawful English money, to be paid to him, within one year next after my decease: and as to the security for the payment thereof, I do hereby charge all those my lands, tenements and hereditaments within and parcel of the manor of Wyke Regis aforesaid, which were heretofore surrendered to me by John Gray deceased; and also all that my close of meadow called Orchard Meadow, lying and being in the town of Weymouth in the said county. Item, I do hereby strictly charge and command my son Henry Weston to take great care of my wife, his mother; and to find and provide for her, during her life, sufficient and convenient necessities of all sorts. Item, I give and devise unto my daughter Mary Wallis, widow, one yearly annuity or yearly rent-charge of 15l. to be paid to her yearly, and every year from my death, for and during the term of her natural life, clear of all deductions, and to be issuing, due and payable to her out of those my lands called Marsh and Bownham, within and parcel of the said manor of Wyke Regis: which said yearly annuity or rent-charge I do hereby direct to be paid to my said daughter yearly and every year, by four equal quarterly payments to be made on, &c. the first payment to be made, &c. And if default shall be made at any time or times in payment of the said annuity or yearly rent-charge of 15l. on any or either of the feasts aforesaid, then I do hereby devise unto my said daughter the said lands called Bownham and Marsh for and during the term of her natural life. And whereas Rachel Buckler, widow, stands indebted to me, in a considerable sum of money, I do hereby appoint and give her twelve months time after my death, to pay the same: and I do give her 50l. to be allowed out of the said debt. Item, I give to the poor of the parish of Wyke Regis aforesaid, the sum of 4l. to be distributed amongst [972] them by my executor hereinafter named, at my funeral. Item, all my lands, tenements and hereditaments within and parcel of the said manor of Wyke Regis, and also all other my lands, tenements and hereditaments in the county of Dorset, (such parts thereof as are above charged for the payment of the said 200l. to my said son William, and for my said daughter's annuity, subject thereto,) I do give and devise unto my said son Henry Weston, and unto Anne his now wife, and to the heirs of the body of my said son Henry, on the body of the said Anne lawfully begotten and to be begotten; and for default of such issue, to my right heirs for ever. Item, I give and bequeath to my said son Henry Weston all my goods and chattels, and personal estate whatsoever; he paying my debts, legacies, and funeral expences: and I do hereby make and appoint him my said son Henry Weston my executor."

That the said testator was seised in fee of the said close called Orchard Meadow, in the said will mentioned.

That the testator died on the 6th of April 1705, without revoking or altering his



said will ; which was proved by the said Henry Weston the son, in the month of May following.

That it did not appear whether the said Rachel Buckler was or was not indebted to the said testator otherwise than on account of the mortgage aforesaid.

That the said money not having been paid, and the said Rachel being also dead, John Buckler, son and heir of the said Andrew and Rachel, was on the 24th day of July 1705, at a court of the said manor, admitted tenant of the premises ; and did, at the same court, make the following surrender of the premises in question, to the said Henry Weston the son : which admittance and surrender are set forth in hæc verba. The admittance is in common form : and the surrender is "of the premises, necnon totum statum jus titulum interesse clam' et demand' sua quæcunque tam in lege quam in æquitate de et in præmissis prædict' et qualibet inde parte et parcella ; ad opus et usum Henrici Weston hæred' et assign' su' in perpetuum, secundum cons', &c." Upon which surrender the said Henry Weston was admitted.

That the said Henry Weston (the son) having issue, amongst others, the lessor of the plaintiff (his eldest son) and a daughter Sarah Weston, did on the 27th day of April 1738, at a court of the said manor, make the following surrender : which surrender is set out in hæc verba, and appears to be a surrender "of the premises, in common form, by the said H. W. to the use and [973] behoof of him the said Henry Weston, for and during the term of his life ; and from and after his decease, to the use and behoof of Sarah Weston daughter of him the said Henry Weston, her heirs and assigns for ever." And the said Henry was, at the same court, admitted according to his said surrender.

That the premises in the last mentioned surrender called "New Close," are the premises in question.

That the beforementioned Anne, the wife of Henry Weston the son, was then living, and did not join in the said surrender.

That the said Sarah Weston afterwards intermarried with John Mowlin : both of whom are dead, leaving the defendant their eldest son and heir.

That the said Henry Weston the son, died on the 18th of December 1749 ; having survived his said daughter Sarah.

The said Anne his wife died on the 28th day of November 1756.

On the death of the said Henry Weston the son, the defendant, by his guardian entered ; and hath been hitherto in possession of the premises in question.

It appeared, that, by the custom of the manor, copyhold estates may be intailed, and barred by surrender.

The question submitted to the judgment of the Court was—"whether the plaintiff, upon this case, is intitled to recover."

This case was argued, on Tuesday the 6th of May 1760, by Mr. Glynn for the plaintiff, and Serjeant Stanniford for the defendant.

Mr. Glynn (for the plaintiff) divided it into two questions ; viz.

1st. Whether any estate-tail was created by the will of old Henry Weston the grandfather, to Henry Weston the son and Anne his wife and the heirs of their two bodies :

2dly. If any such estate-tail was thereby created, then whether it was barred by the surrender of Henry Weston the son, without his wife Anne, on 27th of April 1738.

First—He insisted that an estate-tail was created by old Henry Weston's will.

[974] He argued that the testator clearly considered this as a real estate, and meant to devise it as such, and not as personal estate. He was in possession of it ; he had advanced near the full value upon it ; and he saw no prospect of its being redeemed ; and he had surrendered it to the use of his will.

The estate passed by the surrender ; the will is no more than a declaration of the uses of the surrender.

And as to the clause in the will relating to Rachel Buckler's "standing indebted to the testator in a considerable sum of money," it does not at all appear, what pecuniary connections subsisted between the testator and her : this might be some other distinct debt, that had no relation to this mortgage of her husband's.

The surrender made by John Buckler, the son and heir of Andrew and Rachel, to Henry Weston the son, is by no means a conclusive circumstance. For John Buckler

did not mean to assert any right to himself, in the estate : he only meant to confirm Henry Weston's title to it.

If the money should be paid in, a Court of Equity would direct it to be laid out in land.

Secondly—The estate-tail could not be barred by the single surrender of Henry Weston alone, without his wife. For he and his wife took a joint-estate for their lives, by entirety, under the will of old Henry Weston. 1 Inst. 183, *Marquis of Winchester's case*. 3 Co. 1, *Owen v. Morgan*, there cited, and reported in 3 Co. 5 a.

And if this be the construction as to freeholds, it must be the same as to copyholds : for the same rule holds in both. Coke's Complete Copyholder, 69.

No bar could arise from this surrender, whether it be considered as analogous to a fine, or as a recovery.

1st. Considering it as analogous to a fine, it only makes a discontinuance. A surrender cannot have the effect of an estoppel. 2 Ro. Rep 256, *Southcott v. Adams*, (2d point of that case). It is a deed-poll. No conclusion arises, as to the reversion in fee to himself.

2dly. Considering it as a recovery, it would not be good, by the case of *Owen v. Morgan*, just now cited : for he has assumed to himself a different tenancy, from what he was intitled to.

[975] But fines and recoveries are not to be applied to copyholds, or compared to surrenders of copyholds.

A surrender is in the nature of a conveyance, and operates as an extinguishment. A surrenderor cannot make a discontinuance, unless he has a capacity of surrendering both the inheritance and estate. Co. Litt. 325 a. But this surrenderor had no power to convey it as a remainder ; he had no power over the tenancy ; which he took by entirety. This surrender is totally void : nothing could be conveyed by it. Surrenders are upon the foot of grants or releases : a person can neither grant, release nor surrender more than he has in him. A lease by the husband would have been void after his decease ; the tenancy is in the wife. And thus it is, in cases of waste : so also of a copyhold manor. Cro. Jac. 99. Therefore this act of the husband alone, without his wife, is not voidable, but void : he could only convey an estate of freehold for his own life.

Consequently, there is a good estate in the lessor of the plaintiff ; and it is not affected by the surrender.

Serjeant Stanniford, who argued on behalf of the defendant, previously observed, that whether this estate is to be considered as copyhold, or as personal estate, it still comes to the same person, viz. Henry Weston the son, who is both devisee and also executor : and copyhold lands are not liable to pay debts ; and it does not appear that there was sufficient, without it, to pay the testator's debts. And he also took notice of the clause in old Henry Weston's surrender to the use of his will, "that the limitations in his will were to be subject to the conditions mentioned in certain copies of court-rolls of the said manor ;" and this very court-roll of Andrew Buckler's surrender to him is particularly specified as one of them ; by which court-roll and the copy of it, the said Henry Weston the testator was admitted to this estate, not absolutely, but as subject to redemption by Andrew and Rachel Buckler ; and Andrew being dead when the will was made ; the testator gives Rachel time to redeem it, and also 50l. out of the debt. This, he said, amounted to a clear and full proof "that the testator did not consider himself as absolute owner of this estate." Besides, the devise to his son Henry is only in general terms : and there are other estates mentioned in the will, which are sufficient to satisfy a devise in such general terms, without having recourse to this mortgage of copyhold lands.

Then he proceeded to answer Mr. Glynn, upon the two points which he had made.

[976] As to the former, he denied that any estate-tail was created by old Henry Weston's will ; or that the testator had any such intention. He knew he was but a mortgagee : and he has not devised this particular land by particular words. And he manifestly considers Rachel Buckler as having the right of redemption. Therefore he could not mean to intail it. And though he lived till 1705, he never foreclosed the equity of redemption.

Neither did the persons who claimed under his will, claim under the intail, but as executor and residuary devisees. In July 1705, John Buckler, who was heir both to

his father and mother, surrendered to the use of Henry Weston, the son, in fee ; who was admitted accordingly ; and who accepted it as executor of his father's will, and who lived till December 1749. Anne his wife, who survived him near seven years, did not enter ; but the present defendant entered on the death of his father, and hath been in possession ever since.

As to the latter, he insisted, that although it should be admitted that this land did pass by the devise as real estate, and that Henry Weston the son and Anne his wife were seised of it as devisees. Yet they were seised of it in such a manner, that the surrender of it by Henry Weston alone, without his wife, was a sufficient bar.

Copyholds are not intailable, he said, under the Statute de Donis : but by custom ; and the intail of them can be barred only by custom. And they are barrable in three methods only ; viz. by surrender in the lord's court, by recovery, by forfeiture.

Here, the wife's estate was no impediment to the surrender. The husband and wife were seised to them and to the heirs of his body by her ; and the husband and wife took by moieties. Therefore the recovery is good to a moiety. And it is not like the case of *\* Owen and Morgan* ; for there the husband and wife took by entirety. And † *Cuppledike's case* fully proves "that if the husband alone had been vouched, it had been a good bar." And he cited *Lord Sheffield's case v. Ratcliffe*, in Hob. 434, and several other books, (Godb. 300. Palmer, 352. 2 Ro. Rep. 312, 333, 374, 496, 501. Sir William Jones, 69, and Jenkins, 286,) and also 2 Ro. Abr. 394, tit. Recovery Common, let. A. pl. 4, to the same effect. From whence he argued, that the case of *Owen v. Morgan*, was not founded upon the wife's interest in the estate ; but upon the husband's not being a good tenant to the præcipe.

He said it must be taken that there is, in this manor, a custom "to suffer a recovery." And this is an effectual bar to the estate tail.

[977] Therefore he prayed judgment for the defendant, as in case of a non-suit.

Mr. Glynn replied.

That the estate is particularly described in the surrender to the use of old H. W.'s will, though not in the said will itself : and nothing appears, to shew that the testator meant to consider this as part of his personal estate.

A surrender is not analogous to a recovery : it is not to have the effect of a recovery with double voucher ; which stands upon a peculiar technical reason, (viz. the recovery in value, which would go to the heir in tail ;) which reason does not hold in the present case. The husband can only make an estate for his own life ; he cannot affect his wife's estate. And her estate, remaining unaffected, will protect the subsequent remainders. Therefore the surrender cannot operate as a bar.

The Court took two days time to advise :

And on Thursday the 8th of May 1760,

Lord Mansfield delivered their resolution : which was for the defendant, on both points : viz. that the estate did not pass by the devise ; and that it was well barred, if it had.

After having particularly stated the case, his Lordship observed that at the time of old Henry Weston's making the surrender to the use of his will, he manifestly considered this as a mortgage subject to redemption, though forfeited : for in this surrender he has inserted the words "totum statum jus titulum interesse, &c. prædicti Henrici Weston, tam in lege quam in æquitate, de et in præmissis." Then, by his will, he charges these lands together with his orchard-meadow in Weymouth, for security of the payment of a legacy of 200l. to his son William. Then he mentions Rachel Buckler's standing indebted to him ; and gives her time for payment of the debt, and 50l. but of it. And afterwards, by a general description, he gives and devises "all his lands, tenements, and hereditaments within and parcel of the said manor of Wyke Regis, and also all other his lands, tenements, and hereditaments, in the county of Dorset, (such parts thereof as are above charged for the payment of the said 200l. to his said son William, and for his daughter's annuity subject thereto,) to his son Henry Weston and Anne his wife, and to the heirs of the body of the said son Henry on the body of the said Anne lawfully begotten ; and [978] to be begotten." And he bequeaths all his personal estate whatsoever, to his said son Henry : and makes him his executor.

\* 3 Co. 5 a. Moore, 210. 4 Leon. 26, 93, 222.

† 3 Co. 5 b. 6 a. 2 Ro. Abr. 395, let. D. pl. 3.



The plaintiff is the only son and heir of Henry Weston (this son of the testator) by the said Anne his wife : and he claims this parcel of land called New Close, as heir of their two bodies, in special tail, under the will of his grandfather, as being devised thereby under this general description.

To this claim thus founded on a special intail, two answers are given on the part of the defendant. The first is, that it was not devised as land, but as money : it being only a security for money, and redeemable at that time, by Rachel Buckler. (And if this be so, it makes an end of the case.) The second answer is, that supposing it to be devised as land, and supposing it to be intailed too, yet an estate tail may, by the custom of this manor, be barred there to surrender in the lord's court ; and that here has actually been such a surrender made by Henry Weston, sufficient to bar the intail, though made by him alone, without his wife, and though his wife herself might not have been prejudiced by it.

As to the construction of the will of old Henry Weston—If it appeared that the testator really meant and intended to devise this close as land, it would then be a devise of land ; the mortgage being forfeited by law, and the estate in the land become absolute. But if it appears that the testator meant and intended it as a bequest of money only, then it would be considered, in a Court of Equity, as a specific bequest of the money ; and a Court of Equity will not direct the money to be laid out in land, without express words in the will to ground such direction upon.

It seems to me, that the testator all along understood this to be part of his personal estate ; and that he meant to dispose of it as such, by this will. He surrendered it as charged with a condition of redemption and re-surrender ; and in his will, he manifestly considered it as a debt due from Rachel Buckler ; and that debt, as part of his personal estate.

It will be necessary to consider what species of property the testator had in this estate.

A mortgage is a charge upon the land : and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts : it will go to executors ; it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the [979] debt, or forgiving it\*, will draw the land after it, as a consequence : nay, it would do it, though the debt were forgiven only by parol : for the right to the land would follow, notwithstanding the Statute of Frauds.

The rule of law attaches at the time of the testator's death : no subsequent act of the mortgagor can alter the nature of the property. It is the rule of law that governs the property, and leaves no election to any body to vary it after the death of the testator.

Though the testator has not in his will expressly mentioned this estate to be redeemable, yet he has done so in the surrender to the use of his will : he surrenders it as liable to a condition in equity ; (for at law, it was become absolute ; ) and there had not run above eight or nine years upon this mortgage, when he made this surrender. So that he appears to have made the surrender of it, only to substantiate his claim upon the estate ; and upon the face of the surrender, plainly considered it as redeemable.

And so he did in his will too. We must take it upon the will, that the widow Buckler owed him no other debt but this : for *de non existentibus et de non apparentibus eadem est ratio*. He gives her time to pay it ; he gives her a specific legacy out of it ; he gives it as a debt towards payment of his debts and legacies. "I give and bequeath to my son Henry Weston all my goods, chattels, and personal estate whatsoever, he paying my debts, legacies and funeral expences." And there is nothing to control this, but the general words "all my lands, tenements, and hereditaments, within and parcel of the said manor, &c." But his creditors and legatees had a right to have it considered as personal estate.

Therefore we all agree in opinion, "that he meant to pass it as a debt." And there is no colour to imagine that it could be considered in a Court of Equity, as a specific bequest of money which they would direct to be laid out in land.

As to the estate's being barred, in case it had passed by the devise ; there is no doubt but that it would have been well barred by this surrender.

\* Barnard. Ch. Rep. 90. 1 Atk. 20. 2 Atk. 268.

By the custom of this manor, intailed copyhold estates are barrable by surrender in the lord's court: and Henry Weston the son has here actually made such a surrender. Though he could not bar it in one form, he might do it [980] in another. Wherever the tenant in tail of a freehold estate could by any means bar the estate, there this tenant in tail of this copyhold might do it by surrender; and his surrender shall operate as a good recovery.

Consequently, upon this point, the lessor of the plaintiff can have no title.

Therefore, quâcunque via datâ, the plaintiff appears to have no title; and the defendant must have judgment as in case of a nonsuit.

Rule accordingly, that the postea be delivered to the defendant, and that judgment be entered for him, as in case of a nonsuit.

REX *versus* BENFIELD AND SAUNDERS. 1760. Rule nisi for arresting judgment on conviction of persons for singing in the street songs reflecting on prosecutor's children discharged on objection to the legality of the judgment.

Mr. Serj. Nares, Mr. Aston and Mr. Stowe shewed cause why the judgment against these two defendants should not be arrested.

An information had been filed against these two persons, together with three others, for a misdemeanor: which information consisted of four counts; one, for a riot; another, for publishing a libel; a third, for a riot and libel; and the fourth and last, as hereafter follows.

The other three defendants were acquitted of the whole information.

Benfield and Saunders were acquitted of all the rest of the information, excepting this fourth count: but they were found guilty of this count, which is as follows, viz.

That they the said Thomas Benfield, Thomas Wills, Thomas Kyte, John Saunders, and Thomas Jones, being such persons as aforesaid, and most unlawfully, wickedly, maliciously, and unjustly devising, designing, contriving, and intending (as much as in them lay) further to disturb, molest, and disquiet him the said Daniel Cooke, and to destroy his domestic peace and happiness in his family, and the comfort he had in his said two children, John and Jane Cooke, and to hurt and injure him the said Daniel Cooke in his trade and business of a grocer, which he the said Daniel Cooke then and there, to wit, at Cheltenham aforesaid, in the county of Gloucester aforesaid, exercised, and for a long time before there had exercised [981] and followed with great credit and reputation, and thereby to reduce him the said Daniel Cooke to want and poverty; and also most unlawfully, wickedly, maliciously, and unjustly devising, designing, contriving and intending to traduce, scandalize, and vilify them the said John Cooke and Jane Cooke, son and daughter of the said Daniel Cooke, being persons of good name, fame, credit, character, and reputation, and being persons of honest, chaste and virtuous lives and conversation, and being then in great credit and esteem with all the honest liege subjects of our said present Sovereign Lord the King with whom they the said John Cooke and Jane Cooke were acquainted; and also most unlawfully, unjustly, wickedly and maliciously devising, designing, contriving, and intending to represent, suggest, and make it be believed and thought that the said John Cooke was a dishonest, immoral and ill-disposed person, and that the said Jane Cooke was a lewd, wanton, dissolute, disorderly, and ill-disposed person, and had been guilty of incontinency, lewdness, debauchery, and fornication, and also to make it be believed and thought that she the said Jane Cooke had been got with child of a bastard, and had been delivered of a bastard child at London in order to conceal the birth thereof; and also devising and contriving most unlawfully and unjustly to hurt and injure them the said John Cooke and Jane Cooke in their good name, fame, credit, character, and reputation; and to expose the said John Cooke and Jane Cooke to shame, infamy, scandal and dishonour, and to bring them into disgrace, hatred, and contempt, with all the liege subjects of our said present Sovereign Lord the King, knowing them the said John Cooke, and Jane Cooke: and the sooner to complete, perfect, and bring to effect their said most unlawful, wicked, and unjust purposes as aforesaid; they the said Thomas Benfield, the Younger, Thomas Wills, Thomas Kyte, John Saunders, and Thomas Jones, afterwards, viz. upon the 26th day of May in the said 32d year of the reign of our said present Sovereign Lord the King, in the evening of the same day, with force and arms, at Cheltenham aforesaid, in the county of Gloucester aforesaid, to wit, in the public street and King's common highway there, before and near unto



the dwelling house of him the said Daniel Cooke there situate, with loud voices and in a public open and ludicrous manner, in the presence and hearing of divers liege subjects of our said present Sovereign Lord the King, did unlawfully, wickedly, and maliciously sing, say, speak, utter, publish and pronounce, and did cause to be sung, said, spoken, uttered, published, and pronounced, divers other false, scandalous and malicious, obscene and libellous songs, verses and matters, of and concerning the said John Cooke and Jane Cooke, greatly reflecting upon the characters and reputations of them the said John Cooke and Jane Cooke: in one of which said libellous songs, of and concerning the said Jane Cooke, were contained divers false, scandalous, infamous and malicious words, matters and expressions, according to the tenor following, that is to say, "There are two people in Cheltenham [982] town; the one, a lusty spark; they both do take delight in game: each one doth keep a park. In one, there is a buck; in the other, there's a doe;" (meaning the said John Cooke;) "and if you can but favour get, a hunting you may go. But if that she" (meaning the said Jane Cooke) "is going proud, and like to be at rut; they turn her," (again meaning the said Jane Cooke,) "into a neighbour's park; and there to take the buck. And that when he has done his best, and this fine doe," (again meaning the said Jane Cooke,) "is cloyed; then up she goes to London town her young one for to hide;" (meaning to hide a bastard child of her the said Jane Cooke) "and when she" (again meaning the said Jane Cooke) "had been there a while, if that you will but mind, then out she" (again meaning the said Jane Cooke) "cometh from that park, and leaves her fawn," (meaning a bastard child of the said Jane Cooke) "behind. But yet a while in town must stay; till all things safe and sound: then, home she" (again meaning the said Jane Cooke,) "comes, to her own park, to take the other round." And in one other of the said libellous songs, of and concerning the said John Cooke, were contained divers other false, scandalous, infamous and malicious words, matters and expressions, according to the tenor following, that is to say, "Come all you jolly woters bold; and take a turn with me: such sport I'll shew, each night, (though cold,) before you ne'er did see. And a wonting we will go, we'll go, we'll go: and a wonting we will go. My master Johnny Moll" (meaning the said John Cooke) "has got such tricks enough in store; his fame" (meaning the fame of him the said John Cooke) "is spread from east to west, on shutters, post and doors, &c. When night has spread her sable veil, and all things safe and sure, he'll" (meaning that the said John Cooke will) "shew you tricks: he'll" (again meaning the said John Cooke will) "never fail; if you will but nick the hour, &c. We hire men to catch our wonts; who steal them" (meaning the wonts or moles,) "when it is done. We love our puggs; we dearly hugg: and is not this good fun? &c. For every trap has got a trick, to make the game his own: the like was never known before in country, city or town, &c. No begging dish-clout ne'er shall wipe away so great a blot: for all their talk, and all their balk, it will not be so soon forgot, &c. And the fame of Johnny's Moll" (meaning the said John Cooke) "is seen on every door: each yard, each gate, each stile, each post, shall spread it more and more. And a wonting we will go, we'll go, we'll go; and a wonting we will go." To the great damage, scandal, infamy and disgrace of the said Daniel Cooke, John Cooke, and Jane Cooke; in contempt of our said present Sovereign Lord the King and his laws: to the evil and pernicious example, &c. and against the peace, &c.

[983] Upon this count only, and the matters therein charged, the two present defendants were found guilty.

The motion in arrest of judgment, made by Mr. Ashhurst on Friday 26th of April last, and now supported by Mr. Morton, as well as himself, was grounded upon three objections.

1st. That an information or indictment will not lie, for publishing two distinct libels, upon two distinct persons; any more than an indictment will lie, for an assault upon two: and that such an indictment is not good, was determined in this Court in Tr. 1730, 3, 4 G. 2, in the case of *Rex v. Clendon*, reported in 2 Strange, 870, and 2 Ld. Raym. 1572. The reason is, because these are distinct offences, and require different and distinct judgments, and may require different and distinct fines: and therefore they can not be joined in one and the same indictment; but there ought to be a several indictment for each. The libel upon John Cooke was an absolutely distinct and quite different libel from that on Jane.

In Carthew, 226, 227, *The King v. Roberts*, P. 4 W. & M. B. R. the whole Court



were of opinion, after great deliberation, that an information against a ferryman, "for taking more than the usual rate from divers persons, for the passage of themselves and their cattle," was too general and uncertain: and per Holt, Ch.J. "in every such information, a single offence ought to be laid and ascertained; because every extortion from every particular person is a separate and distinct offence; and therefore they ought not to be accumulated under a general charge; because each offence requires a separate and distinct punishment, according to the quantity of the offence; and it is not possible for the Court to proportion the fine or other punishment to it, unless it is singly and certainly laid." And that judgment was arrested.

The answer given to this first objection, by the counsel for the prosecutors, was, "that the cases cited are distinct offences: whereas the whole of this is but one single offence." And as to the case of *Rex v. Clendon*, there is in West's Symboleography, a precedent of an indictment against one for assaulting and beating two in the highway, to the intent to have killed or robbed them. Part 2d, title Indictments, § 191.

The Court thought that this 1st objection had received a sufficient answer, in both respects. (a) For they looked upon this to be one offence: the gist of the charge is singing these songs, in the manner and with the intent charged in the information; and singing them at the father's door with intent to discredit him and [984] his children, and disturb his domestic peace and comfort.

And as to the case of *\*The King and Clendon*, they treated it as a case that was not well considered; and held it not to be law. Can not the King call a man to account for a breach of the peace; because he broke two heads instead of one? (b) How many informations have been for libels upon the King and his ministers? this is a prosecution in the King's name, for the offence charged: it is not an application at the suit of each particular party injured. It is not like an action: where each person injured is, respectively, to recover separate damages.

Therefore this 1st objection was over-ruled.

The 2d objection upon which this motion was founded, and which was now further enforced, was "that several distinct defendants, charged with several and distinct offences, can not be joined together in the same indictment or information; because the offence of one is not the offence of the other: and the present charge is made up of separate and distinct offences; for which the several defendants can no more be joined, than several defendants can be charged with † perjury, or being ‡ scolds, or keeping § open shop on fast-days, or exercising a § trade without having served an apprenticeship; in all which cases, the offence of the one cannot be considered as the act of the other." So here, the publication by Benfield was not a publication by Saunders; nor e converso.

The answer given to this 2d objection was, "that several defendants may be joined in one and the same indictment or information; if the offence wholly arises from such a joint act as is criminal in itself, without any regard to any particular personal default of the defendant which is peculiar to himself: as, for instance, it may be joint for keeping a gaming house, &c. but not for exercising a trade without having served an apprenticeship, because each trader's guilt must arise from a defect peculiar to himself."

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(a) Buller J. cited this case in *The King v. Lloyd*, 20 MS. 123, and said the point is where it is one act, and then the offence is the same; contra in case of indictments for felony, 2 Hale H. P. C. 173.

\* 2 Strange, 870. 2 Ld. Raym. 1572. [See also 3 Durn. 105.]

(b) No doubt the King might by different indictments; but the question is whether by one, when there is no connection between the facts, which make the offences distinct as there is in a libel against the King and his ministers, between whom there is a connection.

† 2 Strange, 921, *Rex v. Philips et Al*, where six persons were jointly indicted for perjury, and the judgment was arrested. Palmer, 535, was there cited and many other cases; and the point was settled.

‡ 2 Strange, 21, S. C. where the case of perjury was compared to the case of colds; for which an indictment will not lie against two: *Regina v. Hoason et Al*, Tr. 6 Ann.

§ 6 Mod. 210, *Anonymous*.

§ 1 Strange, 623, *Dominus Rex v. Weston, et Al*

2 Hawk. P. C. 140, is clear and express in this distinction.

Style, 244, *Paul Williams and his Wife against The Custodes*, was a joint indictment for words spoken by both : and the Court held the joint indictment good ; though a joint action on the case could not have been brought against them.

[985] Style, 312, *Custodes v. Tawny and Norwood*, jointly indicted for blasphemous words severally spoken by them : Roll, Ch.J. held the indictment good enough, though joint.

Can not several persons join in singing one and the same song ? forty people may join in the same chorus. And if such song or chorus be libellous, the doing so is one joint act, criminal in itself, without regard to any peculiar personal default.

The Court thought this 2d objection to have likewise received a satisfactory answer. They held this to be an entire offence ; one joint act, done by both ; they both joined in the act of singing this libellous and scandalous matter, in the public street, at the father's door, with intent to discredit him and his children. And whether it be two songs, or one ; or a first and second part of the same song ; or separate stanzas, one on John, another on Jane ; yet it is one entire offence : and the more there are that join it in, the greater is the offence.

It is not like the case of perjury.—Where the perjury of one is not the perjury of another ; but the perjury is a separate act in each : whereas this is a joint act.

The 3d objection on which the motion in arrest of judgment was grounded, was “that this is an entire general verdict upon the whole 4th count : and yet, the latter song contained in it, (namely, the song upon John Cooke,) contains no libellous matter, at all. Consequently, no judgment can be entered up for the prosecutors.”

The answer given to this 3d objection was, first “that the latter song is libellous ; and exposes this John Cooke to ridicule.” However, secondly, if either of the two songs be libellous, the judgment will be good and well warranted : for upon indictments or informations, the Court will give judgment on that part which is indictable. And it is not like the case of an action, where general damages are given, and one of the counts appears to be bad ; in which case, the plaintiff in the action can not indeed have judgment : but the reason why it is so in actions, does not hold in indictments or informations.

The Court over-ruled this 3d objection also ; holding this latter song to be libellous and defamatory ; and likewise, that if this part of the charge had not been so, it would, in an information or indictment, only go towards lessening the punishment ; but would not be a sufficient reason for arresting the judgment.

Wherefore, upon the whole,

Per Cur. unanimously,

The rule (to shew cause why the judgment should not be arrested) was discharged.

[986] REX *versus* INHABITANTS OF KNIVETON. Friday, 9th May, 1760.

See this case at large, in the quarto-edition of Settlement Cases, pa. 499, No. 159.

[991] REX *versus* INHABITANTS OF BERWICK ST. JOHN. 1760.

This case may be seen at large, in the quarto-edition of my Settlement-Cases, page 502, No. 160.

REX *versus* VANDEWALL, ESQ. Monday, 12th May, 1760. Tuesday, 13th May, 1760. [S. C. 1 Black. 212.] Quit-rents and casual profits of a manor not liable to the poor's rate. [4 Burr. 2013. 5 Durn. 596, and 1 East, 535.]

The only question in this case was, “whether the lord of a manor is assessable to the poor-rates, under 43 Eliz. c. 2, § 1, for the quit-rents, heriots, and casual profits of his manor.”

It first came before the Court, on Thursday 21st June 1759, upon a motion to quash an order of sessions which had confirmed such a rate made upon Mr. Vandewall, lord of the manor of Aldenham ; from which rate, he had appealed to them. But the case not being stated with sufficient particularity, upon this first order of sessions, it was ordered (on Wednesday 4th July 1759,) “that the order together with the

certiorari, should be sent back to the sessions, to be stated more fully, as to the matters of fact, and afterwards to be returned again to this Court."

This was accordingly done : and the new state of the case was as follows, viz.

That Samuel Vandewall, Esq. was charged to the poor's rate of the parish of Aldenham, bearing date the 28th of March 1759, in the manner following, that is to say, "for the tithe, 3l. 15s. for the manor, 2l. 5s. more, for the quit-rents, 10s. 6d. more, for the wood-lands, 10s."

That it appeared that the said Samuel Vandewall did not, at the time of making this rate, hold or occupy any lands, houses, tithes, coal-mines or saleable underwoods within the said parish, parcel of or belonging to the demesnes of the said manor or otherwise, within the said parish ; except the tithes for which the said Samuel Vandewall is assessed and charged in the said rate at 150l. per annum, and the wood-lands for which the said S. V. is assessed had charged at 20l. per annum.

That the lands from which the quit-rents arise, for which the said Samuel Vandewall is assessed and charged in the said rate, are free and copyhold lands holden of the said manor, and in the occupation of divers persons tenants of the said manor, or their lessees or under-tenants, who are respectively charged and assessed for the said lands, in the said rate, as occupiers thereof, according to the back-rent of the said lands : but that the said quit-rents are not otherwise charged in the said rate, than by the charge on the said Mr. Vandewall under the article of quit-rents.

[992] That the profits of the said manor, exclusive of the said quit-rents, arise by and consist of escheats, beriets, reliefs, and fines on the admission of copyhold tenants on deaths and purchases, and other casualties arising within the said manor ; which, together with the said quit-rents, are by computation communibus annis 111l. per annum : viz. the quit-rents 21l. and the other profits of the manor 90l. per annum.

That it does not appear that the said quit-rents and the said manor of Aldenham, or either of them, have ever been rated to the poor's rate of the said parish of Aldenham, till within two years last, and since the said Samuel Vandewall purchased the same, (which was in or about the year 1754).

Mr. Norton moved (on Friday 1st February 1760,) to quash this order confirming the rate (as the former had done ;) and obtained a rule to shew cause.

On Thursday 25th April 1760, Mr. Gould and Mr. Knowler shewed cause against its being quashed ; and they cited some loose scraps of cases relating to the subject ; viz. *Comberb.* 62, and again 264, both anonymous, and *Hull's case* in *Carthew*, 14, and likewise 2 *Ld. Raym.* 1280. *Dalton*, 165, (in the large folio edition). 8 *Kemble*, 540, *S. C. The Corporation of Wickham against The Mayor.* 2 *Bulstr.* 354, *Sir Antony Earby's case* ; 2 *Inst.* 703, and *Jeffrey's case*, 5 *Co.* 67 b.

Mr. Norton and Mr. Field, on the other side, argued that the quit-rents and casual profits of a manor were not rateable to the poor's tax, within either the words or meaning of 43 *Eliz. c. 2*, no more than ground rents are. Quit-rents have been already rated to the full, in the hands of the respective occupiers ; so that this is rating the same thing doubly. And the casual profits are quite uncertain ; and can never be considered as that sort of fund, out of which the poor of a parish are to be supported.

The Court took some days to consider of the point ; as it was a very general and extensive question ; but not from any great doubt that they had about it.

On Tuesday 13th May 1760—

Lord Mansfield very shortly declared their opinion "that these quit-rents and casual profits of the manor are not rateable to the poor's tax : " which, he said, was so clear, that there was no need to enter into reasonings about it. They were never rated before, in this parish ; and (a) [993] as far as appears to us, the rating such quit-rents and casual profits has never been at all attempted before ; and there is no colour for this attempt now, after more than a century and an half since the making of the Act of Parliament upon which it is grounded.

Rule made absolute, for quashing the rate and the Order of sessions confirming it.

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(a) In other parishes they most usually have been, as appears by some of the cases cited in the last page. See 1 *Cowp.* 453, and 4 *Burr.* 2014.



REX *versus* JOHN SPRAGG AND MARY ELIZABETHA SPRAGG. Wednes. 14th May, 1760. V. ante, 930, (the first attempt towards this motion). Indictment for a conspiracy to indict for a capital offence a good indictment, although the word falsely is not added to the first charge of the conspiracy, nor the particular crime there specified; and although it is not laid that the said W. G. was acquitted of it.

[Distinguished, *King v. R.*, 1845, 7 Q. B. 808.]

The defendants (who were father and daughter) had been convicted of a conspiracy, upon the following indictment—That John Spragg of, &c. mill-wright, and Mary Elizabetha Spragg of, &c. single-woman, being persons of an evil mind and wicked disposition, and devising and intending to deprive one Walter Gilmore of his good name, credit, and reputation, and also to subject the said Walter Gilmore, without any just cause, to the loss of his life and forfeiture of his goods and chattels, lands, and tenements, upon the 31st day of July in the 30th year of the reign of our Lord George the Second King of Great Britain, and so forth, and at divers other times and days thentofore, at New Sarum in the county of Wilts, and at divers other places within the county aforesaid wickedly and maliciously (a) did conspire combine and agree among themselves to indict and cause to be indicted the said Walter Gilmore for a crime or offence liable by the laws of this kingdom to be punished capitally, and to prosecute the said Walter Gilmore upon such indictment. And the jurors aforesaid, upon their oath aforesaid, also present, that the said John Spragg and Mary Elizabetha Spragg, according to the conspiracy, combination and agreement aforesaid between them as aforesaid upon their oath aforesaid, also present, that the said John Spragg and Mary Elizabetha Spragg, according to the conspiracy, combination and agreement aforesaid between them as aforesaid before had, afterwards, to wit, on the said 31st day of July in the said 30th year of the reign of our said now lord the King, at the Session of Oyer and Terminer of our said lord the King then holden at New Sarum aforesaid in and for the said county of Wilts, before the honourable Sir Richard Adams Knt. one of the Barons of His Majesty's Court of Exchequer, Edward Willes one of His said Majesty's serjeants at law, and others their fellows, justices of our said lord the King assigned by letters patent for our said lord the King under the Great Seal of Great Britain (prout in the said letters patent commissioning them to hear and determine,) by the oath of (naming the grand jury,) good and lawful men of the county aforesaid, then and there sworn and charged to inquire for our said lord the King for the body of the said county, falsely, wickedly, and maliciously, and without any reasonable or probable cause, did indict and cause to [994] be indicted the aforesaid Walter Gilmore, by the name of Walter Gilmore late of the borough and town of Marlborough in the county of Wilts bookseller and stationer, for that he, unlawfully and unjustly devising and fraudulently intending to get and obtain to himself unjust lucre, and to defraud our present Sovereign Lord King George of certain duties granted by certain statutes lately made and provided and payable to our said lord the King, and to diminish the public revenue in this behalf, after the making the statutes in such case lately made and provided, and after the second day of August in the year of our Lord 1726, that is to say, on the third day of May in the 29th year of the reign of our Sovereign Lord George the Second by the grace of God of Great Britain, France, and Ireland King Defender of the Faith, the borough and town aforesaid in the county aforesaid, by force and arms, unlawfully, knowingly, fraudulently, and feloniously did counterfeit and forge a stamp to resemble a certain stamp which had before been duly provided, made and published in pursuance of the statutes in such case made and provided, and which was then and there used in pursuance of the said statutes, to stamp vellum, parchment and paper charged, by virtue of the said statutes in such case made and provided, with the payment to our said now lord the King, of the duties of 6d. and 6d. thereby then and there to defraud our now said lord the King of the duties of 6d. and 6d. granted by the statutes in that behalf lately made and provided, and then payable to our said now lord the King; against the form of the statutes in such case made and provided, and against the peace of our said now lord the King his Crown and dignity. And also—(laying by another count, the counterfeiting the two stamps, by the said Gilmore, another way :) and also that—

(a) Qu. It has been adjudged that malice includes falsity.

(It then goes on, and charges that they indicted Gilmore with knowingly uttering two such counterfeit sixpenny stamps). And that the said Gilmore—(laying the uttering them another way). And that the said Gilmore—(then follow other counts laid by them against him, for counterfeiting and knowingly uttering triple sixpenny stamps).

The present defendants, Spragg and his daughter, were convicted at the assizes, upon this indictment for the conspiracy, laid in the manner just mentioned. However, no judgment was there given; but it was adjourned, at the first and also at the subsequent assizes, “quia Curia nondum advisatur.” The record of this conviction was at first removed, without their persons: for which reason, the <sup>\*1</sup> former motion could not proceed.

But this omission was afterwards rectified: the record was now † removed by certiorari; and the defendants were also brought up by habeas corpus. Whereupon, on Saturday 26th of April 1760, Mr. Serj. Davy moved for the opinion of this Court; or (in effect) in arrest of judgment, (the defendants being present in Court).

He made two objections: viz.

[995] (1st.) It is not alledged in the charge itself, “that the defendants conspired falsely to indict Gilmore.”

(2dly.) Nor does it appear, in the said charge, of what particular crime or offence they conspired to indict him. It is only charged in general, “that they did wickedly and maliciously (without adding falsely,) conspire to indict and prosecute him for a crime or offence liable to be capitally punished by the laws of this kingdom.”

Both these matters are essentially necessary; and can not be supplied by any thing that goes before or comes after.

First point. Conspirators are those only who confederate themselves falsely and maliciously to indict or cause to indict. The Statute of 33 E. 1 (intituled “A Definition of Conspirators,”—) defines conspirators in these very terms. 1 Hawk. P. C. 189. 2 Inst. 562. Register 134 a. b. 135, accordingly. F. N. B. title Writ of Conspiracy, folio 124, in old edit. (260 in Hale’s edit.) accordingly. So, Rastal’s Entries, 123 to 127, title Conspiracy. So, Co. Entries, 109, title Conspiracy. And Pulton, 232 a. 233 b. but particularly 232 b. title Writ of Conspiracy. So likewise it is said by Justice Richardson, in *Taylor and Towlin’s case*, Godbolt, 444. All these authorities prove, that the words “falsely and maliciously” are necessary even in a count.

Hale’s Hist. P. C. 2d vol. pa. 183, says “that the same certainty is required in an indictment for goods, as in trespass for goods; and that certainty is much more necessary in an indictment than in trespass.” 2 Hawk. P. C. 225, c. 25, § 59, proves also that indictments must be certain, West’s Precedents, 2d part, title Indictments and Offences, pa. 102 b. § 97, is an indictment for a conspiracy falsely, &c. to indict.

The present indictment, is only “that they wickedly and maliciously conspired to indict this man:” which may be true; and yet it might not be falsely. It must be both malicious and false; to make it indictable as a conspiracy.

The offence consists in the unlawful agreement to indict falsely and maliciously: and such an unlawful agreement “maliciously to indict falsely,” would be indictable, though never carried into execution. But nothing more than the malicious agreement “to indict this man,” appears in the charge itself of this indictment.

[996] Second point. As the charge itself is only general, the setting forth the indictment verbatim afterwards, can not help this defect in the charge.

There are two instances of <sup>\*2</sup> villainous judgment being awarded: 27 Assize, pl. 59, fo. 141 b. (by inquest;) 46 Assize, 11, fo. 307 a. (by indictment). But in neither of them does it appear that the conspiracy was for a capital offence: it is only said “that they were attainted of conspiracy.”

Hawk. P. C. lib. 1, c. 72, § 9, under the title Conspiracy, says “that he who is convicted at the suit of the King, of a conspiracy to accuse another of a matter which may touch his life shall have the villainous judgment, which is given by the common law and not by any statute.” And the villainous judgment is certainly the proper judgment, where the conspiracy is to indict for a capital crime.” But then the capital offence ought to be explicitly set forth: “a crime liable to be punished capitally, is not enough, without specifying what capital crime.” For this is a matter of law: and

<sup>\*1</sup> V. ante, 930.

† V. ante, 930.

<sup>\*2</sup> V. 24 E. 3, pl. 34 to 34 b. accordingly. And see the villainous judgment at large, in 3 Inst. 143.



therefore the jury are not the proper judges of this. And the want of this allegation, if it be omitted in the charge of the conspiracy itself, can not be supplied by any thing that precedes or comes after.

The conspiracy itself is the offence indictable, though no indictment be drawn up or found, or any thing done in pursuance of such conspiracy. And if there was no such conspiracy, then there could be no indictment according to it. So that the charge itself is here insufficient. But if these subsequent words could be connected with it, yet at most, it is a charge by way of implication only, not a clear direct positive charge.

He therefore insisted upon these two things.

1st. This is a charge of a mere conspiracy "to indict" only: not of a conspiracy to indict falsely: and if it be not good, no judgment can be given upon this insufficient indictment.

2dly. It cannot be made good by an implication, (a)<sup>1</sup> if not positively and directly alleged at first. 2 Hawk. P. C. pa. 227, c. 25, § 60, is express to this purport. Hale, H. P. C. 2d vol. 182, 183. 4 Co. 44 b. *Vaue's case*, (for poisoning Nicholas Ridley). Staundford P. C. lib. 2, title Enditement, c. 31, pa. 96 b. is express "that an indictment is not good, which must have an argument or implication to make it good." Certainty in indictments is the subject's security.

[997] The precedents in Tremaine 82 and 85 are not such precedents as that any thing can be collected from them.

Mr. Gould, contra, pro Rege. The term "conspiracy" is always taken *malâ parte*. So it appears by the register.

There is but one count in this indictment; and the whole of it must be taken together, as one charge: it is not to be separated and divided, one part of it from another. It consists of the inducement, the charge itself, and the recited indictment, (which is set forth *verbatim*).

This is an indictment at common law. 2 Inst. 562 says the Statute of 33 (or as he says it really was, the 21) Ed. 1, intitled A Definition of Conspirators, is in affirmation of the common law."

In 6 Mod. 186, *Rex et Regina v. Best*, per Holt—"A conspiracy, *latè loquendo*, or a confederacy to charge one falsely (without more) is a crime: though it be not an indictment for a formed conspiracy, strictly speaking; which requires an infamous judgment and loss of *liberam legem*."

No villainous (a)<sup>2</sup> judgment has been given, since the time of E. 3.

In F. N. B. fo. 253, 8vo. edit. of 1704 (and also of 1718), the form of the writ is "Ostensur quare conspiratione inter eos præhabita, præfat' a de, &c. indictari, et ipsum eâ occasione capi, &c. falso et malitiose procuraverunt; ad, &c. et contra,

(a)<sup>1</sup> Malice is a complex idea, including falsity; at least when it is applied to a legal prosecution.

(a)<sup>2</sup> The punishment of perjury in jurors for a false verdict was so severe by the common law, as few or no juries were upon just cause convicted; but a milder punishment is set down by the Stat. of 23 H. 8, wherein the party grieved hath election to ground his writ of attain upon this statute, or to take his remedy at the common law. 3 Inst. 163, 164.

Note, he who is convicted at the suit of the King, of a conspiracy, to accuse another of a matter which may touch his life, shall have a villainous judgment by the common-law, and not by any stat.; and it is said generally in some books to be the proper judgment upon every conviction of conspiracy at the suit of the King, without any restriction to such as endangered the life of the party; but this point does not appear to be any where settled. See 1 Hawk. Pl. Cr. Chap. 73, s. 9.

In Brown's Mod. Intrad. 3 Ed. 88, there is the form of an execution of a villainous judgment, in an attain by twenty-four jurors against the jurors in the first inquisition, and by Style, it was given in the reign of King Charles; and in the margin it is said to be judgment in attain at the common law; and in p. 89, there is a reference to a similar judgment in attain at common-law in Easter term, 20 H. 8, Rot. 24, and though this was not the judgment in conspiracy, yet there are many authorities that the same judgment is to be given, on a conviction on an indictment for a conspiracy, to charge the person indicted with treason or felony; if the indictment be laid at common-law as in an attain.



&c. provis." So that there, the "falsely and maliciously" is applied to the indictment, not to the conspiring. 2 Inst. 562, the case of *Welbye* (for citing in the Spiritual Court,) does not charge the conspiracy to be false; but only malicious.

1 Hawk. P. C. c. 72, pa. 189 to 191, shews that if there be a conspiracy, it is punishable in an exemplary manner. Conspiracy, ex vi termini only, is indictable.

Tremain's Entries, 85, *Rex v. Freeman*, only charges "that illicite diaboli nequiter et malitiose conspiraverunt (to charge with an attempt to bugger,) without the word falso."\* It is not necessary to apply the "falso et malitiose" to the conspiring. So that the "falsely, wickedly, maliciously" does here come in, in its proper place.

Consequently, here is sufficient certainty. It appears, and is found, "that they did wickedly and maliciously conspire falsely to indict this man." And this is an indictment at common law.

[998] 3 Inst. 143 in making the lawful acquittal of the party grieved a requisite to constitute the guilt of the offender, lays down a proposition, which is not true. And this appears clearly by Hawk. P. C. lib. 1, c. 72, pa. 189, 190, and is confirmed by the *Poulters case* in 9 Co. 56, and 9 Rep. 56 b. *Les Poulters case*, mentions the commission; which does not speak of conspiracies executed, but only of "conspiracies" in general.

As to the 2d objection—It is an offence, undoubtedly, "to conspire to indict a person, falsely and maliciously, of some capital crime, in general;" and then according to such conspiracy, afterwards actually to indict him, falsely and maliciously, for a particular capital crime.

The indictment concludes "contra form' statut':" and therefore the Court may pronounce the villainous judgment, if they think proper.

Mr. Serj. Davy in reply—There is a distinction between a writ of conspiracy, and an indictment for a conspiracy. In an action, the damage is the gist of the action; and therefore the writ and declaration must charge "that he was indicted and sustained damage;" but that is not necessary, in an indictment; which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143.

Its being after verdict, or before verdict, makes no difference. Hale's 2 H. P. C. 193 is express "that a defective indictment is not aided by verdict. For an indictment is not within any of the Statutes of Jeofails: none of them extend to an indictment."

It is not denied "that this is an indictment for a mere conspiracy only," and nothing more: and there is no allegation of its being a false one.

Therefore the indictment is bad: and no judgment can be given upon it.

Lord Mansfield—We will think of it. The argument turns upon its being an indictment for a conspiracy only.

Mr. Just. Denison—In the case of *Moore v. Kinnersley*,<sup>(b)</sup> it was holden "that an indictment would lie for a conspiracy only."

Curia advisare vult.

N.B. The defendants (who had been brought into Court by virtue of the habeas corpus,) were now committed to the marshal, while the Court took time to consider.

[999] On Wednesday 14th May 1760,

Lord Mansfield delivered the opinion of the Court.

He stated the case, and the objections; (which, he said, had been very ingeniously argued:)

But, they all agreed that in reality there was no colour for them.

If this had been a bare unexecuted conspiracy, which had never taken effect, (as that in *Kinnersley's case* was,) the objections might have had more weight: (though he gave no opinion, he said, what degree of weight they might have had even in that case).

But here is much more than a bare conspiracy without effect. Here is an overt

\* V. ante.

(b) This is a mistake in the name of the case, which was *Rex v. Kinnersley and Moor*: it is reported in Str. 193, and the point was holden as here mentioned, and S. P. hath been often before so adjudged, 11 Co. 56 b. Ld. Raym. 1169; but vid. 11 Co. 57 a.

But an action will not lie for a conspiracy, if nothing be put in execution. Ld. Raym. 378.

act laid, as I may call it; and it is found "that the defendants, according to the conspiracy, combination and agreement between them before had, actually did, falsely, wickedly, and maliciously, and without any reasonable or probable cause, indict this man;" and the very indictment itself is particularly specified in the present one.

So that this was a complete formed conspiracy, actually carried into execution.\*

We are all very clear, that there is no colour for the objections, in the present case; and that the rule ought to be discharged.

Per Cur. The rule to shew cause why the judgment should not be arrested, was discharged. V. post, 1027.

REX *versus* TURKEY-COMPANY; or (rather now) REX *versus* MARCH, Deputy Governor of the Turkey-Company. (V. ante, 943.) Saturday, 17th May, 1760. Mandamus to admit a Quaker, having taken his affirmation, but refusing to take the oath prescribed by 26 G. 2, c. 18, into the freedom of the Turkey Company, granted peremptorily.

This case, (pursuant to what had been before settled) came on in the Crown-paper, upon the return to a mandamus which had issued since the † last motion: which mandamus and return were as follows—

The writ was directed to John March, Deputy Governor of the Company of Merchants of London trading into the Levant seas, commonly called the Turkey-Company.

[1000] It recited that whereas since the 24th day of June 1754, that is to say, upon the 13th day of November, now last past, (and the writ bore teste on the 12th February, 33 G. 2,) Isaac Rogers (being then a subject of this realm of Great Britain, and also one of the people commonly called Quakers,) desiring admission into the said Company, did in due manner make and subscribe his solemn affirmation and declaration in that behalf requisite, before William Alexander, Esq. and Sir William Stephenson, Knt. two of His Majesty's justices assigned to keep the peace in and for the City of London, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said city; and whereas the said Isaac Rogers, after the making the said affirmation and declaration as aforesaid, offered himself and did make request to him the said John March, to be admitted into the said Company; and did then tender to him, for such his admission, for the use of the said Company, the sum of 20l. and at the same time did also produce to him a certificate under the hands and seals of the said William Alexander and Sir William Stephenson, the justices aforesaid, certifying "that on the 13th day of November, in the year of our Lord 1759, the above-named Isaac Rogers, one of the people called Quakers, appeared before them (the said justices,) and had to him administered, by them, the above affirmation;" yet he the said John March, well knowing the premises, but not regarding his duty in this behalf, hath absolutely refused, and yet doth refuse to admit the said Isaac Rogers into the said Company; in contempt, &c. and to the great damage and grievance of the said Isaac Rogers, and in manifest injury of his estate, &c. We therefore, being willing, &c. do command, &c. that immediately after the receipt of this our writ, you admit or cause to be admitted the said Isaac Rogers into the said Company of Merchants, trading into the Levant seas, commonly called the Turkey-Company; or shew to us cause to the contrary thereof; lest, &c. And how, &c. Witness, &c.

The return—The answer of John March, Deputy-Governor of the Company of Merchants of England, trading into the Levant seas, commonly called the Turkey-Company to the within writ.

I, John March, Deputy-Governor of the Company of Merchants of England, trading into the Levant seas, commonly called the Turkey-Company, in the within writ called "the Deputy-Governor of the Company of Merchants of London, trading into the Levant seas, commonly called the Turkey-Company," (to whom the said writ hath been delivered,) do most humbly certify and return to, &c. that long before Isaac Rogers, in the [1001] said within writ named, offered himself to me to be admitted into the said Company, to wit, in the 26th year of His present Majesty's reign, by a

\* The fact was, that though Gilmore was indeed discharged, for want of prosecution; yet he had been actually indicted, and long kept in prison upon such indictment.

† V. ante, 943.



certain Act of Parliament, made at a session of Parliament of our lord the present King held at Westminster, in the county of Middlesex, on the 11th day of January, in the year of our Lord 1753, in the 26th year of the reign of His present Majesty, intituled "An Act for Enlarging and Regulating the Trade into the Levant Seas," it was and is (amongst other things) enacted "that from and after the 24th day of June 1754, a certain oath (the form of which is set forth in the said Act) in lieu of the oath theretofore taken by persons upon their admissions to their freedom in the said Company, should be taken by every person, upon his admission to his freedom; either before the governor or deputy-governor of the said Company, or before two of His Majesty's justices of the peace (who were and are thereby respectively empowered and required to administer the said oath:)" which justices are thereby required to certify under their hands and seals, "that the said oath was taken before them."

And I do further humbly certify and return to our said present most serene Sovereign Lord the King, that the said Isaac Rogers, in the said writ named, hath not taken, but hath refused to take the said oath by the said last mentioned Act of Parliament required; either before the governor or deputy-governor of the said Company, or before two of His Majesty's justices of the peace: and therefore I cannot admit or cause to be admitted him the said Isaac Rogers into the said Company of Merchants trading into the Levant seas, commonly called the Turkey-Company, as by the said writ I am commanded.

JOHN MARCH, Deputy Governor.

Mr. Norton argued, (on Wednesday last,) for the mandamus.

The only question was, whether a Quaker, who has in due manner made and subscribed his solemn affirmation and declaration to the effect of the oath, can be admitted to the freedom of this Company, without actually taking the oath appointed by the Act of 26 G. 2, c. 18, § 2, enabling every subject of Great Britain, desiring admission into that Company, to be admitted into it, upon paying or tendering 20l.

He argued that he ought to be admitted to this freedom. The Act of 22 G. 2, c. 46, § 36, (& penult.) pa. 945, (for allowing Quakers to make affirmation in cases where an oath is or shall be required) extends to all cases of oaths of all kinds, required by any Act of Parliament to be [1002] taken by Quakers: and the three exceptions in the † proviso, excluding them from "being thereby qualified or permitted to give evidence in any criminal cases, or to serve on juries, or to bear any office or place of profit in the Government," still more strongly shew the sense of the Legislature. And this case is not within any of these three exceptions: it is only a claim of an admission into a trading corporation; not of any emoluments from the public offices of Government.

But this question has been already determined in the case of *Rex v. Morris*, P. 10 W. 3, B. R. 1 Ld. Raym. 337, upon a mandamus to admit Morris (who was a Quaker) to his freedom of the City of Lincoln; he having served an apprenticeship there, for seven years. Carthew, 448, S. C. *Rex v. Maurice, Mayor of Lincoln*, 5 Mod. 402, S. C. *Rex v. Mayor of Lincoln*—It was holden "that the Quaker might take the solemn affirmation (by the Act of 7, 8 W. 3, 34,) instead of the oath, and that such freedom was not a place of profit in the Government within the meaning of the exception in that Act."

Lord Mansfield—This case explains the proviso in this Act of 22 G. 2, and the declaration "that it was made to explain a doubt, whether the solemn affirmation prescribed by 8 G. 1 could be allowed and taken instead of an oath, in any case wherein by any Act or Acts of Parliament an oath is required: unless the said affirmation or declaration be by such Act or Acts of Parliament particularly and expressly directed to be allowed and taken instead of such oath."

Mr. Harvey, for the Turkey-Company, argued (1st.) That this case was not within the purview of the Act: (2dly.) That if it is, yet it is within the meaning of the exception.

First—The Act did not mean to give Quakers any privilege of affirming instead of swearing, where they were not under some penalty or forfeiture, or had some antecedent right vested in them.

The Act of 13, 14 C. 2, c. 1, was highly penal upon Quakers. 1 W. & M. c. 18, § 13, (the Act of Toleration) gave them some indulgencies. 7, 8 W. 3, c. 34, permits



the solemn affirmation or declaration, instead of an oath, under the three exceptions which have been mentioned. 8 G. 1, c. 6, (which is the Act recited in this Act of 22 G. 2, c. 4) alters the form of the solemn affirmation or declaration.

The enacting part of the Act of 22 G. 2, c. 46, § 36, 37, (a hotchpot Act,) does indeed extend the solemn affirmation or declaration to all cases wherein, by any Act or Acts [1003] of Parliament then in force or thereafter to be made, an oath is allowed or required; although no particular or express provision be therein made for it. But this Act in itself, in its purview, is a good deal confined, and extends only to their giving testimony: the words are—"by reason of which doubt, the testimony of the said people called Quakers is frequently refused, whereby the said people, and others requiring their evidence, are subjected to great inconveniences; therefore, &c. be it enacted, &c."

Secondly—They are within the third exception contained in the proviso of this Act of 22 G. 2, § 36, for it is a place of profit.

In the case cited, it was an office in a corporation, without profit.

This is not a place under the Crown, or under the Government: but it is \*<sup>1</sup> in the Government, (which is the expression used in the \*<sup>1</sup> Act;) as corporations for managing trade, are part of the Government. And the very principles of the Quakers are prejudicial to trading corporations carrying on great trade in foreign countries; as their rights often require to be supported by force, as well as (in the present case) with pomp and show (by their ambassador at the port).

This case may be distinguished from the cited case of *Rex v. Morris*: for that was a right to the freedom of a particular place, acquired by serving an apprenticeship there; and it appears from 5 Mod. 403, that the man had there an antecedent vested right; viz. by having served such apprenticeship; whereas here is no antecedent vested right: but only a general claim, common to all other subjects.

Mr. Norton in reply—The Acts relating to Quakers do all of them give privileges and indulgencies to the species of Dissenters, called Quakers: so, particularly, it appears from the preamble to 8 G. 2, c. 6, which speaks of them with high regard and commendation.

The case cited shews that there was a profit to the freeman; (viz. a vote for members of Parliament, and also pasture in a common;) and that they had a government in their corporation; whereas this is a mere trading company.

Here is just as much an antecedent right, as there was in that case. Our claim is founded upon such a right.

Therefore he prayed a peremptory mandamus, commanding the Company to admit him.

[1004] Lord Mansfield said he could not even start a doubt; the point was so clear.

This can never be considered as a place of profit in the Government. And the case cited is stronger than this: there was a right to vote in elections to Parliament, as well as a right to have common of pasture.

However, as Mr. Just. Denison chose to read the Act of Parliament at more leisure, before he gave a positive and direct opinion upon the question;

The Court therefore took a few days to consider of it. And

Lord Mansfield now delivered the resolution of the Court.

He said, it was not possible to find any colour of doubt. It was very clear, he said, on the Act of \*<sup>2</sup> King William: and the case of *The Mayor of Lincoln* is a determination in point.

The preamble of the 36th section of 22 G. 2, c. 46, recites, as the reason of the enacting part, that a doubt had arisen "whether the solemn affirmation of Quakers, prescribed by 8 G. 1, could be allowed in any case where an Act of Parliament had required an oath; unless the affirmation be by such Act particularly and expressly directed to be allowed and taken instead of such oath:" for removing which doubt, it enacts that "in all such cases, upon Acts of Parliament then in force, or thereafter to be made, which direct or require an oath, it shall be allowed, although no particular or express provision be made for that purpose in such Act or Acts."

As to its being "an office or place of profit in the Government."—It is impossible to support that notion: for it can never be considered in that light, most certainly.

\*<sup>1</sup> V. s. 37.

\*<sup>2</sup> V. 7, 8 W. 3, c. 34.

Even the remittances of public money for the use and account of the Government, if given by the ministry to Quakers, may be very profitable appointments to the remitters: but yet, they are no places or offices of profit in the Government.

This man's claim is nothing more than to be admitted into a company of merchants trading to a particular part of the world. And surely, there can be no pretence to call this a place or office of profit in the Government.

[1005] Therefore this return must be quashed; and there must be a peremptory mandamus.

Rule accordingly; viz. that the return be quashed, for the insufficiency thereof; and that a peremptory mandamus do issue.

MOSES *versus* MACFERLAN. Monday, 19th May, 1760. [S. C. Buller, 129, 131. 1 Black. 219, cited post, 1354.] If one recovers money mala fide by suit in an Inferior Court, indebitatus assumpsit will lie in B. R. to make him refund it back.

[Referred to, *Phillips v. London School Board* [1898], 2 Q. B. 453. Discussed and approved, *Jacobs v. Morris* [1901], 1 Ch. 268; [1902], 1 Ch. 816. Referred to, *Bradford Corporation v. Ferrand* [1902], 2 Ch. 662; *In re Bodega Company* [1904], 1 Ch. 286. Approved, *Lodge v. National Union Investment Company* [1907], 1 Ch. 311.]

Lord Mansfield delivered the resolution of the Court in this case; which stood for their opinion, "whether the plaintiff could recover against the defendant, in the present form of action, (an action upon the case for money had and received to the plaintiff's use;) or whether he should be obliged to bring a special action upon the contract and agreement between them."

It was an action upon the case, brought in this Court by the now plaintiff, Moses, against the now defendant, Macferlan, (heretofore plaintiff in the Court of Conscience, against the same Moses now plaintiff here,) for money had and received to the use of Moses the now plaintiff in this Court.

The case, as it came out upon evidence and without dispute, at Nisi Prius before Ld. Mansfield at Guildhall, was as follows.

It was clearly proved, that the now plaintiff, Moses, had indorsed to the now defendant Macferlan, four several promissory notes, made to Moses himself by one Chapman Jacob, for 30s. each, for value received, bearing date 7th November 1758; and that this was done, in order to enable the now defendant Macferlan to recover the money in his own name, against Chapman Jacob. But previous to the now plaintiff's indorsing these notes, Macferlan assured him "that such his indorsement should be of no prejudice to him:" and there was an agreement signed by Macferlan, whereby he (amongst other things) expressly agreed "that Moses should not be liable to the payment of the money or any part of it; and that he should not be prejudiced, or be put to any costs, or any way suffer, by reason of such his indorsement." Notwithstanding which express condition and agreement, and contrary thereto, the present defendant Macferlan summoned the present plaintiff Moses into the Court of Conscience,\* upon each of these four notes, as the indorser thereof respectively, by four separate summonses. Whereupon Moses, (by one Smith who attended the Court of Conscience at their second Court, as solicitor for him and on his behalf,) tendered the said indemnity to the [1006] Court of Conscience, upon the first of the said four causes; and offered to give evidence of it, and of the said agreement, by way of defence for Moses in that Court. But the Court of Conscience rejected this defence, and refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it: and gave judgment against Moses, upon the mere foot of his indorsement, (which he himself did not at all dispute,) without hearing his witnesses about the agreement "that he should not be liable:" for the commissioners held this agreement to be no sufficient bar to the suit in their Court; and consequently decreed for the plaintiff in that Court, upon the undisputed indorsement made by Moses. This decree was actually pronounced, in only one of the four causes there depending: but Moses's agent, (finding the opinion of the commissioners to be as above-mentioned,) paid the money into that Court, upon all

[\* 23 Geo. 2, c. 33.]

the four notes; and it was taken out of Court by the now defendant Macferlan, (the then plaintiff, in that Court,) by order of the commissioners.

All this matter appearing upon evidence before Lord Mansfield at Nisi Prius at Guildhall, there was no doubt but that, upon the merits, the plaintiff was intitled to the money: and accordingly, a verdict was there found for Moses, the plaintiff in this Court, for 6l. (the whole sum paid into the Court of Conscience;) but subject to the opinion of the Court, upon this question, "whether the money could be recovered in the present form of action, or whether it must be recovered by an action brought upon the special agreement only."

On Saturday the 26th April last,—

Mr. Morton, on behalf of the defendant Macferlan, moved to set aside this verdict found for the plaintiff; and to have leave to enter up judgment against the plaintiff, as for a nonsuit.

And in order to shew that the action was not maintainable in its present form, he laid down a position "that indebitatus assumpsit will not lie, but where debt will lie." It lies not upon a wager, nor upon a mutual assumpsit; nor against the acceptor of a bill of exchange; neither will it lie for money won at play: for it will never lie, but where the debt will lie; and can never be, upon mutual promises. 1 Salk. 23, *Hard's case*; and 6 Mod. 128, *Smith v. Abery*, are expressly so, in terms.

And, to maintain debt, there must be either an express contract broken; or an implied contract broken. But there is no contract either express or implied, "that Moses would have this cause of action against Macferlan:" Chapman Jacob was only to pay Moses the money, when it should be recovered by Macferlan. An [1007] indorsement of a promissory note is a just cause of action: and Macferlan recovered this money, of Moses the indorser, by judgment of a Court of Justice.

But this action, "for money had and received to his use," is not the proper way of setting right the judgment of a Court of Justice.

This agreement could not repel the action before the Court of Conscience: it was only the subject of an action to be brought upon itself. This appears from the case of *Beston v. Robinson*, in Cro. Jac. 218, where Beston was in execution upon a statute merchant at the suit of Robinson; and brought an auditâ querela, and produced articles between him and Robinson, as a discharge; which was holden not good, to discharge him of the execution; but that his remedy was to have an action of covenant upon them. So in 1 Bulstr. 152, *Anon*, by Williams and the rest of the Judges, "if the party be taken and imprisoned upon a judgment and execution, where he has paid the money, he shall not have a supersedeas quia erroneâ, nor no remedy, but only an auditâ querela: and upon promise of enlargement, and not performing it, an action on the case only lieth for this, and no other remedy. (a)"

Mr. Norton contra for the plaintiff.

We have not misconceived our action: we were not confined to bring an action upon the special agreement; but were at liberty to bring this action, "for money had and received to our use," to recover this money unfairly received by the defendant.

I do not agree to the position, "that assumpsit will not lie, but where debt will lie."

In the case of *Astley v. Reynolds*,\* this principle was settled, viz. "that wherever a person has wrongfully paid money, he may have it back again, by this action for money had and received to his use." And yet in that very case, there was another remedy. And there was the consent of the payer too.

So likewise, for money paid on a contract which is never performed.

So, on a wager (on a horse-race,) against the stake-holder, after the thing is completed and over.

And no inconvenience can arise: everything is done and finished, in the present case; and no writ of error lies to the Court of Conscience: nor can its judgments be overhaled.

[1008] The Court, having heard the counsel on both sides, took time to advise.

(a) The reason of these cases seems to be because there was no opportunity of pleading; but according to modern practice, the Court would discharge the party on motion if the fact was clear.

\* M. 5 G. 2, B. R. (V. 2 Strange, 915.)



Lord Mansfield now delivered their unanimous opinion, in favour of the present action.

There was no doubt at the trial, but that upon the merits the plaintiff was intitled to the money; and the jury accordingly found a verdict for the 6l. subject to the opinion of the Court upon this question, "whether the money might be recovered by this form of action," or "must be by an action upon the special agreement only."

Many other objections, besides that which arose at the trial, have since been made to the propriety of this action in the present case.

The 1st objection is, "that an action of debt would not lie here; and no assumpsit will lie, where an action of debt may not be brought:" some sayings at *Nisi Prius*, reported by note takers who did not understand the force of what was said, are quoted in support of that proposition. But there is no foundation for it. (c)

It is much more plausible to say, "that where debt lies, an action upon the case ought not to be brought." And that was the point relied upon in \* *Slade's case*: but the rule then settled and followed ever since is, "that an action of assumpsit will lie in many cases where debt lies, and in many where it does not lie."

A main inducement, originally, for encouraging actions of assumpsit was, "to take away the wager of law:" and that might give rise to loose expressions, as if the action was confined to cases only where that reason held.

2d objection.—"That no assumpsit lies, except upon an express or implied contract: but here it is impossible to presume any contract to refund money, which the defendant recovered by an adverse suit."

Answer. If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it).

This species of assumpsit, ("for money had and received to the plaintiff's use,") lies in numberless instances, [1009] for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had, by law, authority to receive from such third person.

3d objection. Where money has been recovered by the judgment of a Court having competent jurisdiction, the matter can never be brought over again by a new action.

Answer. It is most clear, "that the merits of a judgment can never be over-haled by an original suit, either at law or in equity." Till the judgment is set aside, or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes.

But the ground of this action is consistent (d) with the judgment of the Court of Conscience: it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff: which indorsement is not now disputed. The ground upon which this action proceeds, was no defence against that sentence.

It is enough for us, that the commissioners adjudged "they had no cognizance of

(c) Besides 1 Salk. 23, and 6 Mod. 128, before cited by Mr. Norton in Ld. Raym. 69, the position that indebitatus assumpsit will lie only in cases where debt will lie, is reported to be the ground on which a judgment was there given against a person in an action of indebitatus assumpsit.

But this reporter is either mistaken, or else no proper distinction was taken, for the objection is put wrong; for there are two sorts of assumpsit, one a general indebitatus assumpsit, and the other a special assumpsit; and Burrow reports the objection to be, that no assumpsit will lie where debt will not; and some sayings at *Nisi Prius* were said by Lord Mansfield to have been quoted in support of it, whereas it is well known a special assumpsit will lie on a collateral undertaking; and in many other cases where debt will not lie, and there are no sayings at *Nisi Prius* to the contrary, for they relate only to a general indebitatus assumpsit; but there was a notion that indebitatus assumpsit would not lie, except where debt would lie, and not there, if the debt was due by specialty; but even in that case a special assumpsit would lie. See Cro. Car. 343. 2 Mod. 263. 1 Vin. 141, pl. 9.

\* 4 Co. 92.

(d) Qu. of this? For how can it be legal for any Court of Law to give judgment for a plaintiff to recover a sum, which as soon as paid, the defendant hath a legal right to recover back again, and that on the very same facts as in the former suit.

such collateral matter." We can not correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to be right. But we think, "the commissioners (c) did right, in refusing to go into such collateral matter." Otherwise, by way of defence against a promissory note for 30s. they might go into agreements and transactions of a great value: and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account.

The ground of this action is not, "that the judgment was wrong:" but, "that, (for a reason which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money." And at Guildhall, I declared very particularly, "that the merits of a question, determined by the commissioners, where they had jurisdiction, never could be brought over again, in any shape whatsoever."

Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment.

Suppose an indorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the indorser who knew nothing of such payment.

Suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home;—or upon [1010] the life of a man presumed to be dead, who afterwards appears;—or upon a representation of a risque deemed to be fair, which comes out afterwards to be grossly fraudulent.

But there is no occasion to go further: for the admission "that unquestionably, an action might be brought upon the agreement," is a decisive answer to any objection from the judgment. For it is the same thing, as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received; or upon the agreement itself, that besides refunding the money, he may pay the costs and expences the plaintiff was put to.

This brings the whole to the question saved at *Nisi Prius*, "viz. whether the plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement."

One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes "that, *ex æquo & bono*, the money received by the defendant, ought to be deemed as belonging to him:" he may declare generally, "that the money was received to his use;" and make out his case, at the trial.

This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff, *ex æquo & bono*, is not intitled to the whole of his demand, or to any part of it.

If the plaintiff elects to proceed in this favourable way, it is a bar to his bringing another action upon the agreement; though he might recover more upon the agreement, than he can by this form of action. And therefore, if the question was open to

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(c) The commissioners supposing this judgment right, clearly did wrong, for the reason above-mentioned; and also, because the plaintiff below could have no damage by non-payment of money, if he could not keep it. And vide 18 Vin. 312, pl. 5, and the notes: there several cases are cited, that are in effect contrary to the opinion of the Court, as here reported. But if the agreement had not been in writing, the commissioners would have done right in rejecting it. Buller, 269, 270.

So if Macferlan had indorsed the note over, and the action had been brought by his indorsee, the above reasoning seems to be contradictory to itself, and is really in contradiction in terms: for it is saying, a man has a right, which the moment he has received, the person paying it, has a right to recover back; which is a right and no right: even in real actions, if the demandant is bound to warrant; the tenant may to prevent circuitry rebut him; yet one estate may be more convenient to the demandant than another, but all money is alike.

be argued upon principles at large, there seems to be no reason or utility in confining the plaintiff to an action upon the special agreement only.

But the point has been long settled ; and there have been many precedents : I will mention to you one only ; which was very solemnly considered. It was the case of *Dutch v. Warren*, M. 7 G. 1, C. B. An action upon the case, for money had and received to the plaintiff's use.

[1011] The case was as follows—Upon the 18th of August 1720, on payment of 262l. 10s. by the plaintiff to the defendant, the defendant agreed to transfer him five shares in the Welsh copper mines, at the opening of the books ; and for security of his so doing, gave him this note—"18th of August 1720. I do hereby acknowledge to have received of Philip Dutch, 262l. 10s. as a consideration for the purchase of five shares ; which I do hereby promise to transfer to the said Philip Dutch as soon as the books are open ; being five shares in the Welsh copper mines. Witness my hand Robert Warren." The books were opened on the 22d of the said month of August ; when Dutch requested Warren to transfer to him the said five shares ; which he refused to do : and told the plaintiff, "he might take his remedy." Whereupon the plaintiff brought this action, for the consideration money paid by him. And an objection was taken at the trial, "that this action upon the case, for money had and received to the plaintiff's use, would not lie ; but that the action should have been brought for the non-performance of the contract." This objection was overruled by the <sup>\*1</sup> Chief Justice ; who notwithstanding left it to the consideration of the jury, whether they would not make the price of the said stock, as it was upon the 22d of August, when it should have been delivered the measure of the damages ; which they did ; and gave the plaintiff but 175l. damages.

And a case being made for the opinion of the Court of Common Pleas, the action was resolved to be well brought ; and that the recovery was right, being not for the whole money paid, but for the damages, in not transferring the stock at the time ; which was a loss to the plaintiff, and an advantage to the defendant, who was a receiver of the difference money to the plaintiff's use.

The Court said, that the extending those actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it ; it is a fraud : and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it ; or to disaffirm the agreement ab initio, by reason of the fraud, and bring an action for money had and received to his use.

The damages recovered in that case, shew the liberality with which this kind of action is considered : for though the defendant received from the plaintiff 262l. 10s. yet the difference money only, 175l. was retained by him against conscience : and <sup>\*2</sup> therefore the plaintiff, ex æquo et bono, ought to recover no more ; agreeable to the rule of the Roman law—"Quod condictio indebiti non datur ultra, quam locupletior factus est, qui accepit." (e)

[1012] If the five shares had been of much more value, yet the plaintiff could only have recovered the 262l. 10s. by this form of action.

The notion of fraud holds much more strongly in the present case, than in that : for here it is express. The indorsement, which enabled the defendant to recover, was got by fraud and falsehood, for one purpose, and abused to another.

This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, <sup>\*3</sup> ex æquo et bono, the defendant ought to refund : it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law ; as in payment of a debt barred by the Statute of Limitations, or contracted during his

<sup>\*1</sup> Sir Peter King was then Ld. Ch. J. of K. B. [And qu. if the law is not altered by 7 Geo. 2, c. 8, s. 5.]

<sup>\*2</sup> V. post, 2133, *Dale v. Sollet*, M. 8 G. 3, B. R. accord. [Vin. Inst. 720.]

(e) The rule is misapplied ; for Warren who received the 262l. 10s. was certainly the richer by that sum ; and therefore, if the jury had given the plaintiff that sum it would not have been, ultra quam locupletior factus est qui accepit. The reverse of this rule would apply to this case, condictio indebiti non datur ultra quam pauperior factus est qui solvit.

<sup>\*3</sup> V. post, 2133, *Dale v. Sollet*, M. 1767, B. R. accord



infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play : because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake ; or upon a consideration which happens to fail ; or for money got through imposition, (express, or implied ;) or extortion ; or oppression ; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion that the plaintiff might elect to waive any demand upon the foot of the indemnity, for the costs he had been put to ; and bring this action, to recover the 6l. which the defendant got and kept from him iniquitously.

Rule—That the *postea* be delivered to the plaintiff.

The end of Easter term 1760.

[1013] TRINITY TERM, 33 & 34 GEO. II. B. R. 1760.

CRAWFORD *versus* POWELL. Friday, 6th June, 1760. [S. C. 1 Bl. 229.] Corporator when obliged and when not obliged, to prove his having taken the sacrament within a year next before his election.

This was a case reserved at Nisi Prius before Lord Mansfield at Guildhall, upon the trial of an action for a false return to a mandamus. The mandamus was directed to Griffith Powell, commanding him to deliver to Gibbs Crawford, the common seal, books, papers and records of the Corporation of Harwich ; which the said Crawford claimed to belong to his custody, as having been duly elected town-clerk of the corporation ; and his election was set forth in the writ. To this writ of mandamus (to deliver the insignia, &c. *ut supra*) the defendant Griffith Powell returned "that the said Gibbs Crawford was not duly elected town-clerk : " upon which return, alledged to be a false one, the present action was brought.

The declaration shewed that the plaintiff Crawford was duly elected town-clerk, &c. upon the 20th of March 1758 ; in virtue of which election, it alledged, that the common seal, books, papers and records belonged to him, &c. But that the defendant Powell refused to deliver them to him. The declaration then shewed that the plaintiff, upon such his refusal, did, upon the 12th of April 1758, prosecute a writ of mandamus returnable on Friday next after one month from Easter 1758, (being the same writ upon which the action is brought ;) which was accordingly returned upon the said return-day.

So that it appeared upon the face of the declaration, that this mandamus was actually returned within six months after the plaintiff's election to the office.

There was a verdict for the plaintiff ; but it was objected on the part of the defendant, that the plaintiff ought [1014] to prove his having taken the sacrament according to the rites of the Church of England within a year next before his election.

This point was reserved at the trial, for the opinion of the Court, and was twice argued ; once, by Sir Richard Lloyd, on Wednesday 4th July 1759 ; and a second time, by Mr. Gould, on Friday 6th June 1760 ; both of them for the defendant, in support of the objection.

They urged that it was incumbent upon the plaintiff to shew that he was duly elected : and they contended that he could not have been duly elected, unless he had taken the sacrament within a year ; for by the statute of 13 Car. 2, stat. 2, c. 1, "No person can be elected into the office of town-clerk of a corporation, that shall not have within one year next before such election taken the Sacrament of the Lord's Supper according to the rites of the Church of England ; and in default thereof, every such election is thereby declared void." Consequently, in order to make out his title, he ought to prove his having taken the sacrament within one year next before his election : and his not having done this, is without doubt a fatal objection, upon the Statute of 13 C. 2. And it remains equally fatal, even since the Act for Quieting and Establishing Corporations, 5 G. 1, c. 6, as the return to this mandamus was made within six months after the plaintiff's election.

By this Act of 5 G. 1, c. 6, § 3, "No person thereafter to be elected into such office shall be removed by the corporation or otherwise prosecuted for or by reason of such omission; nor shall any incapacity, disability, forfeiture or penalty be incurred by reason of the same; unless such person be so removed, or such prosecution be commenced, within six months after such person's being placed or elected into his respective office, &c."

But this Act does not affect the present case; where the return was made within two months after the election of the officer.

For although such incapacity and disability might be taken away by this Statute of 5 G. 1, in a case where six months had elapsed after the election, without any removal by the corporation or prosecution commenced and carried on without delay; and consequently, a return of "non fuit electus," founded only upon this incapacity and disability, but not made till after the expiration of the six months, would indeed be a false return, and the plaintiff would have no need (in such a case) to prove his having taken the sacrament within a year; yet in the present [1015] case, (where the return is made within the six months) it is not a false, but a true return, if the fact was "that he really had not received the sacrament within a year next before his election:" for, as the incapacity and disability incurred by the 13 C. 2 stands in this case unremoved by the 5 G. 1, the plaintiff remains still open and liable to a removal by the corporation, or to a prosecution to be commenced within the six months. So that there is a vast difference between a return of this kind made within the six months (as this is,) and a return made after the expiration of the six months: the former, if supported by the fact, is a true return; the latter, a false one.

In the present case, therefore, as this statute of 5 G. 1, c. 6, had never taken place, it was incumbent upon the "plaintiff to prove that he had taken the sacrament within the year next before his election;" as his election would otherwise be void, by 13 C. 2.

In the case of *Tufton, Esq. v. Nerinson, Mayor of Appleby*, 2 Ld. Raym. 1354, (which was in Easter term 10 G. 1) upon an issue taken on a "non fuit electus" returned by the mayor to a mandamus commanding him to swear the plaintiff Mr. Tufton into the office of an alderman of that borough, being (as the writ suggested) duly chosen, Mr. Serj. Pengelly, who was for the defendant, made this very objection, "that Mr. Tufton ought to prove that he had received the sacrament within a year before his election;" (though six months were, in that case, elapsed since his election). And the whole Court were unanimous in opinion, first, that the case was not within the 5 G. 1, c. 6, because the plaintiff Tufton never was admitted into the office, and therefore could not be removed out of it nor incur a forfeiture; secondly, that it was incumbent upon the plaintiff to prove "that he had received the sacrament, &c. within a year before his election, by 13 C. 2, c. 1, else, his election was void:" and so it was said to have been ruled in other cases there mentioned.

*Marten v. Jenkin*, M. 14 G. 2, B. R. mentioned in 2 Strange 1145, was a mandamus directed to Jenkin the late Mayor of Winchelsea, commanding him to swear Marten into that office: who returned "non fuit electus;" and an issue was joined thereon. A special verdict found, that the mayor was to be chosen out of the jurats: and that the plaintiff Marten was on 1st May 1739, chosen a jurat and sworn in, and continued so till 7th April 1740, when he was chosen mayor; and that he had received the sacrament within a year before his election to be mayor, but had not done so within a year next before his election to be a jurat. The Court held the statute of 5 G. 1, c. 6, § 3, to operate so as to give him the benefit of non-prosecution within six months, with regard to the previous qualification, and remove his incapacity and dis-[1016]-ability arising from such neglect: and they held the verdict to be sufficient for them to give judgment upon, although it was not found negatively, "that there was no prosecution within the six months:" as his election did appear, and nothing appeared to avoid it, (which should have come on the other side). And they gave judgment for the plaintiff.

In the latter of these cases, the officer was settled in his office, by the six months being expired without prosecution. Here, the plaintiff Mr. Crawford was not so: his incapacity and disability, if ever it existed at all, must remain the same, till after the expiration of the six months.

Therefore the action for a false return cannot be maintained in the present case, without the proof insisted upon: nor ought the defendant Powell, who was the



preceding officer, to have delivered over the books and insignia of the corporation, to a man at that time liable to removal or prosecution for not having taken the sacrament within the year next before his election.

But the Court (notwithstanding all this plausible reasoning) over-ruled the objection, and gave judgment for the plaintiff.

Lord Mansfield said that since the statute of 5 G. 1, c. 6, \* the election of a person who had not taken the sacrament within a year next preceding it, is not void, but only voidable in case of a removal or prosecution within the time thereby limited: and consequently, as here was no such removal or prosecution within that limited time, the plaintiff's election stood confirmed and became absolute. He therefore thought this a clear case; and that there was no real force in the objection. He did not think it like to the case of *Tufton v. Nevins* that had been cited from *Ld. Raymond's Reports*: because that arose from the officer's bringing a mandamus to swear him into his office, being then out of possession; whereas this plaintiff is in possession of the office, and only brings his mandamus for the insignia and other things belonging to it.

Per Cur. Judgment for the plaintiff.

[1017] *OLDKNOW versus WAINWRIGHT, or REX versus FOXCROFT.* Tuesday, 10th June, 1760. [S. C. 1 Black. 229.] A majority dissent from an election, but vote for nobody else; the election by the minority is good.

Tr. 31 G. 2, Rot'lo. 159.

This case of *Oldknow v. Wainwright* was a feigned action, under a rule by consent, to try a right of election to the office of town-clerk of Nottingham: which rule was made in the other cause of *Rex v. Foxcroft*, against whom an information had been prayed by Seagrave his competitor.

The consent-rule was to the effect following—"Rex v. Foxcroft, &c." The first part of the consent is, "that the matters in difference between the parties shall be tried in a feigned action:" then the rule goes on, "that Oldknow should be plaintiff, and Wainwright defendant;" and particularly specifies and settles the several issues that were to be tried. Then comes a clause of consent "that the Judge who should try the cause should be at liberty to indorse any special matter that might arise at the trial, upon the postea." Then it concludes thus—"And by the like consent, it is lastly ordered that the costs shall abide the event of the issue."

There were four issues to be tried: 1st. "Whether the mayor alone had a right to appoint the town-clerk." And it was found "that he had not." 2d issue—Supposing he had, then "whether J. Foxcroft was duly appointed by him." On this issue, a verdict was given "against the mayor's appointment." 3d issue—"Whether the mayor, aldermen and common council have the said right of election." This was found in the affirmative. (So that these three issues were all found for the defendant.) 4th issue—Supposing the mayor, aldermen and common council have the right, then "whether Thomas Seagrave was duly elected by them." As to this 4th issue, there was a special verdict to the following effect. It sets out the constitution of the borough, and that the voices were all equal votes. Then it sets out the vacancy of the office of town-clerk, and a regular summons to elect another. That the whole number of electors was twenty-five: and that out of that number, twenty-one assembled on the 26th of May, pursuant to the said summons. That the mayor put Thomas Seagrave in nomination; and that no other person was put in nomination. That nine of the twenty-one voted [1018] for him: but twelve of them did not vote at all, but eleven of them protested against any election at that time; because the office was already full (as they alleged) of Foxcroft, whose right was then under litigation in this Court. That there was a written protest against any election at all, either of Seagrave, or any other person, by four aldermen and six common-councilmen; because a suit was then depending in the Court of King's Bench concerning the right of Foxcroft. These ten signed the written protest: another (Hollins) did not sign, nor vote; but declared "that he suspended doing any thing."

However, at the same Court or assembly, the mayor declared the said Thomas

\* Vide s. 3. [And Doug. 384.]



Seagrave duly elected and he took the oaths of office, and other requisite oaths, in due manner and form.

Mr. Caldecote, on behalf of the plaintiff, argued (on Tuesday 6th of May last) that Seagrave was not duly elected. For twenty-five had a right of voting; all had equal voices; and of twenty-one that met, eleven protested against any election at that time: therefore, these eleven were all negative voices, and against Seagrave, and only nine were for him.

Besides, this was no corporate act.

All the twenty-five were summoned, and twenty-one appeared: the voice of the majority of those who were present, was the voice of the whole twenty-five; and Mr. Seagrave had not a majority of them.

Therefore the issue is found for the plaintiff: and we pray that the postea may be delivered to him.

Mr. Serj. Hewitt, contra, for the defendant.

The substantial matter in question was, "whether the right of appointing the town clerk was in the mayor: or in the mayor, aldermen and common-council." The mayor, aldermen and common-council-men make twenty-five, who are the corporate body.

Here was a regular summons of the whole body; and a corporate meeting of twenty-one of them, for the business of this election: and they entered upon the election: therefore they could not desert it unfinished.

At this meeting, the mayor nominated Mr. Seagrave; which no one then opposed: a vote was taken: and nine [1019] voted for Mr. Seagrave. After which, ten, or (as it is said) eleven protested against any election at all, at that time. But mere silence is not a negative, either expressed, or implied; and as no other person was proposed, and nine voted for him, and none against him, he was well elected.

The protesters then thought the office was full already, of Foxcroft: but it now is found "that Foxcroft was not duly elected." They thought that the office being full (as they apprehended) of Foxcroft, precluded them from electing another person. But if Foxcroft's nomination and appointment were bad, they were at liberty to elect another person. The case of *Aberystwith*, in 2 Strange, 1157, and also that of *Tintagel* there cited, shew that the protesters proceeded upon a mistake, in fancying they could not elect another, whilst a former claimed upon a controverted title.

Though the presence of a majority of the whole number be necessary, yet the concurrence and consent of a majority of the whole number is not necessary. A majority of the number present is sufficient. This appears from the case of *Sir Robert Salisbury Cotton v. Davies*, 1 Strange, 53.

If these protesters had gone away, and left the assembly, it had made no difference, after the business was not begun. In such case, the rest had a right to proceed. M. 4 G. 2, *Rex v. Norris*, B. R. 1 Barnardiston, 385, 386.

It does not appear that these protesters would not have voted for Mr. Seagrave, if they had voted at all. And, at this very assembly, he was declared by the mayor to be duly elected: and was accordingly sworn in, in the presence of the protesters.

This is clearly a corporate act.

Mr. Caldecott, in reply.

Though there was a question, "in whom the right of appointment or election lay:" yet this right of the person elected was also in question.

Mr. Foxcroft had a prior nomination or election by the mayor: and the protesters thought, that whilst his right was sub lite, they ought not to go on at all to the election of another person. Eleven of them formally protested against it: which certainly is voting against Seagrave's election.

[1020] The case of *Aberystwith*, in 2 Strange, 1157, is certainly true—"that where there is a void election, the Court will grant a mandamus to go to an election." But that is nothing to this case.

In this case of *Rex v. Norris*, the presence of the mayor was necessary.

Lord Mansfield saw no doubt in this case. Here was an assembly duly summoned; one candidate was named: no other was named; the poll was taken; they had no right to stop, in the middle of the election; the mayor did not put any question for adjournment; nor was there any.

But Mr. Caldecott prayed another argument; because Mr. Serj. Poole was retained to argue it on the same side with him, for the plaintiff.

Whereupon, the Court gave leave that it should be argued again; and ordered an *Uterius concilium*.

On Tuesday 10th June 1760, this cause stood in the paper for further argument. But

Mr. Serj. Poole, for the plaintiff, said he but very lately received his instructions; and therefore prayed further time.

But the Court refused to grant it: because it was his own client's fault, not to have instructed him sooner; as the further argument was indulged to the plaintiff, at his own desire, in the last term. However, they offered and even desired to hear what Mr. Serj. Poole might now have to say: for that they were quite open to conviction.

But the serjeant not urging any thing further—

Lord Mansfield confirmed his former opinion.

He said, the protesting electors had no way to stop the election, when once entered upon, but by voting for some other person than Seagrave, or at least against him; whereas here they had only protested against any election at that time.

Mr. Just. Wilmot—There was a case of *Rex v. Withers*, [1021] Pasch. 8 G. 2, B. R. where out of eleven voters, five voted, and six <sup>\*1</sup> refused: and the Court there held “that the six virtually consented.”

In the case of *Regina v. Boscawen*, P. 13 Anne, B. R. (in Truro,) where ten voted for Roberts; and ten for Boscawen, a non-inhabitant; the votes given for a non-inhabitant, where inhabitancy was necessary, were holden to be thrown away. So, in the case of *Taylor v. Mayor of Bath*, <sup>\*2</sup> temp. Ld. Ch. J. Lee, B. R.

Lord Mansfield—Whenever electors are present, and do not vote at all, (as they have done here,) “they virtually acquiesce in the election made by those who do.”

Therefore, per Cur. judgment for the defendant, (on <sup>\*3</sup> this 4th issue, upon the special verdict).

<sup>\*3</sup> Note—The three other issues had been found for the defendant as is above mentioned.

Afterwards, on Wednesday 25th of June, this case then bearing the latter name, viz. *Rex v. Foxcroft*;—Mr. Caldecott, on behalf of the defendant therein, shewed cause why the said defendant Foxcroft should not pay to the prosecutor in this cause, his costs as well in this cause of *Rex v. Foxcroft*, as in the information in the nature of a *quo warranto* against Robert Seagrave; and likewise the costs in the mandamus moved for against Cornelius Huthwaite, Esq. late Mayor of Nottingham.

He urged that no other costs were payable but those that arose upon the civil action, viz. the feigned issue which had been tried by consent of the parties, in order to determine the right; and which feigned issue had been found in favour of Seagrave, and against Foxcroft.

And for this, he relied upon the authority of the case of *The Borough of Walsall*,<sup>†1</sup> (in the dispute between the borough and the foreign of that place,) Tr. 28 G. 2, B. R. as a resolution directly in point: where it was determined “that no costs were payable upon these feigned issues; but the costs in the civil suit only.”<sup>\*4</sup>

Mr. Norton, contra, on behalf of Mr. Seagrave the prosecutor, insisted upon costs of the whole; viz. the costs in this cause of *Rex v. Foxcroft*, the costs in the information against Seagrave, and the costs of the mandamus directed to Huthwaite, as well as the costs of the civil suit upon the feigned issue.

[1022] Lord Mansfield was of opinion that the Court were tied down by the <sup>†2</sup> consent rule, to direct the costs of the whole to be paid by the defendant Foxcroft. It was made in the cause where an information was prayed against him, in the nature

<sup>\*1</sup> It was an election of a burgess of Westbury upon a single vacancy. Six voted for Withers singly; six others voted for two persons jointly, (though it was upon a single vacancy). The Court held clearly, “that the double votes were absolutely thrown away;” and refused to grant an information against Withers.

<sup>\*2</sup> M. 15 G. 2, 21st November 1741.—It was holden “that votes given for an unqualified person, under notice of his incapacity, are thrown away.”

<sup>†1</sup> *Rex v. Nichols & Al'* 12th June 1755.

<sup>\*4</sup> And so it was also determined in *Rex v. Griffiths*, M. 29 G. 2, B. R. and in *Thomas v. Powell*, P. 31 G. 2, B. R.

<sup>†2</sup> V. the consent rule before p. 1017.

of a quo warranto, to shew by what authority he claimed to be town-clerk of Nottingham; to which office Seagrave also claimed a right. Foxcroft thereupon consents "that the matters in difference between the parties shall be tried in a feigned action:" and then he consents, in express terms, "that the costs shall abide the event of the issue:" which must mean the whole costs; or else it has no meaning at all; for the costs on the civil side (arising upon the feigned issue only) would of course abide its event, without needing any rule or any consent for that purpose; (that point having been fully settled long before the making of the present consent-rule). Consequently, this consent takes in the other costs, on the Crown-side.

The other three Judges were of the same opinion.

Rule made absolute.

TRAPAUD *versus* MERCER. 1760. Where there is an affirmative and a negative, the conclusion must be to the country. [Doug. 91.]

Hil. 32 G. 2, Rot'lo, 984.

This was a cause in the paper, upon a demurrer: and the whole question turned upon the pleadings. The replication concluded to the country: and the defendant insisted that it ought to have concluded with an averment.

The principle was agreed, by both Bar and Bench, "that where there was an affirmative and a negative, the conclusion ought to be to the country:" but the present demurrer was grounded upon a supposition "that as these pleadings stood, here was not an affirmative and a negative."

The pleadings were as follow—

It was an action of debt on bond. On oyer, it appeared to be conditioned thus—The condition first recited that one Robert Grier had been appointed by the plaintiff, who was Lieutenant-Colonel of the Second Battalion of the Buffs, and by Mr. Hughes, the Major, to be paymaster of the said battalion: and then went on, that if the said Grier should within thirty days after any demand in writing, render an account of all monies received by him, &c. and in case there should be any deficiency, &c. [1023] then if the defendant should make good any such deficiency, not exceeding 1000*l.* the obligation to be void. And the plaintiff assigned the breach, in Grier's not rendering an account within thirty days after a demand in writing.

The defendant (who stood thus bound as security for Grier) pleaded (by leave of the Court) two several pleas; viz. 1st. That no demand in writing was made, &c. 2dly. (Protesting that no demand, &c. was made). He for plea says that Grier did render an account within thirty days after any demand in writing, and paid the monies due, &c. and that no deficiency at all was made to appear.

To this second plea, (which second plea alone was now before the Court,) the plaintiff replied "that a large sum of money, that is to say, the sum of 2000*l.* was received by Grier, &c. and that, on such a day (particularizing it) a demand in writing was made, &c. and yet no account was rendered by Grier, within thirty days, &c." which replication concluded to the country.

To this replication, the defendant demurred: and

Mr. Yates, for the defendant, argued in support of the demurrer, that the replication ought to have concluded with an averment: for that this was not a proper affirmative and negative, but a matter newly alledged in the replication; which newly alledged matter the defendant ought to have an opportunity of answering. And as the plea is general, it was necessary for the plaintiff to assign a particular breach, in his replication.

Mr. Serj. Hewitt, for the plaintiff, urged that it was not new matter, but a proper negation of the matter pleaded, and made a sufficient affirmative and negative; and therefore the conclusion was as it ought to be. And

The Court were of this opinion.

Lord Mansfield—The material question between the parties is,—“Whether an account has been demanded in writing, such an account rendered within due time; and the money paid.” The sum of the defence is “that no demand was made; but supposing that a demand was made, yet an account was rendered within due time after every such demand, and the money paid.” The replication alledges “that an account was demanded in writing, on such a particular day; but that Robert Grier



did not, then or at any time [1024] after, render an account." This is undoubtedly a proper fact to be tried.

Mr. Just. Denison concurred that it was; and that this was a proper affirmative and negative.

The plea, "that Grier did render an account within thirty days after any demand, &c." must be understood as if it had been worded "after every demand;" and imports that he had done it after every demand. To which, the plaintiff replies, "that a demand was made upon such a particular day; yet Grier did not render an account within thirty days after it." It is objected that as the plea is general, the replication ought to assign a particular breach.

And it is so, in some cases; as, for instance, in a plea a general performance of covenants; but it is not so, in the present case. For the question here is not "whether Grier rendered an account:" but "whether a demand was made upon Grier, so as to intitle the plaintiff to an account." It is as much an affirmative and a negative (to my apprehension,) as if the defendant had pleaded "that after demand made upon such a day, he had rendered an account;" to which, the plaintiff had replied, "that he had not."

Mr. Just. Foster also thought that the whole merits might have been tried upon this issue, "whether there was a demand, or not."

Mr. Just. Wilmot concurred, that the replication does here meet the plea; and is properly concluded to the country. For the plea says, "You made no demand: but if you did, he rendered an account." The replication says, "I made a demand, on such a day; yet he rendered no account." Which is a sufficient affirmative and negative.

Per Cur. unanimously,  
Judgment for the plaintiff.

NEDRIFFE *versus* HOGAN. 1760. [S. C. Buller, 180, cited.] The whole penalty cannot be pleaded by way of set-off. [See Bull. 179, 180. 2 Durn. 35. 1 Barnes, 203.]

This was an action on several promises: viz. indebitatus assumpsit for 40l. lent, 40l. had and received to the plaintiff's use, and 40l. laid out and expended for the plaintiff's use.

The defendant (having had leave to do so) pleaded several pleas; one of which was a plea of a set-off; namely, of a penalty of 200l. incurred by the non-per-[1025]-formance of certain articles of agreement, relating to the sale of a ship.

The plaintiff demurred, for cause; and one of the causes specified, was "that the penalty of articles of agreement (which sounds in damages only, and is not a liquidated certain debt or demand) can not be set off."

To this, there was a joinder in demurrer.

Mr. Walker, for the plaintiff.—This set-off is not within the Act of 2 G. 2, c. 22, § 13. For no penalty at all can be set off, under that Act. Whereas this is not the penalty of even a bond conditioned for payment of money only, but a penalty of a bond conditioned for performance of articles; which penalty sounds in damages: and damages cannot be set off. It ought to be a certain demand: a penalty founded in damages was never meant or intended by this Act of Parliament.

But the \*second Act of 8 Geo. 2, c. 24, § 5, is clearer still: for this § 5 fixes it to the sum truly and justly due; even on bonds conditioned for payment of money only. Which fully proves "that the penalty of such a bond as this is, can not be set off."

A second objection (which was also the second cause of demurrer,) was mentioned; but no further notice was taken of it, either by Court or counsel.

Mr. Field for the defendant.—The former Act is general, "that mutual debts may be set one against the other." Upon which, there was a doubt, and a difference of opinion between this Court and the Court of Common Pleas, concerning setting off debts of different natures. The 8 G. 2, c. 24, § 5, allows it, notwithstanding the debts are deemed in law to be of a different nature. And the purpose of 8 G. 2 was

\* V. ante, p. 822 to 826, where these two Acts are discussed and explained.

to extend, and not to restrain the former Act. Indeed it restrains the case of a debt accruing by reason of a penalty so far, (but no farther,) "that it shall be † pleaded."

Lord Mansfield stopt Mr. Field; and declared it to be, most clearly, a case not within these Acts: as it was for the whole penalty.

He said, he expected that it would have been put upon the foot of setting off the sum that the defendant [1026] imagined to be really due for the damages sustained: but he now perceived that it was insisted that the whole penalty might be set-off. He said, it is clearly most unjust, and contrary to the intention of the Acts of Parliament, "that the whole penalty should be admitted to be pleaded by way of set-off, when perhaps a very small sum was really due for such damages as the defendant had actually sustained."\*1

Therefore the Court, without further argument, gave Judgment for the plaintiff.

MAXWELL *versus* MAYER, ESQ. 1760. [S. C. Sayer's L. of C. 128. 1 Black. 271, 364.]

Security for answering costs shall not be required of a Scotch plaintiff resident in Scotland, nor even of a foreigner.

Mr. Norton, on behalf of the defendant, moved to stay the plaintiff's proceeding, until security should be given for answering the costs of this suit, in case it should go against him.\*2

It was an action against the defendant as a justice of peace, for illegally convicting the plaintiff upon the Acts of Parliament relating to hawkers and pedlars; which Acts give costs to magistrates, upon actions brought against them for acting in pursuance thereto, to be paid by persons who fail in such actions.

He moved this, upon an affidavit "that the plaintiff was a Scotchman resident in Scotland:" whom the process of this Court could not therefore reach, in case he should fail in his action.

But the Court answered, that it was, at the utmost, no more than the case of a foreigner who brings an action here; in which case, the Court will never oblige him to give security for the costs.

And Mr. Norton acknowledged that he did not expect to prevail in his motion; and had told his client so.

Per Cur. Take nothing by your motion.

[1027] REX *versus* JOHN SPRAGG AND MARY ELIZABETHA SPRAGG (his daughter).  
Wednes. 11th June 1760. V. ante, 930 and 993.

Mr. Justice Foster (in the absence of Mr. Just. Denison) pronounced the \*3 sentence upon the defendants: whose offence (of maliciously conspiring to indict and actually falsely indicting a person of a capital crime, whereof he was innocent,) would have been, in point of real guilt, (a) an aggravated and atrocious murder, he said, if it had succeeded according to their intention: and even now deserved a very exemplary punishment, notwithstanding it had not succeeded according to their wish.

John Spragg (the father) was sentenced to be remanded to the prison of this Court, for one month; to be set twice, in and upon the pillory, (for an hour each time,) once at Charing-Cross, and again at the Royal Exchange; to be imprisoned. in

† But this clause (§ 5,) adds "that in such plea shall be shewn how much is truly and justly due on either side; and that judgment shall be entered for no more than what shall appear to be so truly and justly due.

\*1 V. post, *Howlet v. Strickland*, B. R. 3d May 1774; where it was determined, "that unliquidated uncertain damages cannot be set off."

\*2 V. post, p. 2105. *Bosewell v. Irish*, B. R. 27th June, 1767. [And *Strange*, 1206.]

\*3 V. 2 Inst. 384, where it is said "that the villainous judgment there particularly specified,) remains a constant law, in such cases as the present, to this day."

But Mr. Gould and Serj. Davy agreed they could find no instance or entry of such a judgment actually given; [that is to say, not since the time of Ed. 3. See 996, 997, supra, and 9 Co. 57 a.]

(a) And so it ought to be in law: but the contrary hath been adjudged, *Foster*, 131.

the prison of this Court, for two years from the end of the said month ; to pay a fine of 50*l.* to the King ; to find security for his good behaviour for three years, (himself in 40*l.* and each security in 20*l.*). And to be committed quousque.

Mary, the daughter, (being considered by the Court as less criminal, partly from her \* youth, and partly as she was under the direction and influence of her father,) was only committed to the custody of the marshal, to be imprisoned for the space of † six months from this time.

LANCASTER *versus* THORNTON. Thursday, 12th June, 1760. Devise that executors shall and may absolutely sell, mortgage, or otherwise dispose of his freehold estate, for the payment of the testator's debts, legacies, and funeral expences, as his leasehold estate, should not be sufficient to discharge, is only a power to sell, and no estate passes to the executors.

This was a case out of Chancery for the opinion of this Court ; the substance whereof was as follows.

George Lancaster being seised in fee of some lands (the premises in question) and possessed of other lands for a term of years, made his last will and testament, dated the 3d of June 1734 ; which, after having given certain lega-[1028]-cies, goes on thus —“ I do hereby charge and make chargeable all and every my lands and inheritance and leasehold with the payment of my debts, funeral expences and legacies ; and for more speedy raising money for payment of them, I devise to George Edmund, and Dorothy Lancaster (who were his two sons and his daughter) their heirs, executors, and administrators, the leasehold-estate (describing it,) for all the residue of the term therein to come, &c. upon trust to sell the same, &c. and to apply the money, &c. to the payment of my debts, legacies, and funeral expences.” But in case the money arising from the sale of the leasehold estate shall not be sufficient to pay and discharge all his debts, legacies, and funeral expences, then he devises “ that his said two sons and daughter shall and may absolutely sell, mortgage or otherwise dispose of his freehold estate, for the payment of such of his said debts, legacies, and funeral expences, as his said leasehold estate should not be sufficient to pay and discharge.” And from and immediately after payment of all his debts, legacies, and funeral expences, he devises the said freehold estate, or so much of it as should remain after such payment of his debts, legacies, and funeral expences as aforesaid, to Thomas Dobson and James Lancaster, and their heirs and assigns : upon trust that they and the survivor of them and his heirs should stand seised thereof (except a parlour and room over it, which he devised to Dorothy so long as she should remain unmarried,) to the use of his son Edmund for life, without impeachment of waste ; and from and after the determination of that estate, to the said Thomas Dobson and James Lancaster, and their heirs during his life, to support, &c. with remainder to the heirs male of the body of the said Edmund ; remainder to the said Thomas Dobson and James Lancaster for the term of 1000 years, to raise 120*l.* for his grand-daughters (the daughters of said Edmund). Then he devises the remainder, subject to the said term, to the use of his son George, in tail-male ; with remainder to his grandson George. And he appoints his said sons Edmund and George and his daughter Dorothy, his executors.

The testator died, and left two sons, viz. the said Edmund his eldest son and heir, and George, and two daughters, viz. the beforementioned Dorothy, and Hannah.

Edmund entered, and proved the will.

The leasehold-estate was not sufficient to pay and discharge the testator's debts, legacies, and funeral expences.

Edmund suffered a recovery, to the use of himself in fee : and in 1740, he made a mortgage to secure a bond debt to one Machil, upon a bond made by the testator, whereby the testator had bound his heirs.

[1029] Some of the testator's debts are still remaining due and unpaid.

Edmund died, leaving issue two daughters.

George filed his bill in Chancery, to establish the will ; and insisted “ that the devise to Thomas Dobson and James Lancaster never took effect in possession ; as the

\* She seemed to be under twenty.

† Note—They had been, both of them, already in custody, (in town and country) near a year and a half.



debts, legacies, and funeral expences were not paid :” and he insisted “that the freehold-estate, subject to the said debts, &c. does therefore belong to him, in tail-male.”

On the other hand, the daughters of Edmund insist “that the recovery was well suffered by their father, Edmund ; and that they are intitled to the freehold-estate, subject to the mortgage above-mentioned.”

The Lord Keeper directed the following question to be referred to this Court for their opinion ; viz.

Whether, by virtue of these words, viz. “in case the money arising from the sale of the leasehold estate shall not be sufficient to pay and discharge all the testator’s debts, legacies, and funeral expences, that then he devises that his two sons and his daughter shall and may absolutely sell, mortgage or otherwise dispose of his freehold estate, for the payment of such of his said debts, legacies and funeral expences as his said leasehold estate should not be sufficient to pay and discharge”—Any estate passed to Edmund, George, and Dorothy : or only a power to sell.

It was argued on Tuesday 10th June 1760.

Mr. Ashhurst, for the plaintiff, George Lancaster, though he admitted that, in general, where the devise was “that the testator’s executors should sell his land for the payment of debts, &c.” the legal estate will not pass, nevertheless argued that in the present case, a conditional fee passed to the executors, either by express words, or at least by the intention of the testator.

1st. As to the words. The testator uses the word “devise ;” which alone is sufficient to pass an estate. And Litt. § 383 proves “that a defeazible estate will pass to executors by a devise of tenements, to be sold by his executors.” And there is no \* difference between a devise, “to be sold by executors ; and a devise to them, to sell.”

[1030] 2dly. But the intention plainly is, to convey a legal estate. The testator’s primary intention was the certain and speedy payment of his debts, legacies, and funeral expences. And this intention will be best answered, by construing it to be a devise of the legal estate. The case in 10 H. 7, cited in Plowden, 414 a. is similar to this : where cestuy que use devised “that his wife, being his executrix, should sell his land,” and died ; and she sold it to her second husband ; and this was adjudged a good sale. In 1 Vern. 45, *Newman v. Johnson*, a devise “of all his estate, both real and personal, to J. S. my debts and legacies being first deducted,” was holden to amount to a devise “to sell, for payment of his debts.” The intention is also apparent from other parts of this will. For if it was only a bare power to sell, mortgage, &c. the estate must descend to the heir at law, in the mean time ; who would not be compellable to refund or to account for the rents and profits which he should receive prior to the sale ; even though the whole real and personal estate should not suffice to answer the charge of the debts, legacies, and funeral expences. A devise “that they shall and may absolutely sell, mortgage, or otherwise dispose of his estate,” gives them an estate in the land ; and includes giving them the rents and profits ; especially as the heir would be unaccountable for them, if they were to descend to him, till sale, &c. : and the rather still, for that the testator has taken express notice of his heir at law, by a particular bequest to him.

Mr. Clayton, for the defendant (the heir at law) and also (as he said) for the mortgagee, argued, that no legal estate passed to the executors ; but only a power to sell, mortgage, or otherwise dispose of this estate, in case the leasehold estate should prove deficient.

And he insisted that this construction was agreeable both to the words of the will and to the intention of the testator.

There are many cases where the word “devise” is used, and yet no fee passes. Sir William Jones, 327, *Dike v. Ricks*. Cro. Car. 335, S. C. and a case in 1 Leon. 31, case 38, Tr. 23 Eliz. in C. B.

1 Inst. 113 a. is agreeable to Windham’s opinion in 1 Leon. 31, “that the vendee is in by the devise, and not by the conveyance of the executors ;” and to Plowd. 414 a. (the cited case in 10 H. 7). 1 Inst. 236 a. comments upon, explains and distinguishes the text of Littleton § 383 (cited by Mr. Ashhurst,) and shews the diver[1031]-sity

\* So is Co. Lit. 236 a. Yet see Co. Lit. 112 b.

between a devise "that his executors shall sell," and a devise "to his executors to be sold:" the former of which is a bare naked power.

And here is nothing at all devised to the executors: they have only a bare power to sell, &c.

The case of *Fates and Compton*, in 2 Wms. 308, 309, proves "that the legal estate did not pass."

Though the devise be general, "that they shall and may absolutely sell, mortgage or otherwise dispose of;" it is still nothing more than a power.

And as to the intermediate rents and profits from the death of the testator till sale or mortgage or other disposal, the heir at law will be accountable for them, if he receives them: and they may be come at, by application in equity, or otherwise.

Mr. Ashhurst, in reply, relied on the intention of the testator; who meant, he said, that no one should take benefit, till after his debts, legacies, and funeral expences should be paid.

Lord Mansfield thought it a plain case.

Here are no words by which the estate is devised to the executors. Therefore, if it be construed, that there is a devise to them, it must be raised by implication. But, by the frame of the will, it is plain that the testator did not so intend: for he shews, by the expressions that he has used, that he knew the distinction between a devise of an estate to them, and giving them only a power to sell. As to the term "devise," the expression "I devise," is here synonymous to saying "I will" or "my mind is."

The intention of the testator, Mr. Ashhurst says, can not be complied with, in this case, without an implication of a devise to the executors; because it must otherwise descend to the heir at law in the mean time; who, he says, would not be chargeable with the intermediate rents and profits, but altogether unaccountable for them.

That, clearly, is not so. The land could only descend to the heir, subject to the charges; and would be liable, in his hands, to the payment of debts, legacies, and funeral expences. So that the testator's intention is equally answered, one way, as the other.

The certificate was as follows—Having heard counsel on both sides, and considered this case, (which the parties delayed bringing on to be argued, until this [1032] term,) we are of opinion that no estate passed to the said Edmund, George, and Dorothy Lancaster; but only a power to sell, demise, mortgage, or otherwise dispose of the premises.

MOULTBY *versus* RICHARDSON. 1760. Affidavit to hold to bail must be positive, not as he computes it. [See 4 Burr. 1995. 1 Durn. 716.]

Mr. Howard moved that the defendant might be discharged on common bail; the affidavit to hold to bail, being only "that the defendant was indebted to the plaintiff in such a sum as he computes it."

But Mr. Just. Foster and Mr. Just. Wilmot (the only Judges then in Court) thought it sufficient: and they added "that cases of \* this sort had gone a great way;" (intimating that they had gone full far).†

Motion denied.

FERGUSON ET UX' *versus* CORNISH. Friday, 13th June, 1760. Lease for seven, fourteen, or twenty-one years, as lessee shall think proper, is a good lease for seven years, whatever may be its validity, as to the two other eventual terms of fourteen or twenty-one years. [See 4 Durn. 462.]

This was upon a demurrer by the defendant, to a declaration in an action of covenant upon an indenture of lease, assigning a breach in non-payment of rent.

The declaration set forth that Adam Harper and Phoebe his wife, demised the premises to the defendant John Cornish, from, &c. for seven, fourteen, or twenty-one years, as the lessee (Cornish) should think proper; at 60l. per annum rent; and the defendant covenanted to pay to the said Adam Harper and Phoebe his wife, their executors, administrators, and assigns, the said rent, during the said term; and that

\* V. ante, 655, 656.

† See *Barclay et Al' v. Hunt*, M. 1766, 7 G. 3, B. R.

Cornish entered, and was possessed, and continues in possession. Then it shews the death of Adam Harper, and the intermarriage of Phoebe with the now plaintiff Ferguson: and that so much rent, &c. became due and in arrear; and assigns the breach in this, that the defendant has not paid, &c. (in the words of the covenant,) to the plaintiff Ferguson and Phoebe his wife.\*

To this declaration, there was a general demurrer by the defendant; and a joinder in demurrer, by the plaintiffs.

Mr. Eyre, for the defendant, argued in support of the demurrer.

[1033] Question—Whether the plaintiffs have made a good assignment of a breach, in non-payment of rent supposed to have become due upon this lease.

1st objection—This covenant is a relative covenant: it is to pay for and during a term of seven, fourteen, or twenty-one years. But if no term was ever granted, the covenant fails.

Now no term was created by this indenture: for it is void for uncertainty. This appears from the two following cases.

Plowd. 273, *Say v. Smyth and Fuller*, proves, "that every contract sufficient to make a lease for years ought to have certainty in three limitations; namely, the commencement, continuance, and end of the term."

6 Co. Rep. 35, *The Bishop of Bath's case*, lays it down, "that the certainty of continuance is to be intended, either where the term is made certain by an express enumeration of years: or by reference to certainty; or by reducing it to certainty, by matter ex post facto, or by construction in law by express limitation."

Therefore, the habendum in this lease is void for uncertainty. It is a demise to hold from Michaelmas, &c. for the term of seven, fourteen, or twenty-one years, as the lessee shall think proper. Now, if the lessee should not elect, the lease could never commence.

But, at least, the continuance of it is quite uncertain. It is not (as the usual way of making these leases is,) a lease for twenty-one years certain, covenanted to be defeasible at the election of the lessee; nor is it made certain by any reference to a thing which has certainty at the time of the lease made; nor is there any thing ex post facto to be done, or averred to have been done; (and the lessee's entry determines nothing; it can be no more than evidence, even after seven years possession;) nor can here be any construction of law, by express limitation.

2d objection—But if the Court should think it to be a subsisting covenant; then a second question will arise, "whether it subsists between the present parties."

The covenant is, "to pay to the deceased husband and his wife, (Adam Harper and Phoebe,) and to their executors, administrators, and assigns." Therefore the executors of the deceased husband ought to have joined in this action.

[1034] 3d objection goes to the manner of assigning the breach: it ought to have been shewn "that the rent was not paid to the executors of the husband."

Lord Mansfield—The lessee has certainly entered, and continues in possession: and it is as certain, that he must pay the rent.

It is undoubtedly a good lease for seven years; (whatever may be the validity of it as to the other two eventual terms of fourteen and twenty-one years;) and the breach is assigned for non-payment of rent incurred within the first seven years.

Mr. Serj. Poole was for the plaintiffs: but the Chief Justice was so clear in his opinion, that there was no need for him to interfere; nor did he.

Per Cur.—Judgment for the plaintiffs.

HEWSON *versus* BROWN. 1760. Recovery in C. P. being put in issue on nuli tiel record, Court refused to order officer of C. P. to attend in B. R. with the record.

Mr. Winn moved, on behalf of the plaintiff, for an order upon the proper officer of the Court of Common Pleas, to attend here with the record of that Court (between *Watson v. Hewson*), in order for its being inspected by this Court.

The defendant in this Court, who was sued here upon a bond to indemnify the present plaintiff, had pleaded "non damnificatus:" to which plea, the plaintiff replied a recovery in the Court of Common Pleas against him, by one Thomas Watson;

\* Note—The arrear of rent upon which the breach is assigned, was alledged to have incurred within the first seven years.



whereby he was damnified. To this replication, the defendant here had rejoined "nul tiel record:" and the plaintiff sur-rejoined, "that there is such a record."

Mr. Winn acknowledged that the ordinary course and method of practice in these cases, was to issue a certiorari, and have it certified; and he also acknowledged that he could not find any precedent that came up to the present case: but he urged that it would save time and expence; and that this Court by their general jurisdiction, had such a power over all inferior jurisdictions.

But Lord Mansfield and the \*<sup>1</sup> two other Judges now in Court were very clear that as here was no sort of reason to go out of the common and ordinary course, it would be wrong to break the established rules and methods of proceeding: and therefore they

Denied the motion.

[1035] *REX versus INHABITANTS OF HITCHAM.*

See this case at large, in the quarto-edition of my Settlement-Cases, pa. 504, No. 161.

*REX versus PEMBERTON.* Saturday, 14th June, 1760. [S. C. 1 Black. 230.] Indictment for exercising the occupation of a tanner, not having served an apprenticeship for seven years therein, is sufficient, without specifying and averring the want of other qualifications allowed by subsequent statutes; for such other qualifications or exceptions ought to be shewn by the defendant.

On shewing cause against a rule for quashing an indictment on 5 Eliz. c. 4, § 31, for exercising the occupation of a tanner, not having served an apprenticeship therein for seven years.

Mr. Sayer, on the part of the defendant, objected,

1st. That though the trade of a tanner was undoubtedly a trade used within the realm of England at the time of making this Act of 5 Eliz. yet it was not meant and intended to be included in this prohibitory clause; being at that very time under regulation by other statutes (no less than sixteen in number) made for the purpose of regulating it; and particularly by 1 Eliz. c. 9, which allows the use of it to apprentices, or covenant servants brought up in that trade four years: and another statute made in the very same year with the present one, viz. 5 Eliz. c. 8, describes who may be tanners. So that it can not be imagined that this occupation was ever meant to be included in the prohibition of 5 Eliz. c. 4, § 31.

And though both these statutes (of 1 Eliz. c. 9, and 5 Eliz. c. 8,) are now repealed, yet they are equally an argument to shew the construction of the clause in question, as if they stood unrepealed: and so the Court considered a repealed statute, in construing the unrepealed one of 43 Eliz. c. 2, in the case of *Rex v. Loxdale et Al'*, \*<sup>2</sup> H. 1758, 31 G. 2, B. R.

2d objection.—If the trade of a tanner was meant to be included in the prohibitory clause of 5 Eliz. c. 4, § 31, yet that statute was, as to this particular trade or occupa-<sup>[1036]</sup>tion, repealed by the 5 Eliz. c. 8, and 1 Jac. 1, c. 22, § 5, which are repugnant to, and consequently a virtual repeal thereof, so far as concerns this trade. The former is indeed now repealed: but the latter is not. They admit of five or six other qualifications besides having served an apprenticeship for seven years; namely, such as then had tanhouses, and used the trade; also the wives and sons of tanners having used the mystery four years; also such persons as should marry the wives or daughters to whom tan-houses and fats should be left. So that there are now many other qualifications that justify using the trade, besides that of serving a seven years apprenticeship.

3d objection.—An indictment will not therefore now lie upon 5 Eliz. c. 4, § 41, alone and generally: but it ought to specify all these other qualifications allowed by the subsequent statute; and to shew that the party is not within any of them; as is done in convictions upon the Game-Acts, and convictions for swearing, and upon the Act of 8, 9 W. 3, c. 26, "for the better preventing counterfeiting the current coin of

\*<sup>1</sup> Mr. Just. Denison was absent.

\*<sup>2</sup> V. ante, 445 to 452.

this kingdom." And for this, he cited \* *Rex v. Maurice Jarvis*, H. 1757, 30 G. 2, and *Rex v. † Sparrow*, (as he called it,) where a conviction for prophane cursing and swearing, was quashed, because it did not alledge "that the defendant was not a servant, labourer, common soldier, or sailor."

This indictment is upon a statute not favoured: and the case is the harder upon the defendant, and the more oppressive, for that he is under another indictment on 1 J. 1, c. 22.

Mr. Norton, for the prosecutor, having been heard in answer to the objections; and having made the proper distinctions between the cases cited and the cases now in question;

The Court were unanimously of opinion—That whatever licence might be given by any statute subsequent to 5 Eliz. c. 4, to persons who had not served a seven years apprenticeship, to exercise the trade of a tanner under certain other qualifications therein described; yet, as the trade of a tanner was clearly a trade used at the time of making the 5 Eliz. c. 4, (and seems acknowledged even by 1 J. 1, c. 22, § 5, to be included in 5 Eliz. c. 4,) it is not necessary, in an indictment upon 5 Eliz. c. 4, § 31, for having used this trade without having served such an apprenticeship, to aver the want of the other qualifications, which by the subsequent statute intitle a person so qualified, to use the trade: but such other qualifications or exceptions must be shewn by the defendant, by way of excuse, either by plea, or in evidence. It is enough [1037] for the prosecutor, to bring the case within the general purview of the statute upon which the indictment is founded: if that statute has general prohibitory words in it. For where an indictment is brought upon a statute which has general prohibitory words in it, it is sufficient to charge the offence generally, in the words of the statute: and if a subsequent statute, or (as Mr. Just. Foster and Mr. Just. Wilmot, who spoke after Lord Mansfield and Mr. Just. Denison, added,) even a clause of exception contained in the same statute, excuses persons under such and such circumstances, or gives licence to persons so and so qualified, so as to excuse or except them out of the general prohibitory words, that must come by way of plea, or evidence, "that the party is not within such general prohibition, but excepted out of it."

Indeed where the words of a statute are descriptive of the nature of the offence, or the purview of the statute, or necessary to give a summary jurisdiction, there it is necessary to specify in the particular words of such statute. In the statute to prevent counterfeiting the coin (8, 9 W. 3, c. 26,) it is the purview of the statute; not a general prohibition: it is description—"Any smith, engraver, founder, or other person or persons whatsoever, other than and except the persons employed in or for His Majesty's mint, &c."

N.B. Mr. Just. Foster said, he believed there were not less than a hundred trades mentioned in other clauses of 5 Eliz. c. 4, and that he had once taken the pains to extract them and range them alphabetically.

Per Cur. unanimously,

The rule to shew cause why the indictment should not be quashed, was discharged.

KING'S BENCH PRISONERS *versus* MARSHALSEA PRISONERS: on Mr. Frederick Ashfield's Will. Tuesday, 17th June, 1760. Marshalsea or Palace Court, Court prison, is a description in a will, not of the King's Bench prison.

This was a claim of a legacy, supposed by the prisoners in the prison of this Court to be left to them: and the matter came on (by order of the Court,) in the paper, to be argued. The short and single question was "whether the following bequest was made to the prisoners in the prison of this Court, or to those who were in the prison of the Palace Court."

[1038] Frederick Ashfield, of Richmond in Surry gentleman, devised his copyhold estate (already surrendered to the use of his will,) and also all his personal estate, (after, &c.) to trustees to be sold; and directed the produce to be laid out in freehold lands. Then he further directs, that his trustees shall, for ever, issue, pay, and dispose of the rents and profits, unto and amongst such persons, who, for the time being,

\* V. ante, 118 to 151.

† *Rex v. Sparling*, H. 8 G. 1, S. C.

shall be poor prisoners and insolvent debtors in the Marshalsea prison in the borough of Southwark in the county of Surrey, and real and fit objects of charity; for and towards their subsistence during their respective imprisonments there; in such manner, and in such parts and proportions, as his said trustees and the survivors of them and their heirs should from time to time order, direct, and appoint.

Mr. Gould, for the prisoners in the prison of this Court, argued that this devise belongs to the prison of this Court.

The jurisdiction of this Court, in the present question depends upon the Act of 32 G. 2, c. 28, § 9, which gives power to the several Courts therein named, to examine into and order payment of bequests made to poor prisoners in the several gaols or prisons within their respective jurisdictions. By which order, the prisoners of this Court will be bound, if the determination shall turn against them: but the prisoners of the Palace-Court prison will not be bound by any determination of the Judges of this Court; in favour of the prisoners of this Court.

The devise is "to the prisoners in the Marshalsea prison in the borough of Southwark:" which must mean the prison of this Court.—In support whereof, he cited Co. 10 Rep. 69, 71, 72. The case of *The Marshalsea*; and Spelman's Glossary, title Marshal. And he observed that the defendant who is a prisoner in the King's Bench prison is, and is always supposed (in the declaration against him) to be in custod' mareschalli Mareschalsiæ domini Regis: the other, (the defendant in the Palace-Court,) in custod' mareschalli Mareschalsiæ hospitii domini Regis. He also cited 1 Bulstr. 207 to 212, *Cox v. Gray*, at large; and argued that therefore, propter excellentiam, this devise: is to the prisoners of the prison of this Court.

Mr. Field, contra, for the prisoners of the Palace-Court, argued and sufficiently shewed that this devise must be understood to be to the prisoners in the prison of the marshal of the household.

[1039] Lord Mansfield was clearly of that opinion. He observed that not only in vulgar speech, but likewise in many Act. of Parliament, the prison of this Court is called the King's Bench prison; and the \* other is called the Marshalsea-prison. Both of them indeed are in the borough of Southwark: but each of them has its respective appellation. And this testator used the name that was always used by every body else in common parlance; without searching Spelman's Glossary or my Lord Coke's or Bulstrode's Reports, to find the strict and legal name. This a sufficient reason for us, not to make any order at all in the present case.

Therefore no rule was taken.

REX versus PEARSON. Thursday, 19th June, 1760. [See 16 Vin. 259.]

Mr. Baynham moved, upon the usual affidavit, that the defendant might be admitted to defend in forma pauperis.

But, upon its appearing that this was upon an attachment for a contempt, and not a cause in Court; and Mr. Baynham not being able to produce any precedent of such a rule having ever been made where no cause was depending in Court;

The motion was denied.

MARGARET HUTT'S CASE; or REX versus BOWMASTER AND EPWORTH. 1760. [S. C. 1 Black. 233.] Attachment upon articles of the peace in the King's Bench, bailable before justices of the county.

On this woman's offering to exhibit articles of the peace against these two persons, it appeared that the facts charged were done at Portsmouth.

Whereupon the Court objected to her, that she might as well have applied to a justice of peace in the neighbourhood: and then the defendants would not be under a necessity of coming up to London, to put in bail.

It was answered, that if there should be any particular inconvenience arising therefrom, there might be a manda-[1040]-mus to a justice of peace in the country

\* V. Cowel's Interpreter, sub verbo Marshalsee, expressly accord': also Blount's Nomolexicon, Marshalsee. Note.—This respective appellation of each of these prisons was agreed by the marshal of this Court (on appeal to his own candour by Lord Mansfield,) to be the name used in common parlance.



impowering him to take the security there: and of this Mr. Harvey (as *amicus Curiae*) mentioned several instances within his own observation and memory.

At length, Mr. Athorpe (Secondary of the Crown-Office) proposed, and the Court came into this expedient, viz. that on issuing an attachment of the peace, which is of course made out upon the Court's receiving the articles praying security of the peace, an indorsement should be at the same time made thereon, authorizing and directing any justice or justices of peace in that county (Southampton) to take the security of the peace there; specifying the particular sums wherein the principals and also their sureties should be bound.<sup>(a)</sup>

Per Cur. It was ordered accordingly.

REX *versus* MORELEY; REX *versus* OSBORNE; REX *versus* REEVE; and REX *versus* NORRIS. Saturday, 21st June, 1760. [S. C. 1 Black. 231.] Certiorari cannot be taken by any general, but only by express negative words. [See Bul. 8. 3 Burr. 1697, and 5 East, 314.]

Mr. Knowler and Mr. Filmer shewed cause against the issuing of a certiorari to remove several orders made by Mr. Monypenny, a justice of the peace in Kent, upon the Conventicle-Act, 22 Car. 2, c. 1: by which orders he had convicted a Methodist-preacher, and the master of the house wherein he preached and several of the audience, in the respective penalties following.

The \* preacher (Moreley) was convicted in 20l. the † master of the house (Osborne) in 20l. and several of ‡ the persons present, in 5s. a-piece. Two of the auditors (Reeve and Norris) had had 10l. § a-piece levied upon them, (by virtue of the 3d section of this Act,) the preacher himself not being to be found. The penalty had been levied upon Osborne, (the master of the house,) as well as upon Reeve and Norris, they had all appealed (within the week) to the sessions: and Mr. Monypenny had returned to the sessions the monies levied, and certified the evidence, with the record of the conviction, agreeable to the directions of the 6th section; and the defendants had pleaded and been tried by a jury at the Quarter Sessions; and there had been both verdict and judgment given against them.

Mr. Knowler and Mr. Filmer, on behalf of the prosecution, urged, that after all this had passed, a writ of error might lie; but not a certiorari, which will only lie when there is no other remedy.

[1041] And there is a clause in the 6th section, which is express "that no other Court whatsoever shall intermeddle with any cause or causes of appeal upon this Act: but they shall be finally determined in the Quarter-Sessions only." Which negative words must include all the Courts of Judicature in the kingdom, and this Court in particular, as being most likely to meddle with matters of this kind.

And the 13th section directs "that this Act, and all clauses therein contained, shall be construed most largely and beneficially for the suppressing of conventicles, and for the justification and encouragement of all persons to be employed in the execution thereof; and that no record, warrant or mittimus to be made by virtue of this Act, or any proceedings thereupon, shall be reversed, avoided or any way impeached, by reason of any default in form."

Therefore, to what purpose should a certiorari issue, when the Court can neither intermeddle with the fact or form.

The penalties are (by the 2d section) to be distributed into three parts; one-third to the King, one-third to the poor, one-third to the informer: and these penalties have been so distributed; and this Court can not order restitution.

As to the penalties under 10s. the Act gives no appeal: if the justices have done wrong in the matter of these, it is in a matter *coram non judice*.

Mr. Knowler and Mr. Filmer had affidavits of the facts which they alledged.

(a) This seems agreeable to the report of this case by Blackstone, though he has used the word Court there in the last line but two improperly, which at first reading may seem to refer to the King's Bench; but the sense requires the reference to be to the justice or justices of the peace, who not acting in such case in sessions are not a Court; but where the defendant appears in B. R. that Court directs the sums in which he and the sureties are to be bound.

\* V. sect. 3.

† V. sect. 4.

‡ V. sect. 1.

§ V. sect. 5.

Lord Mansfield asked them, whether the negative words in the 6th section would not conclude strongly against a writ of error.

Mr. Knowler and Mr. Filmer answered, that as to fact, they might; but, perhaps, not as to law. They cited a little printed book, said to be written by Ld. Ch. J. Saunders, (a comment on this Conventicle-Act) fo. 69, § 6 & § 13: which shewed him to be of opinion "that no certiorari would lie upon it."

Mr. Just. Denison observed, "that there have been many determinations to the contrary since."

Mr. Norton, Mr. Stow, and Mr. Leigh, who were for the certiorari, insisted that the general jurisdiction of this Court is not taken away by mere negative words in an Act of Par-[1042]-liament: this Court shall never be ousted of its jurisdiction without special words. *Dr. Foster's case*, 11 Co. 64 b. 1 Rep. 92, 94, S. C. 1 Ventr. 66, *Smith's case*. 1 Mod. 45, S. C.

Besides, these words "that no other Court whatsoever intermeddle with any cause or causes of appeal: but that they shall be finally determined in the Quarter Sessions only;" mean no more than that the facts shall not be re-examined: but the legality may; or a want of jurisdiction may be taken advantage of. The case may be such as that the justices have no jurisdiction of the matter. And where a statute does not expressly and totidem verbis take away a certiorari, and direct "that no certiorari shall issue," the Court will grant one. And *Peat's case*, in 6 Mod. 228, proves "that a certiorari does lie upon this very Act." The Court there say, "that the justices of peace being judges of the matter, if they wrong you, you have your remedy by certiorari, or appeal to the sessions." And it appears in that case (at the end of it,) that a certiorari had then actually issued.

As to the five of these convictions, which were against persons present at this assembly, and under 10s. (namely, only 5s. a-piece,) no appeal is given: and consequently, there can be no doubt but that a certiorari does lie, as to them.

Mr. Norton, being asked "what was the objection that he had to these convictions," answered, that it was not alledged "that the defendants were \* subjects of this realm:" which is an essential requisite.

The Court were unanimously of opinion that a certiorari ought to issue. A certiorari does not go, to try the merits of the question,(b) but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this Court is not taken away, unless there be express words to take it away: this is a point settled.(c) Therefore a certiorari ought to issue: and after a return shall be made to it, you will be at liberty, and it will still be open to you, to move to supersede it, if there should appear reason for the Court's so doing.(d)

Rule made absolute, for a certiorari.

[1043] REX *versus* BLOOER. Wednes. 25th June, 1760. [Vide post, 1265. 1 Durn. 398, 399. 3 Durn. 650.] Mandamus lies to restore a curate to a chapel, being a donative endowed with lands.

Mr. Norton and Mr. Madocks shewed cause against the issuing of a mandamus which had been prayed to be directed to one Samuel Blooer, a parishioner of Matfield in Staffordshire, and an inhabitant of the chapelry of Calton within that parish, (who had turned Mr. William Langley, the curate of that chapel, out of it, after he had been eleven weeks in possession, and locked it up,) commanding him to restore the said William Langley, clerk, to the place and office of curate of the said chapel.

This chapel is a donative, and is endowed with lands: and the inhabitants of four different parishes contribute to the repair of it. The curate of it has a stipend. Mr. Evans, the vicar of Matfield swore in his affidavit, "that he believes he has a right of nomination to it; and that it has been executed; and that Mr. Langley is appointed and nominated by him." But there were contrary affidavits: wherein the deponents

\* V. sect. 1.

(b) That is, not in this case as it does in some, as in the common case of certiorari to remove an order of sessions made on appeal from an order of removal.

(c) 11 Co. 64 b. 4 Mod. 145. Salk. 45. 2 Hawk. P. C. 211. 3 Durn. 443.

(d) See Comy. 80. 2 Keb. 43, pl. 87. Ld. Raym. 469. 1 Siderf. 296, pl. 20. 8 Durn. 542.

swear "that they believe the right of nomination to be in the inhabitants." It appeared that Mr. Langley had a licence.

The two gentlemen before mentioned, who were counsel for the parishioner and against the mandamus, argued that this chapel appeared to be a donative; and as the particular nature of it was not stated, it must be considered as only a private chapel, and not as a public office: and consequently, no mandamus will lie.

Besides, the right of nomination is not established. The vicar only swears "that he believes he has right of the nomination:" which is contradicted by the adverse affidavits. And if it were not, yet a vicar has nothing to do with a donative.

They mentioned *Prescol's case, the Chaplain of Manchester College*, reported in 2 Strange, 797, by the name of *Dominus Rex v. Episcopum Chester*. But there, they said, were letters patent: that college was of the foundation of the Crown. The ground of the Court's interposing in that case, was because there was no other remedy.

This man may have another remedy: he may bring an ejectment for the farm which he says belongs to him as curate of this chapel; or he may have his action of trespass.

Every vicar might as well come for a mandamus to be restored, as this man.

[1044] Mr. Morton and Mr. Aston argued for a mandamus; and urged that this was an office or degree that concerned the public weal; and therefore a mandamus would lie to restore to it, upon the principle laid down by Chief Justice Glynn, in the case of *The Clerk of the City Works of London, 2 Siderfin, 112, 113*, who says that a mandamus shall be granted in these two cases; first, to restore to an office which concerns the execution of justice; secondly, if the office or degree be for the weal public.

A mandamus will lie to restore even a sexton. *Raym. 211, Isle's case, Sexton of Kingsclere*; and 2 Lev. 18, *S. C. Rex v. Churchwardens of Kingsclere*. So it will, to restore a parish-clerk. 6 Mod. 253, *Parker v. Clerk*. And surely a curate of a chapel, with a stipend, is more a public officer, than a parish-clerk or sexton is.

Non constat that this is a donative. But if it be, yet no licence is necessary in case of a donative; though in the case of a perpetual curacy, it is necessary.

And it is no objection, to say "that we have another remedy," if we are intitled to this.

The counsel on the other side (against the mandamus) observed that parish-clerks and sextons are temporal officers; whereas this was ecclesiastical: and a vicar or rector may just as well apply for a mandamus, as the chaplain of a donative.

The Court proposed to the parties, to try the merits in a feigned issue: which was declined, on the part of Bloer; who insisted on taking the opinion of the Court "whether the rule ought not to be discharged."

Lord Mansfield—This is a mere temporal question.

Three objections have been offered against making the rule absolute.

The 1st was, "that there is no sufficient ground for asking a mandamus."

Answer. But this chaplain has shewn an appointment, and a licence; and was in quiet possession for eleven weeks.

2d objection. That he has not the right: for the nomination was not in the vicar, but in the inhabitants.

[1045] Answer. We can not try the merits upon affidavit. He claims a right, though it is litigated: and that is sufficient for the present purpose.

3d objection.—That, even supposing him to have a title, and to have been in possession, and turned out of it; yet he ought not to be assisted by way of mandamus, but be left to his ordinary legal remedy, by ejectment or an action of trespass.

Answer. A mandamus to restore is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law has not provided a specific remedy by another form of proceeding: which is the case with regard to rectories and vicarages.

Here are lands annexed to this chapel, which belong to the chaplain in respect of his function. If the bishop had refused, without cause, to licence him, he might have had a mandamus to compel the Ordinary to grant him a licence. He is now turned out of the chapel and every thing belonging thereto, by force. Such chapels were not



objects of attention in the days when the register was formed : and therefore there is no particular remedy provided for this case.

It is said "he may bring an ejectment or an action of trespass." I am not sure that he could. It does not appear that the legal property is in him : on the contrary, it is certain that it is not. It might originally be in feoffees. Those feoffees may not have been regularly continued. It may be impossible to find the heir of the survivor. If they have been continued, the present feoffees may refuse to let Mr. Langley make use of their names. Neither of these actions, if he could bring them, would be a specific remedy. In the one, he might recover damages ; in the other, he might recover the land : but by neither would he be restored to his pulpit, and quieted in the exercise of his function and office. We may very well take notice too, that the inhabitants refuse to try the merits, in an issue. If a mandamus goes, we shall see what return they make to it. And this is what ought to be done in the present case.

Mr. Just. Denison concurred.

Where there is a temporal right, the Court will assist by way of mandamus, because it is a specific remedy.

Rule made absolute (for † granting a mandamus).

[1046] No return was made : but the parties agreed to try the merits in a feigned issue ; which was accordingly tried.

Note—Upon this case being † afterwards mentioned, the Court took occasion to say "that they had reconsidered the point, and weighed all the principles and authorities applicable to it ; and were fully satisfied that the properest and most effectual method of trying the right to officiate in such chapels, whether it depended upon nomination or election, was by mandamus."

DOE, EX DIMISS. RUST, *versus* ROE. 1760. Ancient demesne may be pleaded in ejectment by leave of the Court, and upon a proper affidavit.

In ejectment—

Mr. Norton shewed cause why the tenants in possession should not have leave to plead "that the lands specified in the declaration are holden in ancient demesne."

He admitted, that such a plea might be received, in\* this action (of ejectment,) with leave of the Court (e) and upon a proper affidavit : but he objected to the sufficiency of the present affidavit ; because it only alledges "that the lands in question are holden in ancient demesne, and that they are holden of the manor of Godmanchester ;" but does not go on to alledge "that the manor of Godmanchester is (itself) holden in ancient demesne," (as it ought to do). In the case of *Denn v. Fenn*, Trin. 24 G. 2, B. R. the affidavit was "that the lands were holden of such a manor, which manor was holden in ancient demesne."

Besides, this may be only a term, in the lessor of the plaintiff : and if so, he cannot sue there ; for the writ of right close will only lie where the demandant has a fee or a freehold.

Mr. Gould contra, in support of the rule, cited the case of *Ferrers v. Miller*, P. 4 W. & M. B. R. reported in 1 Salkeld, 217. Carthew, 220. 1 Shower, 386, and cases in B. R. temp. W. 3, fo. 21, where ancient demesne was pleaded in ejectment : so, in Lilly's Practical Register, title Abatement : and in the abovementioned case of *Denn v. Fenn*.

† V. post, p. 1265, *Rez v. Barker et Al'* S. P. acc.

† Vide *Rez v. Barker, et Al'*, H. 1762, 2 G. 3, post, p. 1265. [Vide also 2 Vez. 426. Str. 159, 914. 1 Wm. 773. 17 Vin. 411, pl. 1.]

\* See *Alden's case*, 5 Co. 105, accord. [Also 3 Wils. 50, contra. Ld. Raym. 1418. Vin. Abr. Anc. Demesne (E) 23, 25. Reg. Brev. 9 a. Ld. Raym. 43. 1 Com. Dig. 2.]

(e) But leave must be moved for within the first four days ; and note that either freehold or copyhold lands may be holden in ancient demesne : if the former they are triable in the lord's court ; but the copyholds are not triable there, because, if they were, the lord or his steward, appointed by him, would be judge ; and so the lord, who is interested in the tenure, would be both judge and party ; but in the case of freehold lands the suitors are the judges and not interested in the tenure.

Indeed, leave must be asked of the Court to plead it : and by 4, 5 Ann. c. 16, § 11, it is required, in case of pleading a dilatory plea, [1047] "that the party offering it do by affidavit prove the truth of it, or shew some probable cause to the Court to induce them to believe that the fact of it is true."

Now this affidavit does shew probable cause to induce such belief. It shews "that the lands are holden in ancient demesne; that they are holden of the manor of Godmanchester: and that there is a court of ancient demesne in the borough of Godmanchester, where they might have proceeded:" instead of which, they have brought their ejectment in this Court.

"Whether these lands are parcel of the superior manor," is a fact triable by a jury: though the question whether that superior manor be or be not holden in ancient demesne," must be tried by record, (by Domesday Book).

Mr. Just. Foster and Mr. Just. Wilmot, the only two Judges at this time in Court, concurred in opinion, that there was not sufficient ground laid for obtaining leave to plead this plea.

Mr. Just. Foster observed, that as it was agreed to be necessary to ask the leave of the Court to plead this plea to a declaration in ejectment, it follows of course, that it must be in the discretion of the Court, either to grant or to refuse their leave. And he thought that this affidavit was not sufficient to oust this Court of jurisdiction. He spoke of these courts of ancient demesne, as putting people out of the protection of the law, and fitter to be totally \* destroyed, than to be favoured and assisted.

Mr. Just. Wilmot said it was a strange wild jurisdiction; where the jurors are judges both of law and of fact, and ignorant country fellows are to determine the nicest points of law: and therefore he was not for granting such leave, unless compelled by authority. Indeed if the case is brought strictly with the rule, then the leave must be granted: we cannot help it.

The authorities, down from *Alden's case* to this time, it is true, are "that ancient demesne is a good plea in ejectment."

But if you would oust this Court of jurisdiction, you "must shew that another Court has jurisdiction."

Now this affidavit does not shew "that there are suitors, in the other court;" nor "that these lands are holden in ancient demesne;" whereas, if the lands only, and not the manor, are ancient demesne, the matter can not be tried in the court of that manor.(f)

The affidavit ought to have shewn "that the lands are holden of a manor, which manor is ancient demesne;" [1048] and so was the affidavit in the case of *Denn v. Fenn*; and so is the plea, 1 Show. 386, and Carthew, 220, in the case of *Ferrers v. Miller*, S. C.

It cannot be tried "whether the lands themselves are ancient demesne." Domesday will not shew this: Domesday will only shew whether the manor is so or not. The form of the plea makes this as clear as the sun.(g)

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\* Sed v. 5 Co. 105 b. where that reporter is of a different sentiment. [See 3 Wils. 234.]

(f) That this a good objection see 4 Inst. 270, and the distinction is this, that if copyhold they are not triable there, Salk. 186. 3 Lev. 405. Lutw. 714. But if the lands are freehold, qu. if the lord may not reverse the judgment by writ of deceit, and whether the plea doth not then go in bar. Vid. 1 New Abr. 113, and it seems that the only reason why ancient demesne, where the lands are copyhold is not pleadable, is because in the modern ejectment, the lessee of the copyholder is plaintiff, and the lease if by licence of the lord or by custom, or perhaps without, is an estate at common law, though without licence or custom, voidable by the lord, except where it is to try a title, which case the Judges have excepted for the sake of enlarging their jurisdiction; otherwise no real action can be maintained in the manor court: yet a plaint in the nature of a real action is maintainable there; and by the law, till altered by the Judges the title to copyholds was only triable in the manor court; see Litt. sec. 79.

Note, that ancient demesne is not pleadable to a quare impedit in C. B. nor to a general action of trespass. Hughes Com. 206, pl. 4, and vide there in what actions it is pleadable and in what not.

(g) This is right, though contrary to F.N. B. 16 (D) Register Bre. 14 b. but

This affidavit does not therefore pursue the proper form.

And it ought to be shewn that the lessor of the plaintiff has a freehold. How can he sue there, in ejectment, as lessee of a term?

Upon such a strange, wild jurisdiction as this, and upon such an affidavit, I am not for giving the defendant leave to plead this plea.<sup>(h)</sup>

Rule discharged.

HUTCHINS *versus* KENRICK; HILLS, ET AL' *versus* KENRICK. 1760. Method of charging prisoners in custody, and the practice ancient and modern both in term time and vacation. [2 Black. 824.]

On shewing cause, (upon Saturday 21st June,) in both these causes, "why the defendant should not be discharged out of the custody of the marshal, as to each of these actions respectively," it appeared that the circumstances of the cases were a good deal different: viz.

In the cause of *Hutchins v. Kenrick*, the defendant was regularly intitled to be superseded: yet was not actually superseded, but remained in custody of the marshal. (For although the order for his being superseded had become absolute, two days before the end of a preceding term, yet the defendant had still continued in the custody of the marshal, without ever carrying this order into execution by getting himself actually and in fact superseded; and upon the 5th day of the then next following term, whilst the defendant so remained actually in custody, although intitled to have been so long ago superseded, a declaration was delivered to him at the suit of *Hutchins*.)

In the other cause wherein *Hills* and others were plaintiffs, the declaration was delivered to him, whilst he was regularly and indisputably in the custody of the marshal, and not intitled to be superseded: but the [1049] objection to this was, "that it was vacation-time, when this declaration was delivered, and likewise when the bill (whereupon it was grounded) was filed."

Note. The ordinary modern practice and method of charging the defendants in custody in vacation-time, is by previously issuing a habeas corpus (ad respondendum) tested the last day of the preceding term, and returnable in this Court the first day of the next. This the present practisers look upon to be a good foundation for charging a defendant in custody, in vacation-time.

And Mr. Day (who had been clerk of the declarations in the King's Bench Office about thirty years) certified (ore tenus) "that from the beginning of his time, some bills had, all along, been filed with him in vacation-time; but, that (not being clear that this was quite regular,) he had always used the precaution of marking upon them the exact time when he received them."

The marshal also (upon being asked,) said that he had found, upon a search for five or six years backward, (but he had looked no further back,) "that many declarations had been left in vacation-time, for prisoners in custody."

Note also, that there is a book kept in the King's Bench Office, called the marshal's book; in which are entered the names of persons charged in custody previously to their being so charged. But this is a book of no authority; and only meant for the marshal's convenience, that he may readily see what persons are charged in custody; so that it is, (in truth and reality,) only a memorial of the defendant's being charged in custody of the marshal; and not the cause or foundation of such charge and detainer.

It was agreed, on all sides, that a habeas corpus to remove from one Court to another, was a plain and intelligible proceeding; but it was very difficult to account either for the reason, or the original, or the validity of this practice of issuing an habeas corpus returnable in the same Court; or to discover how that method could answer the purpose intended by it.

F. N. B. 14 (D) and 4 Inst. 269 agree therewith, viz. "Writ of droit close, is a writ which is directed unto the lord of ancient demesne, which lieth for those tenants within such demesne, who held their lands and tenements by charter in fee-simple, or in fee-tail, or for life, or in dower. F. N. B. 11 (F).

(h) And it cannot be pleaded without. See also Co. Cop. p. 60, sec. 51. 2 Esp. 440.



Mr. Gould, who argued on behalf of the defendant in both causes, urged, as to the former of them (in which Hutchins was plaintiff,) that the defendant being regularly intitled to be superseded was not in legal custody of the marshal; and that no person could be charged as in custody of the marshal, who was not lawfully so. He cited the case of *Unwin v. Kirchoffe*, 2 Strange, 1215, where upon a motion to supersede the [1050] defendant as not being charged in execution within two terms,) it is holden, "that the committitur must be actually entered on record, before the end of the second term; and that there is no extension of the time, to the continuance day after term: nor was it sufficient, that there was an entry in the marshal's book, in time." And Mr. Gould laid it down as a rule, "that a defendant once supersedable is always supersedable."

As to the latter cause (wherein Hills and others were plaintiffs,) he cited the case of *Tilsden v. Palfriman*, M. 3 Ann. B. R. reported in 1 Salk. 273, and 345, and more largely in 6 Mod. 253, 254, where it is said "that there is no way to charge a defendant in custod' mar', in vacation, but to go to the marshal's book in the (King's Bench) Office, and make an entry therein, quod remanet in custod' mar' ad sectum, &c. And this is sufficient to charge him, provided he be in actual custody: (for if he be out of gaol, he may be arrested.)" But this entry in the marshal's book, Mr. Gould insisted, could be no sufficient foundation for such a charge: no more could the modern extraordinary practice of issuing a habeas corpus. The old method of charging a defendant in custody, both in this Court, and (as appears by 8, 9 W. 3, c. 27, § 13,) in the Common Pleas too, was by bringing him into Court, and there charging him when actually present in Court: which could not possibly be ever done, but in term-time, when the Court was sitting. And this clearly and fully shews that the defendant cannot be at all charged in custody, in vacation time, when the Court is not sitting.

Mr. Norton, who shewed cause on behalf of the plaintiffs in both causes, urged, as to the former (at the suit of Hutchins,) that the entry in the marshal's book is right and proper; provided there be (as here was) a previous affidavit, sworn before the proper officer, and filed: and so is the practice in the Court of Common Pleas. The defendant was found in the actual custody of the marshal; and consequently, could not be arrested, (as he might have been, if he had been at large). And his being intitled to be superseded makes no difference: for if a defendant still continues in custody and is actually found in prison, he is subject to be charged in custody, at the suit of a third person. The rule "that a defendant once supersedable is always supersedable," holds only with regard to the same plaintiff, at whose suit he was supersedable: it does not extend to a third person, to another plaintiff.

As to the latter cause, (at the suit of Hills and others,) little needs to be said: for if the defendant is properly in custody at the suit of Hutchins, these other plaintiffs can soon charge him regularly; (whether their present [1051] charge will hold, or not). To be sure, the habeas corpus seems an odd method: especially, when the custody is never altered.

The statute of 8, 9 W. 3, c. 27, § 13, only regards the method of charging prisoners in custody in the Fleet prison: and enacts, "that the delivering a copy of the declaration (after filing it, and then giving a rule to plead, &c. and making affidavit of the delivery of the declaration,) shall intitle the plaintiff to sign judgment, as if the defendant had been actually charged at the Common Pleas or Exchequer Bar."

And there is a rule in the Court of Common Pleas, in H. 1734, 8 G. 2, similar to the rule of this Court, made in 1742.

The Court were extremely clear, in the former cause, wherein Hutchins was plaintiff, that the defendant was regularly charged. For the plaintiff found the defendant in actual custody, and had a right to charge him in custody, without inquiring whether he was intitled to be superseded, or not. If he could not charge his debtor in custody, the debtor would not be amenable to justice at all: for the plaintiff could not arrest him, not being at large: nor could have any other way of coming at him. The rule of a defendant's being "always supersedable, after he is once so," holds only between the parties themselves, the plaintiff and defendant in that cause: it does not extend to other persons, to plaintiffs in other causes.

And Mr. Just. Foster added that he had known, (in experience,) of defendants remaining many terms in custody, after they were intitled to be superseded.

As to the latter cause, wherein Hills and others were plaintiffs, and the charge was in vacation time—

The Court were all of opinion that there ought to be some method of charging a prisoner in custody, in vacation time; because, not being at large, he cannot be arrested: and so his being in custody would be an asylum during the whole vacation.

But what this method should be, was not so clear, and deserved (they said) a good deal of consideration. The habeas corpus they all looked upon to be a strange method: and they agreed that the cheapest and easiest way would be the best.

Mr. Just. Denison was explicit, "that by the practice of this Court, no declaration can be delivered to a prisoner in custody in this Court, but in term time." [1052] In proof of which, he cited a case in point: P. 17 G. 2, B. R.\* *Holloway v. Cross*: where it was holden "that every declaration against a prisoner in custody of the marshal must be delivered in term time; for prisoners are considered in the same light with attornies (who are supposed to be always present in Court;) against whom, bills cannot be filed, but in term time." And this was \* agreed, though the point was determined upon \* another question.

He added, that formerly the defendant (when in custody) was brought up into Court, by rule, in order to be charged: there was no occasion for a habeas corpus, when it was in the same Court. And he cited Lilly's Practical Register, title Prison and Prisoner, per Rolle Ch.J. accordingly.

And this practice of bringing up the prisoner into Court, still remains in the Counties Palatine.

The modern practice of delivering declarations to defendants in custody, takes its rise from this old one of actually bringing them into Court, in term time, and there charging them; which must still, in point of law, be supposed to be done; and which cannot be done, but in term time.

Per Cur. In *Hutchins v. Kenrick*, the rule to shew cause "why the defendant should not be discharged out of the custody of the marshal, as to this action," was discharged, (the cause shewn being holden clearly to be sufficient).

In *Hills et Al' v. Kenrick*, the matter was ordered to stand over till the last day of this term, (in order to have the practice settled).

And accordingly,

Lord Mansfield now delivered the resolution the Court had come to; which was to the following effect.

We have considered of the practice of this Court, and of that the Common Pleas; and we are of opinion that the right method is (like that which is taken in the Common Pleas) to file a bill as of the preceding term; and then to deliver to or leave for the defendant, being in custody, a copy of the declaration as of the preceding term, and to make an affidavit thereof. We think this to be the right method for the purpose of charging such a defendant with a new suit; and that it ought to be used in this Court for the future: and we think there is no occasion for a habeas corpus.

The end of Trinity term, 1760.

### [1053] MICHAELMAS TERM, 1 GEO. III. B. R. 1760.

REX *versus* OCCUPIERS OF ST. LUKE'S HOSPITAL. Friday, 7th Nov. 1760.  
St. Luke's Hospital for Lunatics not rateable to the poor.

[Referred to, *West Bromwich School Board v. Overseers of West Bromwich*, 1884, 13 Q. B. D. 934.]

On Monday 29th January 1759, Mr. Williams moved to quash an order made by the justices of peace for the county of Middlesex, at their Quarter Sessions at Hicks's Hall, confirming an assessment or rate for the relief of the poor, made upon one Joseph Mansfield, and charging him as occupier of St. Luke's Hospital; being of opinion, upon consideration of the circumstances therein set forth, "that the said

\* Note—The whole Court there agreed, (and the officers had certified,) "that the delivery of the declaration was irregular, as being delivered in vacation time;" but all the Court, except Mr. Justice Wright, thought "that the defendant had, by cravingoyer of the bond, waved this irregularity;" and upon that foot discharged the rule to shew cause why there should not issue a supersedeas. [See also 8 Durn. 643.]

Joseph Mansfield is the occupier of the said hospital:" whereas in fact, he was (as Mr. Williams alledged) only a servant there. He cited 2 Strange, 745, *Rex v. Inhabitants of St. Thomas's in Southwark*; where a preacher at a meeting-house was holden not to be rateable as an occupier.

A rule was thereupon made to shew cause. And on Tuesday 8th May 1759, Mr. Gould moved to make that rule absolute; insisting upon two objections\* to the validity of the rate; viz. 1st. "That this man is only a servant: and therefore could not be rated as occupier." 2d. "That this hospital is not rateable at all."

Mr. Norton, (who was for the rate,) agreed that, strictly speaking, it could not be well supported "that a servant was rateable as occupier:" but he offered to defend it upon the merits; viz. "whether this new-erected charitable hospital for lunatics be or be not rateable."

And if the other side would not agree to that, he said he must object to the certiorari, as having irregularly issued; viz. not till after the six months were expired; (it being more than nine months from 2d of February to Michaelmas term).

[1054] And accordingly, a rule was then made to shew cause "why the certiorari should not be quashed." But afterwards,

On Wednesday 16th May 1759, it was ordered, by consent of counsel on both sides "that the orders returned with the certiorari in the cause of *The King* against *Joseph Mansfield* (who then stood charged as occupier of this hospital) should be sent back to be re-stated."\* In consequence of which rule by consent, the following re-stated order was afterwards sent up, as the return to the said writ: viz.

A complaint and appeal being made unto this Court, against a certain article contained in the rate or assessment made on the 19th day of July in the year of our Lord 1757, for relief of the poor of the parish of St. Luke in the said county, which article is as follows, viz.—"The occupiers of a messuage or tenement and premises called St. Luke's Hospital for Lunatics: rent 80l. rate 2l. 13s. 4d." By which article, the said messuage called St. Luke's Hospital for Lunatics is valued after the rate of 80l. by the year, and assessed (accordingly) to pay 2l. 13s. 4d. by the quarter of a year; and this Court having fully heard and examined the said complaint and appeal, it appears in evidence unto this Court, that by indenture made the 21st day of November, in the year of our Lord 1750, between the Mayor, Commonalty, and Citizens of the City of London of the one part, and James Sperling of Mincing-Lane, in the parish of St. Dunstan, in the East, London, merchant, Henry Bankes of the parish St. Mary Hill, citizen and grocer of London, Richard Speed, of Old Fish-Street, in the parish of St. Mary Magdalen, London, druggist, Thomas Light, of Mincing-Lane aforesaid, in the said parish of St. Dunstan in the East, merchant, and William Prowting of Tower-Street, in the said parish of St. Dunstan in the East, apothecary, of the other part, the said mayor, commonalty, and citizens, as well for and in consideration of the sum of 100l. of lawful money of Great Britain already paid to Sir John Bosworth Knt. Chamberlain of London, to and for the public uses of the said mayor, commonalty and citizens, as also for and in consideration that they the said James Sperling, Henry Bankes, Richard Speed, Thomas Light and William Prowting, should and would build or convert the premises in the said indenture mentioned or some part thereof into an hospital for lunatics: and for and in consideration of the rents and covenants in the said indenture contained on the part and behalf of the said James Sterling, H. B. R. S. T. L. and W. P. their executors, administrators and assigns to be paid and performed, and for divers other good causes and considerations, them the said mayor and commonalty and citizens especially mov-[1055]-ing, did, pursuant to an order of the Court of Common Council made the 15th day of November then next preceding, demise, grant and to farm let unto the said J. S. H. B. R. S., T. L. and W. P. their executors, administrators and assigns, all that piece or parcel of ground, with the buildings thereupon erected, situate and being on Windmill-Hill, in the parish of St. Luke in the county of Middlesex, containing from west to east, on the south side fronting the Upper Moorfields, 180 feet of assize (little

[\* See Bott. 289. T. Jones, 187. Skin. 27. 4 Bur. 2014, 2439. Hen. Black. 68. 5 Durn. 589. 6 Durn. 333. 3 Bosanq. 132. 1 East, 588. 5 East, 459. 4 Durn. 26, 732.]

\* Note—The re-stated order was under the like caption (verbatim) with the old one.



more or less,) and from south to north on the east side, 178 feet of assize (little more or less,) and from east to west on the north side, 165 feet of assize (little more or less,) and from north to south on the west side, 180 feet two inches of assize (little more or less,) and abutting on the way leading to St. Agnes le Clair: all which said premises were formerly devised, by two separate leases, to Philip Whiteman and John Davis, and do more fully appear by a scheme or draft thereof, with a scale made to the same, unto the said indenture annexed: to have and to hold the said piece or parcel of ground, with the appurtenances, unto the said J. S. H. B. R. S. T. L. and W. P. their executors, administrators and assigns, from the Feast Day of the Birth of our Lord Christ, next ensuing the date of the same indenture, for and during and unto the full end and term of thirty-two years from thence next ensuing and fully to be complete and ended; yielding and paying therefore yearly and every year during the said term, unto the said mayor, and commonalty, and citizens, in the office of receipts and payments of money of the said chamberlain of the said city for the time being, the rent or sum of ten pounds of lawful money of Great Britain, on the four most usual feasts or terms in the year, that is to say, the Feast of the Annunciation of the Blessed Virgin Mary, the Nativity of St. John the Baptist, St. Michael the Archangel, and the Birth of our Lord Christ, by even and equal portions, without making any deduction, defalcation or abatement, for or by reason of any taxes, rates or assessments, imposed or to be imposed during the term aforesaid, upon the premises hereby demised, or any part thereof, by any Act or Acts of Parliament, or otherwise howsoever; the first payment thereof to begin and to be made on the Feast of the Annunciation of the Blessed Virgin Mary, next ensuing the date of the same indenture; and that it was amongst other things covenanted and agreed by the said indenture and between the said parties thereto, that they the said J. S. H. B. R. S. T. L. and W. P. their executors, administrators or assigns, or some of them should and would build or convert the premises thereby demised or some part thereof into an hospital for poor lunatics, and employ the same to no other use, intent or purpose whatsoever during the said term; and that among other things in the said indenture, are contained two clauses and provisoes in the following terms, "provided always that if the said yearly rent of 10*l.* be behind and unpaid in part or in all by [1056] the space of fourteen days next after any of the said days of payment on which the same ought to be paid as aforesaid, being lawfully demanded at the place of payment aforesaid, or if the said J. S. H. B. R. S. T. L. and W. P. their executors, administrators and assigns, do not well and truly perform and keep all and singular the covenants herein contained on his and their parts to be performed and kept, that then and at all times afterwards, it shall and may be lawful to and for the said mayor, and commonalty, and citizens or their assigns, into all or any part of the said demised premises in the name of the whole wholly to re-enter, and the same to have again, retain and re-possess in their former estate, and the said J. S. H. B. R. S. T. L. and W. P. their executors, administrators and assigns, and all other occupiers of the premises thereout and from thence utterly to expel, put out and amove, these presents or any thing therein contained to the contrary notwithstanding: provided also, and these presents are upon this condition, that if the said J. S. H. B. R. S. T. L. and W. P. their executors, administrators or assigns, or any of them do or shall at any time or times hereafter during the said term convert the said premises to any other use than that of the charitable design of poor lunatics, then these presents and every thing herein contained shall cease, determine and be utterly void; any thing herein contained to the contrary thereof in any wise notwithstanding."

It appears likewise in evidence unto this Court, that before the erecting the said hospital, divers, to wit, twenty-nine houses were situate upon the land and premises, in and by the said indenture contained and demised; and that in the several rates made by the overseers of the poor, for the relief of the poor within the said parish of St. Luke, for in and during the several years between the year of our Lord 1744, and the date of the indenture herein before mentioned, the said twenty-nine houses were valued and estimated at the annual value of 196*l.* by the year; and that in the year of our Lord 1745, the said twenty-nine houses being assessed in the rate made in the said year for the relief of the poor within the said parish of St. Luke, after the rate and proportion of three shillings in the pound sterling, did yet pay and yield no more to the said overseers in satisfaction of the said rate and towards the relief of the poor, than ten pounds and one shilling; and that in the year of our Lord 1746, the said

twenty-nine houses being assessed in the rate made by the overseers of the poor of the said parish of St. Luke in the said last mentioned year, for the relief of the poor within the said parish, after the rate and proportion of three shillings in the pound sterling, did yet pay and yield no more to the said overseers in satisfaction of the said rate and towards the relief of the poor, than 8l. 11s. and that in the year of our Lord 1747, the said [1057] twenty-nine houses being assessed in the rate made in the said last mentioned year for the relief of the poor within the said parish of St. Luke, after the rate and proportion of 3s. 3d. in the pound sterling, did yet pay and yield no more to the said overseers in satisfaction of the said rate, and towards the relief of the poor, than 8l. 14s. 9d. And that in the year of our Lord 1748, the said twenty-nine houses being assessed (ut supra) after the rate of 3s. in the pound sterling, did yet (ut supra) no more than 7l. 1s. And that in the year of our Lord 1746, the said twenty-nine houses being, &c. after the rate and proportion of 3s. &c. no more, &c. than 6l. 3s. And that in, &c. 1750, the said twenty-nine houses being assessed (ut supra) after, &c. of 2s. 9d. in the pound sterling, did yet, &c. no more, &c. than 2l. 8s. 9d.

It appears also in evidence to this Court that the premises demised were accordingly built and converted into the hospital mentioned in the said article of the rate in question, called, "St. Luke's Hospital for Lunatics," for the affording a charitable and free sustentation and cure to poor and helpless lunatics; and that every apartment and parcel of the said premises so built and converted into such hospital as aforesaid, is laid out and applied, either in wards or cells for the lodging of such lunatics as aforesaid, or in offices necessary for their sustentation and cure, or in apartments necessary for persons who are hired from time to time to attend on such lunatics for their better sustentation and cure, and in no other apartments or buildings whatsoever; and that the said edifice was originally erected, and still is supported, and very many poor and helpless lunatics continually have been and still are sustained and taken care of therein, and the menial servants attending upon such lunatics have been and still are hired and paid, and all other expences relating to and necessary for the said hospital and charity, have been and still are from time to time defrayed and borne, by the free and voluntary contributions of divers persons; out of whom, a committee annually is appointed, who meet weekly, to order the admission and discharge of patients, the hiring and retaining servants, the payment of bills, and the regulation of all other matters relative to the maintenance and upholding of this charity; and that none but such poor and helpless lunatics, and the persons necessarily attending upon them, have any kind of dwelling or occupation in the said hospital: and that one Joseph Mansfield (the appellant) is the principal person hired from year to year by the said committee of contributors, and receiving certain wages, and living in the said hospital for the purpose of attending on the said lunatics, and having no other abode, occupation, or establishment therein; and that the said James Sperling, Henry Bankes, Richard Speed, Thomas Light and William Prowt-[1058]-ing, or any of them, their or any of their executors, administrators or assigns, have not nor ever had or can have any profit, benefit or advantage from the said premises or any part thereof, nor any possession or occupation thereof, otherwise than as aforesaid.

The Court (the general session at Hicks's Hall,) upon consideration of the circumstances above set forth, is of opinion, "that the said tenement called St. Luke's Hospital ought to be assessed and rated towards the relief of the poor, by the said rate;" and doth accordingly dismiss the said appeal, and confirm the said rate.

By the Court.

WALLER.

Mr. Gould, Mr. Thurlow, and Mr. Lane, on behalf of St. Luke's Hospital, moved (on Monday 23d June 1760,) to quash this re-stated order of sessions thus again confirming the said rates.

They argued, 1st. That this building itself, (an hospital supported by voluntary charitable contributions,) was not rateable towards the support of the poor; and 2dly. That no particular person whosever was chargeable as occupier of it.

First—This is only a mere building, a house supported by private, free and voluntary charitable pecuniary contributions; and used only as an hospital for the sustentation and cure of poor helpless lunatics: it has no apartments in it, nor any accommodations for the residence of any persons whatsoever, except the patients and the hired servants necessarily attending them. It is not endowed with any land: nor has it any land about it, being the mere site of the house itself. Therefore it cannot possibly be included within the intention of the dictum of Ld. Ch. J. Holt, mentioned



in a scrap of an *Anonymous case* in 2 Salk. 527, "that hospital-lands are chargeable to the poor, as well as other lands: for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burthen upon their neighbours." For he there plainly means lands leased out to tenants and bringing in an annual profit: which is, by no means, the present case. This is no beneficial lease: the lessees receive no profit by it; nor can they, by the\*<sup>1</sup> proviso in their lease, put it to any other use than that of the charitable design of poor lunatics.

The statute of 43 Eliz. c. 2, § 14, 15, directs "that a proportion of the money to be raised by virtue of that Act, shall be sent for the relief of hospitals in the respective counties." And it would be absurd to suppose, that that same statute intended to tax hospitals towards the relief of hospitals.

[1059] In 2 Bulstr. 354 the Judges (Hutton and Croke) put the matter of taxing one or the other of the persons there in question, upon the foot of the profit or advantage received by them. But these lessees receive no sort of profit or advantage, nor can possibly receive any, under this lease.

And nothing is subject to be rated towards the relief of the poor, but a beneficial interest. There is no instance of an hospital having ever been rated, as to such part of it as is only applied to charitable uses: whatever may have been done, as to those large and fine apartments in the great hospitals, wherein the officers (who are gentlemen of fortune and fashion) reside with all their families, and use them as their dwelling-houses.

Secondly—No particular person whosoever can be charged as occupier of this house of mere charity.

By the 43 Eliz. c. 2, § 1, the taxation is to be upon every occupier of lands, houses, tithes, coal-mines, or sale-underwoods in the parish.

But none of the persons mentioned in this order are occupiers of this house, within the meaning and intention of the makers of this Act. They have no possession or enjoyment of any lucrative or profitable tenement. Therefore there is no rule or medium or proportion whereby to rate them: for if they were rateable at all, it must be in proportion with others. But these persons receive no profit or emolument at all: and there can be no proportion to nothing. Therefore they are not rateable at all.

For the same reason, no person can be rated as an occupier of a church, a meeting-house, or an alms-house.

\*<sup>2</sup> In H. 13 G. 1, in this Court, one Read was charged to the poor's rate in respect of his being an occupier of a meeting-house where he preached: and he was holden not to be liable; because, as a preacher, he is no more chargeable as an occupier, than any of his audience. And the Court there took notice, that it was not stated "that he let out pews;" so as to make him a person that occupies, and receives a profit from it.

So, in the present case, no one can be charged as occupier; because no one receives any lucrative profit.

And this circumstance makes it widely different from the case of *Eyre v. Smallpace et Al* P. 1750, 23 G. 2, B. R. where the question [1060] was "whether the plaintiff, being controller of Chelsea College, and residing in the controller's apartments there, was assessable towards the maintenance of the poor of the parish of Chelsea, for the apartments which he occupied there by virtue of his said office:" and the Court held him to be chargeable as occupier; grounding their opinion upon a then recent and unanimous opinion of all the Judges, upon a like question, in the case of Greenwich-Hospital, concerning the payment of the window tax: in which case, all the twelve Judges unanimously held, "that the Act of Parliament relating to the window-tax, did extend to the apartments of officers in Greenwich-Hospital;" which case of Greenwich-Hospital, they thought not distinguishable from that of Chelsea-Hospital then in judgment before them.

But that was an hospital of Royal foundation, and the King's own house. The officers have large noble apartments there, with distinct doors: they reside in them with their families, and live distinctly in them, at their separate expences. Those apartments are substantially their house, their domicile. In this hospital, there are

\*<sup>1</sup> V. ante, p. 1056.

\*<sup>2</sup> V. Strange, 45.



only cells for the lunatics, and a bare lodging for those who necessarily attend them, and are always about their persons.

On 6th November 1760,

Mr. Norton and Mr. Stowe argued in support of the order.

They insisted, 1st. That this building was rateable; and 2dly. That the charge is sufficiently laid upon it, although no particular occupier be personally and specifically named.

First—Hospital-lands are rateable to the relief of the poor of the parish wherein they lie, as well as other lands are: this appears from 2 Salk. 527. And this charity is only a voluntary act of private persons, proprietors of this building: which private persons have it not in their power, by applying it to the use of a charity, to discharge it of legal rates and payments duly charged upon it for the relief of the parish; and thereby to take away this relief from the parish. And it would be most unreasonable that this property which was always rateable before, should, merely by the voluntary act of the proprietor, be rendered unrateable; when, by that very act, the proprietor introduces many servants into this building, who will gain settlements in the parish by their service performed therein: so that these gentlemen would load the parish with poor, and yet exempt themselves from paying any thing towards its relief. Therefore the parish are still intitled to their rates; whether the proprietors make a beneficial interest of it, or choose to apply it to the purposes of a charity.

[1061] And there are many instances of hospitals and charitable foundations being in fact rated to the relief of the parishes wherein they are situated; particularly, the British lying in hospital, in St. Giles's; and hospital in St. Botolph's Aldersgate; another in St. James's Clerkenwell; (which last never, till now, refused to pay). And this very hospital pays the land-tax, and also the four rates (viz. scavengers, lights, &c.).

And the cases of window-lights are not unlike to the present case.

The foundling-hospital pays the window-tax: as appears by the tax-book (fo. 48 :) and all the Judges, (upon the question being referred to them,) were of opinion, "that they ought to do so."

So St. Bartholomew's Hospital was an instance where the officers were assessed for their apartments: and on 7th June 1748, all the Judges held them rateable. So also in the case of Christ's Hospital (at the same time,) and of St. Bride's, and St. Thomas's, the general point determined was "that the officers are chargeable to the window lights."

In the case of the French hospital in St. Luke's, the Judges held it not to be assessable, as to the lunatics maintained therein: but they gave no opinion as to the charge upon one Romier (who was personally assessed,) because it did not appear to them, whether he did or did not live in it.

In the case of Sutton's Hospital, where some of the officers have their apartments intermixed with the rooms of the persons supported by that charity, the commissioners thought "that none of the inhabitants of those intermixed rooms were chargeable, (neither the officers, nor the poor men;)" and the Judges confirmed that opinion of the commissioners.

In the present case, the five lessees may be considered as occupiers by their servants, who are under their control; and they are properly chargeable, as such: the patients indeed neither are nor ought to be rated.

They concluded this head, with observing "that the 43 Eliz. c. 2, is a beneficial law made for the benefit of the poor of the parishes."

[1062] Secondly—As to the not charging any particular person, as occupier—

They insisted that it was not necessary that any particular person should be specifically rated as occupier.

They cited a case, from 8 Mod. pa. 38, *Res v. Inhabitants of \* Brickhill*, P. 7 G. 1, B. R. where a man who had been rated by the name of "the occupier of Roscoe's

\* This case really was *Res v. Inhabitants of Bughtmen (in Lancashire)* P. 8 G. 1, 1722. The point was indeed determined as is mentioned in 8 Mod. 38, though the names, places and persons are there mistaken. But the man had actually paid the rate no less than eleven years under this assessment, which described him without specifying his name, viz. calling him only the "occupier of Roscoe's tenement."

tenement," and not by his own proper name, and had paid the said rates under such assessment, was holden to have gained a settlement under this general rate.

They also urged the case in 2 Salk. 527, P. 1 Ann. *Anonymous*: which, they said, was probably the same case with a case of *Rex v. Staines*,† relating to the parishes of Ilford and East-Ham. And they said they had a certificate "that the parishes of Ilford and East-Ham do now pay."

Mr. Gould and Mr. Lane, who had made the objections to the order, replied—

1st. That the cases and instances cited by the counsel on the other side proved nothing to the present point: for they went no further than the case of Chelsea-Hospital, *Eyre v. Smallpox et Al*, P. 1750, 23 G. 2, B. R. where it was settled "that all apartments of officers, used as dwelling-houses, are liable to be taxed to the window-lights, as dwelling-houses." And the Window-Light Acts are positive and affirmative, "that all dwelling-houses shall pay to that tax." The officers have a benefit from their apartments. But here could arise no benefit at all, to any person whatsoever: therefore no one could be taxable to the relief of the poor.

And as to their loading the parish by introducing servants who would gain settlements by their service in the hospital, they denied that these servants would gain a settlement by such service.

2dly. The case of *Brickhill*, being cited from a book of no authority, deserves no answer. Besides, in that case, the man had long acquiesced under the order, and paid the tax.

[1063] The Court did not give any opinion yesterday; but "inclined that the occupier ought to be particularly specified;" "and also, that the whole turns upon the person or persons who ought to be rated."

Indeed, if a person rated generally, by the appellation of occupier of such tenement, acquiesces, and takes the charge upon him, and pays it; it would be unreasonable that he should be excluded from gaining a settlement, if he afterwards has occasion to claim it. But that is not this case.

The instances of the several hospitals, mentioned by the counsel for supporting the order, carry the matter no farther than the case of Chelsea-Hospital has settled it: and the Judges have unanimously determined, "that all apartments of officers in hospitals, which are used as dwelling-houses, ought to be taxed to the window-lights, as dwelling-houses."

However, they said they would consider of it, and then declare their opinion.

Cur. advs.

Lord Mansfield now delivered the opinion of the Court; (having first stated the order, and the objection taken to it).

Cases of this kind depend upon the particular nature of the respective hospitals: each stands upon its own distinct circumstances. Therefore no general consequences will arise from the determination of this particular case.

The land-tax differs from the poor's-tax. The landlord who receives the rent, is to pay the land-tax: but the poor's-tax is payable by the occupiers. Therefore the rating hospital lands to the land-tax is not applicable to the present question.

The occupier ought to be rated, regularly, by name. But in the present case, it is no more than a mere defect in form: the fault in form here arises from the essence of the thing. For if they can not fix upon some particular person who may properly be rated as occupier of this building, it follows, as a necessary consequence, "that no rate can at all be made upon it."

As to the argument that has been urged in support of the order, "that a proprietor of lands or houses can not, by his own private voluntary act, discharge such his property, from payments legally due to other persons [1064] upon and out of it"—It does not hold true in fact. For this rate payable to the parish, as well as several other payments arising from property and chargeable upon it, do and must depend upon the will of the proprietor. The owner of a house may, if he pleases, pull it quite down, and convert it into a toft. The owner of lands may, if he pleases, suffer them to lie barren and unoccupied.(a) Tithes and the right

† *Rex v. Staines* was H. 13 W. 3, William Staines was taxed to those two parishes, for the concerns of an hospital in them. The sessions, upon appeal, discharged the original order, as being founded upon misinformation and surprise.

(a) But according to Salk. 257, cited ante, 1060, hospital lands are chargeable

of them vary, according to the different species of the produce of the land: yet the land-holder may sow it, or plant it, or use it in the manner he likes best; or even not at all, if he so chooses.

The material question in this case is, "who can be named and charged as the occupier."

There are only three sorts of persons that occur to me. If they can find any others who may be properly charged as occupiers, such other persons will not be included in or affected by the opinion we now give.

The only persons that I can think of, are 1st. The five lessees; 2dly. The servants attending this charity; and 3dly. The poor mad persons, who are the objects of it.

First—As to the lessees—mere nominal trustees can not be esteemed occupiers, or rated as such. Besides, these lessees are expressly excluded, by a special\* proviso inserted in the lease, from converting the building to any other than this specific use: and the lease is to determine and become void, if they do. They are so far therefore from being occupiers of it, that they are merely nominal; mere instruments of conveyance; and have no more interest in the thing, than the crier of the Court of Common Pleas has when he is named as the last vouchee in a common recovery.

Secondly.—As to the servants attending this charity—they are not in a like situation with the officers of Chelsea-Hospital, or of the other charitable foundations that have been mentioned at the Bar; where there are large distinct apartments appropriated to the use of the respective officers, wherein they and their families reside. Those officers are not charged as servants of such hospitals, or as inhabitants and occupiers of the ordinary rooms and lodgings therein; but as having separate and distinct apartments, which are considered as their dwelling-houses. The cases that have been determined by the Judges, relating to the window-tax, are uniform in rating officers of hospitals for their distinct apartments: but in this hospital, there are neither any such officers, or any such apartments, as were in those cases determined to be rateable.

[1065] If the first of these orders, which rated Joseph Mansfield as the occupier of this hospital, had stood as it was originally drawn up, without being afterwards altered; and if Mansfield had actually had a separate and distinct apartment in it (which is not now pretended;) yet certainly he could not have been rated for any thing more than his own particular and distinct apartment. However, that matter ceases now to be any part of the case; there being no foundation, by the new order, to ground such a question upon.

Thirdly.—As to the poor miserable wretches who are the unhappy objects of this charity—it would be too gross to conceive them to be proper persons to be rated to the relief of the parish. Therefore it is unnecessary to say any thing on this head; and the rather, as it appeared so very unreasonable to the counsel themselves who argued in support of the order, that they gave it up.

And if no person can be found, who is rateable to this tax, it follows, by necessary consequence, "that there can be no rate at all."

Therefore the order must be quashed.

GOODTITLE, EX DIMISS. BRIDGES ET AL', *versus* DUKE OF CHANDOS. Thurs. 13th Nov. 1760. Common recovery may be suffered by a tenant in tail, who has power to suffer it, but he must either be tenant in tail in possession, or have the concurrence of the freeholders claiming under the same settlements.

Upon a motion for a new trial, made on the part of the defendant, upon the foot of a misdirection given to the jury by the Judge who tried the cause; (upon which direction of the Judge, the jury had found a verdict for the plaintiff;) the case appeared upon the report of Mr. Just. Noel, (the Judge who tried the cause,) to be as follows; viz.

Sir Thomas Bridges, being seised in fee, of the manor and demesne lands of

to the poor; for no man by appointing his lands to an hospital can discharge them from taxes to which they were subject before, and throw a greater burden on their neighbours.

\* V. ante, p. 1056. [And post, 4 Burr. 2013.]



Keynsham in Somersetshire, and of several other lands in Keynsham aforesaid, and also of several estates in various other places, made a settlement of all these estates, at the time of the marriage of his eldest son, Mr. Harry Bridges, with his first wife the Lady Diana Hollis; Sir Thomas having at that time five sons living, viz. this Mr. Harry Bridges, Edward Bridges, George Bridges, and two younger sons.

The settlement was to the use of Sir Thomas himself for life, as to part; with remainder to his eldest son Harry, for life; remainder to the heirs male of Harry's body by that first marriage; remainder to the heirs male [1066] of his body by any other marriage; remainder to Sir Thomas's second son, Edward Bridges, in strict settlement; remainder to George Bridges, for life; remainder to George, in tail male; with remainder to the right heirs of Sir Thomas, the rest of the estate was settled to the same uses, with this difference only, viz. that there was no life-estate to Sir Thomas himself therein; but Mr. Harry Bridges's estate for life, took place immediately. There was a power given, by this settlement, to Mr. Harry Bridges, to make a jointure upon a second wife.

Mr. Harry B. had no issue by Lady Diana: but, during her life he had an illegitimate son named James Bridges, by another woman. After the death of Lady Diana, and after the birth of James Mr. Harry Bridges, (in his old age) married a young woman, (of the name of Freeman;) upon whom, pursuant to the power given him, he settled about 280l. per annum (being part of the demesne lands of Keynsham,) for her life: and she survived him, and lived till 1759.

Mr. Harry Bridges having no issue by his last wife nor by his former, and being reversioner or remainder-man in fee (as before mentioned) of the whole family estate, and his brother Edward, and his two youngest brothers being all dead without issue; and his nephew George Rodney Bridges, (the only son of his brother George) having no child by his lady; the said Mr. Harry Bridges did, in his life-time, by bargain and sale inrolled, grant this his reversion of the whole settled estate, to his natural son James Bridges, the lessor of the plaintiff.

But after the death of Harry, and during the life of his widow, (who was tenant for life of this 280l. per ann. part of the demesne lands of Keynsham,) the said George Rodney Bridges, (the only son of George then deceased,) being tenant in tail in possession of all the rest of the estate, except that part which was settled upon the widow, who was then living in possession of that part;) but being tenant in tail in remainder only, of that part whereof the said widow was in possession as tenant for life; suffered a recovery, in the year 1728, of the whole settled estate; using (at least) such descriptions as might be sufficient to include all the estate that lay in Keynsham, under the general description of that part of the estate: after the suffering of which recovery, he settled the whole estate included in the recovery, upon the Duke of Chandos, and then died. The duke, upon the death of the said Mr. George Rodney Bridges, came into immediate possession of all the rest of the estate, except that part which the widow of Harry was in possession of for her life as aforesaid: and upon her death, in 1759, he took possession of that part also.

[1067] Whereupon, Mr. James Bridges, the bargainee of the reversion in fee, which was granted to him by his father Harry as aforesaid, brought this ejectment against the duke for that part of the Keynsham estate, which Harry's widow died in possession of; supposing that Mr. George Rodney Bridges could have no power to settle that part upon the duke, whatever power he might have over the rest of the estate, (of which he was tenant in tail in possession when he suffered the recovery).

The duke, at the trial, would have defended his title, by setting up this common recovery suffered by G. R. B. the remainder man in tail; which he produced and proved; but the duke being unable to give any sort of evidence of an actual surrender of the widow's life estate, (which the plaintiff urged to be necessary, in order to enable the tenant in tail in remainder to make a good tenant to the præcipe;) the counsel for the defendant (the Duke of Chandos) insisted at the trial, "that a surrender of the life-estate ought, after so long a time, to be presumed; even although they should give no evidence whatsoever relating to any such surrender."

But Mr. Justice Noel was of opinion, "that a surrender by the tenant for life could not be presumed, when no evidence at all had been given to render it in the least probable; and when the possession had not gone along with the recovery, but continued in the tenant for life, till the time of bringing the ejectment." And accordingly, he directed the jury to find for the plaintiff: which they did.

Upon this misdirection, as the duke's counsel called it, they moved for a new trial and obtained a rule to shew cause: and Mr. Just. Noel's report was, by Mr. Just. Wilmot, stated to this Court as above.

Upon its being argued in this Court,

The defendant's counsel (Mr. Norton, Mr. Webb, and Mr. Thurlow) relied upon the case of *Warren, ex dimiss. Webb v. Greenville*, P. 13 G. 2, B. R. reported in 2 Strange, 1129, where upon a trial at Bar, the lessor of the plaintiff claimed under an old entail in a family settlement, by which, part of the estate appeared to be in jointure to a widow, at the time her son suffered a common recovery, (which was in 1699;) and the defendant, who claimed title under the recovery, not being able to shew a surrender of the mother's estate for life, it was insisted "that there was no tenant to the præcipe for that [1068] part; and that the remainder under which the lessor claimed was not barred." To obviate this it was insisted by the defendant, "that at that distance of time, a surrender should be presumed; according to 1 Vent. 257, and what is \* laid down in Mr. Pigott's Book of Common Recoveries." And to fortify this presumption they offered to produce (in evidence) the debt book of Mr. Edwards, an attorney at Bristol, then long since deceased, wherein he had charged 32l. for suffering the recovery; two articles of which charges are—"For drawing a surrender of the mother, 20s."—and "For engrossing two parts thereof 20s. more;" and that it appeared by the book, "that the said bill was paid." And this being objected to, as improper evidence; the Court was of opinion to allow it: for it was a circumstance material upon the inquiry into the unreasonableness of presuming a surrender, and could not be suspected to be done for this purpose; and if Edwards was living, he might undoubtedly be examined to it; and after his death, this was the next best evidence. And it was accordingly read. After which, the Court declared, "that without this circumstance, they would have presumed a surrender;" and desired it might be taken notice of, "that they did not require any evidence to fortify the presumption after such a length of time."

The case referred to in 1 Vent. 257, is there anonymous: but it is S. C. with the case of *Green and Froud*, in 3 Keb. 310, 311, and *Green v. Proule*, in 1 Mod. (though differently reported). In Ventris, whose report is much the best, it is said, that in ejectment, upon a trial at Bar, for lands in ancient demesne, there was shewn a recovery in the court of ancient demesne, to cut off an entail which had been suffered a long time since, and the possession had gone accordingly: it appeared that part of the land was leased for life, and the recovery (with a single voucher) was suffered by him in reversion; and so no tenant to the præcipe, for those lands. But, in regard the possession had followed it for so long a time, the Court said "they would presume a surrender:" as in an appropriation of great antiquity, there has been presumed a licence, though none appeared.

The passage in Mr. Pigott's book, (referred to by Sir J. Strange,) is in page 41. "It is apparent there must be a tenant to the præcipe, either by right or wrong. And therefore, in many cases, it may seem wholly impracticable for those who have the remainder in tail, to suffer a recovery. The most usual way is, for him in remainder, to get the tenant for life to surrender to him conditionally: and in this, though the tenant for life keep the possession, yet the recovery will be good."

[1069] In the case of *Dane Griffin v. Stanhope*, Cro. Jac. 455, a common recovery being produced, the counsel for the defendant pressed the lady's counsel to prove, who was tenant to the præcipe, at the time of the recovery. But the Court would not allow thereof: for it shall be intended to be a good recovery; and if it was otherwise, the proof ought to be made by the other party.

And in 2 Lutw. 1549, at the end of the case of *Leigh v. Leigh*, this last cited case appears to have been confirmed by Mr. Just. Powell at York Assizes: and Sir Edward Lutwyche there lays it down, "that in every common recovery, it shall be intended that there was a good tenant to the præcipe, till the contrary is shewn on the other side."

Indeed it appears from *Lincoln College case*, 3 Co. 58 b. (there also cited,) "that where a common recovery was had against the remainder-man in tail, in the life-time of his mother who was tenant for life; and she was expressly alledged to be ad tunc tenens liberi tenementi; it could not there be intended that she had surrendered her



estate, or that her son had entered for a forfeiture." Yet even there, rather than the common recovery should be taken to be void for want of a tenant to the præcipe, the Court intended "that he was in by disseisin."

There indeed she could not be intended to have surrendered; because it was alleged, "that she was ad tunc tenens." But in an ancient recovery, if nothing appears to the contrary, such a surrender shall be presumed.

And it appears from Pigott, 41, "that the tenant for life's continuing in possession, makes no sort of difference."

They observed, that all the cases lay the whole stress of the reason of their determination, singly upon the length of time from the actual suffering the recovery; without shewing any kind of regard to the time of the subsequent continuation of the life estate, or to any other circumstances whatsoever. And, as those cases were in ejectment, the question could not turn upon the length of time that [had incurred before the title of] the tenant in tail in remainder had been come into possession: for after twenty years, he would have been barred from bringing an ejectment.

Now the time in the present case is about thirty-two years: which is alone sufficient to create this presumption; especially since the Act of 14 G. 2, c. 20. By the fifth [1070] section whereof, it is enacted, "that after twenty years from the time of surrendering, all common recoveries shall be deemed good and valid to all intents and purposes; if it appears upon the face of such recovery, that there was a tenant to the writ; and if the persons joining in such recovery had a sufficient estate and power to suffer the same; notwithstanding the deed or deeds for making the tenant to such writ should be lost or not appear."

If it should be objected, "that in the present case Mr. George Rodney Bridges had not a sufficient estate and power to suffer this recovery," as being only remainder-man in tail; the answer is, "that if there was a conditional surrender of the tenant for life, then he had such power: and as nothing appears to the contrary, but that there might be such a surrender, it must therefore be presumed: and this statute only limits the time within which the presumption ought to arise."

The plaintiff's counsel, (Mr. Gould, Mr. Hussey, Serj. Davy, and Mr. Burland,) who shewed cause against granting a new trial, argued in support of Mr. Justice Noel's opinion; and asserted his direction to be right.

They said, there could be no presumption, without some facts to ground it upon. In *Mr. Greenville's case*, in 2 Strange, 1129, there was a very strong presumption, arising from the articles in Mr. Edwards the attorney's bill; the proof whereof, the Court allowed to be entered into, and received satisfaction from.

And there is no case where a presumption of a surrender has been raised, without possession accompanying and following the recovery. In 1 Ventris, 257, (upon which case, that in 2 Strange, 1129, is said to be founded,) there was a possession which had followed the recovery for a long time: and that is the very reason there given for the Court's making the presumption that they then made. That reporter was a very eminent man; and much more to be credited than Keble, or the author of 1 Mod. So that that case was not similar to *Greenville's case*; or, at least, not enough so to support the position which is said to have been founded upon it.

As to 2 Lutw. 1549—it is nothing more than the reporter's own speculations; not any determination of the Court.

And in the case of *Lady Griffin v. Stanhope*, Cro. Jac. 455, the person who suffered the recovery was himself tenant in tail; and the possession had gone along with the recovery.

[1071] The latter part of Sir J. Strange's report of *Greenville's case* is inconsistent with the former part of it. For it says, "that the Court declared, and desired it might be taken notice of, that they did not require any evidence to fortify the presumption after such a length of time:" and yet it appears by the former part of the case, "that they had entered into such evidence: after it had been objected to as improper, and the objection had been considered and over-ruled."

As to the statute of 14 G. 2, c. 20, § 5, it never meant to alter the law, so as to give power to a person to suffer a recovery, who had no power before: (which a remainder-man in tail had not:) it is expressly confined to "persons having a sufficient estate and power to suffer the same."

The Statute of Limitations, 21 J. 1, c. 16, only takes place from the time of the title's accruing.



And the rule, in all the cases cited, and in all cases of this kind, must, in reason and common sense, necessarily be understood to relate to the length of time that has elapsed since the tenant in tail's coming into possession; and not to the length of time since the suffering of the recovery. For where the tenant in tail has been a long time in possession, and has done nothing to complete and confirm his former act; there indeed, it is reasonable to presume that all was rightly transacted before; because if he knew his former act to be defective, and his title insufficient, he would not have neglected to set it right as soon as it was in his power to do so: but no such presumption can arise from a mere antiquity of the recovery, prior to the possession of the tenant in tail.

The outstanding life-estate, even till 1759, is the strongest presumption to the contrary, viz. "that she did not surrender her estate."

Besides, it does not at all appear from the Judge's report, that Mr. George Bridges, the tenant in tail in possession of all the rest of the estate, and of which he had power to suffer a recovery, ever meant or intended to suffer a recovery of these settled lands, of which he had no power to do so. He had other lands in Keynsham, upon which the recovery operated: and there is no reason to imagine that he meant to include these, or ever attempted to procure a surrender of the life-estate in them.

Lord Mansfield—I was of counsel in that case of *Mr. Greenville's*, reported in Sir John Strange's Reports: and I remember very well, that the point of evidence was [1072] strongly litigated. The attorney, who had been concerned in the transaction of the common recovery, was one Mr. Edwards of Bristol, who had been then long dead. The entry in his bill book was made at the time of the transaction; and a receipt had been given upon the bill which contained the articles for drawing and engrossing the surrender: so that there was positive proof, in that case, of an actual surrender. And there, the jointress had been dead a vast number of years; and the person who suffered the recovery, and his son after him, had both of them (during their respective lives) sufficient opportunity to have set it right, after they came into possession, if they had known or suspected it to have been defective: which was certainly a presumption, "that it was regular, and not defective." I am confident, that all that the Court did, or intended to do, in that case, was only to take care that it should be understood, "that they did not mean to shake the authority of any one case that had been founded upon presumption;" and "that they would not require positive proof of a surrender, in any case where there was sufficient presumption of it." This report is incorrect, considered as a foundation for a principle or rule of property; though it might be enough to serve the taker of such a note, for a memorandum, to refresh his own recollection.

If that be so, then consider the present case, upon principles.

There are two sorts of presumptions: one, a presumption of law, not to be contradicted; the other, a species of evidence which (latter) must have a ground to stand upon, something from whence it is to arise.

It is now fully settled and established, that a tenant in tail may, if he pleases, either turn his estate tail into a fee, or alienate it for his own benefit, by duly suffering a common recovery,

But he must have \* a sufficient estate and power, to qualify him to suffer such recovery.

He must either be the tenant in tail in possession; or he must have the concurrence of the freeholder who claims under the same settlements.

This principle is † adhered to, by the statute of 14 G. 2, c. 20.

The tenant for life, whose consent is necessary to the tenant in tail in remainder, to enable him to cut off the entail, is not the lessee of the land under a beneficial lease; but the original tenant for life claiming under the [1073] family-settlement, and having a life-estate settled upon him, prior (in order of succession) to the other's remainder in tail.

Where a person has power to suffer a recovery and thereby bar the estate tail, omnia præsumuntur ritè et solemniter acta, until the contrary appears: and it is reasonable that it should be so. But if the contrary shall appear, there is an end of the presumption. This was the case of the Earl of Suffolk's recovery, upon a trial at Bar

\* V. ante, 116 to 119.

† V. ante, 116.

in this Court in Easter term 1747.<sup>1</sup> There, the contrary did appear: and the presumption was thereby destroyed. There were blundering deeds actually produced, which appeared clearly to be wrong; and it was manifest, upon the evidence disclosed, that there was no good tenant to the præcipe. It was therefore impossible for the Court, in that case, to presume "that there was one."

But if a man has power to suffer a recovery, that is a solid and reasonable ground for presuming "that all was done rightly and regularly;" unless something to the contrary shall appear.

So, where the freeholder is a trustee for the tenant in tail himself, and under his power and direction, it is a reasonable and just cause for presuming "that every thing was regularly transacted."

So, where the person or persons interested to object against the validity of a recovery, have had opportunity to make objections to it, but instead of doing so, have acquiesced under it, and not at all disputed its validity: this is a presumption "that all was right and regular," forasmuch as they never did object to it.<sup>(1)</sup>

But there can be no presumption of the nature of evidence, in any case, without something from whence to make it; some ground to found the presumption upon. Whereas here is absolutely nothing from whence to presume: no sort of ground to build any presumption upon. The single pretence to any the least ground of presumption in the present case, can be only this, "that no tenant in tail in remainder would suffer a recovery, without first getting a surrender of the life-estate, in order to make it valid and effectual."

But even that ground (slight as it is) will not hold in the case now before us: for it does not at all appear, upon the report of the Judge, that Mr. George Bridges (who suffered the recovery in question) had the least intention whatsoever to include those particular lands in the recovery which he suffered, and had a full power in himself alone, to suffer, of all the rest of the estate, whereof he was [1074] at that time tenant in tail in possession. He was then in possession of the manor of Keynsham and of other lands in Keynsham sufficient to answer the general descriptions used in the recovery, relating to such part of the recovered estate as lay in Keynsham. He must probably know or have been informed by his counsel or agents, that he could have no such power over the settled part, without obtaining a surrender of the life-estate. He might perhaps be satisfied that he could not obtain a surrender of the life-estate in these settled lands: or, he might have attempted to obtain it, and failed in such attempt.

If the mere single fact of the remainder-man in tail suffering a recovery, was alone sufficient to ground a presumption of a surrender of the life-estate, it would be in the power of every remainder-man in tail, to bar the estate tail, notwithstanding that the tenant for life should absolutely refuse to join with him in suffering a recovery. Therefore it is necessary that there should be facts and circumstances to ground a presumption of such a surrender upon.

Whereas, in the present case, it is so far from being reasonable to presume "that there was such a surrender from the jointress, in order to bar the estate tail in remainder, and give the power of disposal to George in prejudice to James Bridges;" that there are, on the contrary, many reasons to induce a suspicion, "that there was not such a surrender." She might have more regard for James, than for George; she might have a friendship for James, and a dislike to George; she might think it wrong or unkind, to hurt the reversioner; or even whim and peevishness might prevent her from interfering: there is no defining the various reasons she might have, to hinder her from surrendering her life-estate for such a purpose.

Mr. George Bridges being only tenant in tail in remainder, and the life-estate under the same settlement still subsisting, at the time of his suffering the recovery; it is clear that he had no power to alien or to bar: and there is nothing from whence to presume a surrender of the life-estate, to enable him to do so.

If he had a power to bar or alien, then indeed no presumption could have been

<sup>1</sup> *Keene, ex dimiss. Lady Portsmouth, Mr. Whitwell, and Lord Hervey v. Earl of Effingham: 20th May, 1747. [S. C. Str. 1267.]*

<sup>(1)</sup> This fact may happen to be very uncertain, as if the vouchee sell the estates, but leaves other fee-simple estates of greater value to descend on the person which would be entitled to the entailed estate, if the entailed estate was not properly barred.

too large ; in order to prevent slips in legal forms and methods of conveyance, and effectuate the intention of a person who had a legal right to do such an act.

The Act of 14 G. 2, c. 20, means to preserve the same negative to persons claiming under the family-settlement, as they had before.

[1075] And no argument can be drawn, in the present case, from length of time ; because the jointress died but in 1759 ; and the ejectment was instantly brought.

Upon the whole, there is no colour for objecting to the Judge's direction.

Mr. Just. Denison and Mr. Just. Wilmot concurred : and

Mr. Just. Wilmot added, that he had no notion of a presumption, without some facts or circumstances to found it upon. This would be inferring something seen, from something not seen.

Length of time alone is nothing : the presumption must arise from some facts or circumstances arising within that time.

The Court were all clear and unanimous, that this rule ought to be discharged.

At the sitting of the Court, the next morning—

Lord Mansfield mentioned this case again.

He said he had looked into his own notes of the case of *Warren on the demise of Webb*, against *Greenville*, where the recovery was of forty years standing ; and the Court did lay it down, in that case, "that after a recovery of forty years standing, they would, without any other circumstances, presume a conditional surrender to have been made by the tenant for life ;" and they relied upon 1 Ventr. 257, and Mr. Pigott's book, pa. 41. But his Lordship observed, that there are other circumstances, in the case in Ventr. ; and there is nothing in Pigott, to justify this general position. And he added, that in the case then at the Bar, the Court did (as he had taken it down) admit as evidence the entry in the attorney's book, as has been mentioned.

He said, he was rather more strongly of opinion than he was yesterday, "that in the present case, there is no ground for a presumption that there was any surrender by the tenant for life." Here are two particular reasons against making any such presumption. One is, that there does not appear to have been any intention in the remainder-man in tail, to suffer a recovery of these particular lands ; the other is, that here was no possession at all, under this recovery ; but, on the contrary, the ejectment was brought, and the validity of the recovery put into litigation, immediately after the death of the tenant for life.

[1076] If the eldest son, who has a remainder in tail under a family-settlement, should privately suffer a common recovery, and his father live many years afterwards ; it might as well be argued that "length of time from the date of the recovery should induce a presumption that the father surrendered his estate for life."

And his Lordship declared himself as clear, that if there had been a long possession by the tenant in tail after the death of the tenant for life ; though such a possession might be ascribed to the entail ; the presumption ought to have been made, upon the ground of acquiescence under it, and the probability arising therefrom, "that the parties knew that the recovery was not defective."

Rules of property ought (his Lordship said) to be generally known, and not to be left upon loose notes, which rather serve to confound principles, than to confirm them. He therefore proposed to have a conference with all the Judges upon this case : which proposal did not arise, he said, from any doubt about the matter : (for he was more confirmed in his opinion, than he was yesterday ;) but for the sake of having so considerable a rule of property settled, and of rendering it notorious and public. For which purpose, he (at first) ordered it to stand over till next term : but afterwards, upon its being agreed by all the parties, that in *Mr. Greenville's case* there was a great number of years during which the tenant in tail had been in possession after the death of the tenant for life ; and upon the now defendant's counsel candidly declaring "that they themselves were fully satisfied with the present opinion of the Court ;" he retracted his proposal, and said he would not trouble the Judges with it, since the counsel were so candid as to acquiesce entirely in the opinion that the Court had already intimated.

His Lordship further added, that he would have it understood, that possession of the tenant in tail, after the death of the tenant for life, does leave a ground of presumption "that there was a surrender." But in the present case, here is no possession after the death of the tenant for life : the ejectment was brought immediately.

Therefore, let the rule of yesterday stand.



[1077] PALMES ROBINSON, ESQ. *versus* ANNE BLAND, Spinster Administratrix de bonis non of Sir John Bland, Bart. deceased. Saturday, 15th Nov. 1760. [S. C. 1 Black. 234, 256. Sayer's L. of D. 48. Bull. 274.] Gaming debt won in France not recoverable in England.

[Followed, *Moulis v. Owen* [1907], 1 K. B. 746.]

This was a case reserved at Nisi Prius at Westminster-Hall, before Ld. Mansfield, 22d May 1760.(a)

The action was an action upon the case upon several promises: and the declaration contained three counts. The 1st count was upon a bill of exchange, drawn at Paris, by the intestate Sir John Bland, on the 31st of August 1755, and bearing that same date; on himself in England; for the sum of 672l. sterling, payable to the order of the plaintiff, ten days after sight, value received and accepted by the said Sir John Bland. The 2d count (b) was for 700l. monies lent and advanced by the said plaintiff to the said Sir John Bland, at his request. The 3d count was for 700l. monies had and received by the said Sir John Bland, to and for the use of the plaintiff. And the plaintiff's damage is laid at 800l.

The defendant pleaded the general issue, "that Sir John Bland did not undertake and promise, &c." And issue was joined thereon.

The verdict was found for the plaintiff, and 672l. given for damages; subject to the following case stated for the opinion of the Court, on the following facts proved and admitted: viz.

That the bill of exchange was given at Paris, for 300l. there lent by the plaintiff to Sir John Bland, at the time and place of play; and for 372l. more lost at the same time and place by Sir John Bland, to the plaintiff, at play.

That the play was very fair: and there is not any imputation whatsoever on the plaintiff's behaviour.

That there were several gentlemen and persons of fashion then and there at play, besides the plaintiff and Sir John Bland.

That in France, money lost at play, between gentlemen may be recovered, as a debt of honour, before the marshals of France, who can enforce obedience to their sentences by imprisonment; though such money is not recoverable in the ordinary course of justice.(c)

[1078] That money lent to play with, or at the time and place of play, may be recovered there, as a debt, in the ordinary course of justice; there being no positive law against it.

That Sir John Bland was, and the plaintiff is a gentleman.

The question was—Whether, under these circumstances, the plaintiff is intitled to recover any thing, and what, against the defendant.

It was first argued on Tuesday 17th June last, by Mr. Serj. Hewitt for the plaintiff, and Mr. Blackstone for the defendant: and again, yesterday and to-day, by Mr. Wedderburn for the plaintiff, and Mr. Cox for the defendant.

Upon the conclusion of this second argument,

Lord Mansfield said that in the present case, the facts stated scarce leave room for any question; because the law of France and of England is the same.

The first question is whether the plaintiff is intitled to recover upon this bill of exchange, by force of the writing.

The second question is, whether he is intitled to recover upon the original con-

(a) See Cowp. 341. Durn. 226. 1 Bosanq. 140. 5 East, 130. 3 Durn. 456. 3 Brown. 506, 575. 1 H. Bl. 464.

(b) This is not a good count against the loser, though it might be against a stakeholder, if the game had been lawful.

(c) Si nihil flagitiosi mandatur, si tamen alias, quod mandatur in honestum sit, nulla ex eo mandati actio est; veluti adolescens luxuriosus mandat tibi, ut pro meretrice fidegubras, et tu sciens mandatum susceperis non habebis mandati actionem. Idemque obtinet si mandaverit tibi ut meretrici pecuniam credas: quia simile est, ac si perdituro credideris et adversus bonum fidem. Vin. Com. Inst. lib. 3, tit. 27, page 706 b.

sideration and contract, by the justice and equity of his case, exclusive of any assistance from the bill of exchange, and taking that to be a void security.

As to the 1st question, the defendant has objected "that the consideration of the bill of exchange is, wholly money won and lent at play. Therefore, by force of the writing, the plaintiff can not by the law of England recover; such security being utterly void." And no doubt, the law of England is so.

There are three reasons why the plaintiff cannot recover here, upon this bill of exchange.

1st. The parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. Huberi Prælectiones, lib. 1, tit. 3, pa. 34, is clear and distinct; "verum tamen, &c. locus in quo contractus, &c. potius considerandus, &c. se obligavit." Voet speaks to the same effect.

[1079] Now here, the payment is to be in England: it is an English security, and so intended by the parties.

2d reason—Mr. Coxe has argued very rightly, "that Sir John Bland could never be called upon abroad for payment of this bill, till there had been a wilful default of payment in England." The bill was drawn by Sir John Bland on himself, in England, payable ten days after sight.

In every disposition or contract where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here. (d)

3d reason—The case does not leave room for a question. For the law of both countries is the same. The consideration of the bill of exchange might, in an action upon it, be gone into there, as well as here. And as to the money won at play, it could not be recovered in any Court of Justice there, notwithstanding the bill of exchange.

This writing is, as a security, void, (being for a gaming debt,) both in France and in England. We may therefore lay the bill of exchange out of the case: it is very clear, the plaintiff cannot recover upon that count.

Second question. Then as to the other counts, for money had and received to the plaintiff's use, and for money lent and advanced to him.—Consider it distinctly, as to each part; the money won, and the money lent.

1st. As to the money won.—By the rule of the law of England, no action can be maintained for it.

To this it has been objected, "that the contract was made in France. Therefore, ex comitate, the law of France must prevail, and be the rule of determination."

I admit that there are many cases where the law of the place of the transaction shall be the rule: and the law of England is as liberal in this respect, as other laws are. This is a large field, and not necessary now to be gone into.

It has been laid down, at the Bar, "that a marriage in a foreign country must be governed by the law of that country (e) [1080] where the marriage was had:" which, in general, is true. (f) But the marriages in Scotland, of persons going from hence for

(d) A man's personal estate, is distributable according to the laws of that country, where he dwells: but to enable a person to sue for any part of the personal estate, he must qualify himself from that, which is the proper jurisdiction of the place, where the personal estate lies; but that does not determine the right to the equitable property. Per Ld. Chancellor, in *Pipon v. Pipon*, M. S. and the S. C. was cited per Ld. Hardw. 2 Vez. 37.

(e) If the parties married abroad and continue there, of course they would be man and wife, if the marriage was valid according to the laws of the foreign country; otherwise not: and it would be absurd that their state, in this respect, should be changed by their removal from one country to another; as it must be, if the validity of the marriage be determined by the law of any other country than that where the marriage was had; and on this ground it seems that the Delegates, May 21, 1784, determined against a marriage solemnized abroad between Mr. Morris and a natural daughter of the late Ld. Baltimore. See also Comyns, 693.

(f) Cro. Jac. 542.

that purpose, were instanced by way of example.<sup>(g)</sup> They may come under a very different consideration: according to the opinion of Huberus, pa. 33, and other writers.

No such case has yet been litigated in England, except one, of a marriage at Ostend; which came before Lord Hardwicke; who ordered it to be tried in the Ecclesiastical Court; but the young man came of age, and the parties were married over again; so the matter was never brought to a trial.

The point that the plaintiff must rest upon, in the present case, is this—"The money was won in France; therefore it ought to be governed by the law of France; and it is recoverable there before the marshals of France, who can enforce obedience to their sentence."

The Parliament of Paris would pay no regard to their judgment, nor carry it into execution. The marshals of France proceed personally against gentlemen, as to points of honour, with a view to prevent duelling.

They could not have taken cognizance of the present matter. It was not within their jurisdiction. It was no breach of honour in France: for the money was payable in England; and Sir John Bland could not be said to have forfeited his honour, till the ten days were out, and till the money had been demanded in England, and payment refused there. Sir John Bland was actually dead in a very short time after he gave the note. The marshals of France can only proceed personally against the gentleman who loses the money; but have no power over his estate or representatives, after his death.

Therefore, as to the money won, the contract is to be considered as void by the law of France, as well as by the law of England: which makes it unnecessary to consider "how far the law of France ought to be regarded."

Next, as to the money lent—The sense of the Legislature seems to me to be agreeable to the <sup>\*1</sup>(a) cases that have been cited.

The Act of 16 C. 2, c. 7, § 3, does not meddle with money lent at play. But, as to money (exceeding 100l.) lost, and not paid down at the time of losing it, it says [1081] "that the loser shall not be compellable to make it good; but the contract and contracts for the same and for every part thereof, and all securities shall be utterly void, &c." The words "contract and contracts for the same" are not in 9 Ann.\*<sup>2</sup> and I dare say were designedly left out: it only says "that all notes, bills, bonds, judgments, mortgages or other securities, &c. for money won or lent at play, shall be utterly void, &c."

Here the money was fairly lent, without any imputation whatsoever. Sir John Bland, the borrower of it, being in a foreign country, might very naturally have been distressed, under his then situation amongst foreigners, for want of having ready money or knowing how to procure it: and it might be even a kind, and generous and commendable act, to lend it to him at that time, to extricate him from his difficulties, as he was then circumstanced. The jury have left it quite open to the Court to determine "whether any thing, and what, is recoverable." As to the money won, we think it can not be recovered: as to the money lent, the plaintiff is intitled to it, both by the law of England, and by the law of France.

Interest will be payable upon this bill, after the expiration of the ten days. The

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(g) 1 Vez. 159. 2 Eq. Abr. 411. 2 R. R. 346. But it has been since determined in the Inferior Ecclesiastical Court, and affirmed by the Delegates that such Scotch marriages are valid.

<sup>\*1</sup> *V. Hussey v. Jacob*, Carthew, 356. 5 Mod. 175. 1 Salk. 344. 1 Ld. Raym. 87. *Bowyer v. Bampton*, 2 Strange, 1155. *Barjean v. Walmsley*, 2 Strange, 1249, (a) and *Slater v. Emmerson*, before Eyre, Ld. Ch.J. C. B. at the sittings at Guildhall, after M. term, 1 G. 2. [See also, Buller, 270, 274.]

(a) The case in 2 Str. 1249, was on a lending by parol only, though it seems difficult to maintain even that determination, at least upon the reasons there given; and in that case the person who lent the money won it again of the borrower, so that it was a mere contrivance to evade the law; as to all the other cases cited, they are nothing to the purpose, but rather make against the judgment in this case, as they do not at all apply to it, except it be a dictum, in the case of *Hussey v. Jacob*, which was decided in the case of *Boyer v. Brampton*, Str. 1155. See also 2 Wils. 309, acc.

<sup>\*2</sup> C. 14.



question will be, "how far the interest ought to be carried down." It is generally said, "to the day of the writ brought," i.e. of commencing the action. But I do not see why it should not be carried farther; it is equally reasonable, it is the right of the party, to have it to the last act of the Court ascertaining the sum due. '

I have long wished for an opportunity to have this point considered by the Court; because I would not take upon myself, at *Nisi Prius*, to change what has commonly been the practice.

But as to this last point, we will think of it for a day or two.

Mr. Just. Denison gave no opinion now, on this last point. As to the rest, he said it is a plain, clear, short case: it is determinable by the rules of the common law, and no other law.

The money is made payable in England. As it is a foreign bill of exchange, it must of course be dated abroad: but it is to be paid here at home. And the plaintiff has appealed to the laws of England, by bringing his action here; and ought to be determined by them.

[1082] But, by the laws of England, the security is void: which might have been pleaded, as well as it might be given in evidence; and the defendant needed not, in his plea, to have said where it was won at play. And being a transitory action, it must then have been tried where the action was brought: and so it must have been, if the plea had been local. Indeed in many cases that might be put, the determination must have been according to the laws of the place where the fact arose. But the present case is not so: here, the security, is void by the laws of the country where he brings his action upon it. And this security is one entire security both for the money won at play, and the money lent at play.

There is a distinction between the contract, and the security, if part of the contract arises upon a good consideration, and part of it upon a bad one; it is divisible. But, it is otherwise as to the security: that, being entire is bad for the whole.

Therefore the plaintiff ought to be barred of this action upon this bill of exchange, as being a void security by the laws of this country where he brings his action. But still the contract remains: and he has a right to maintain his action for so much of his demand as is legal; which is the money lent.

As to the time of carrying down the interest, it may be proper to consider of it a little while.

Mr. Just. Wilmut—Here are two sums demanded, which are blended together in one bill of exchange; but are divisible in their nature.

As to the money lent—the cases that have been cited are in point "that it is recoverable." But if there were none, yet I should be clear that the plaintiff may maintain an action for that.

As to contracts being good, and the security void—the contract may certainly be good: though the security be void: and I think that this contract is good; though the security is void, by the Statute of 9 Ann. \*<sup>1</sup> This is not stated to be money lent to play with, or for the purpose of play; but "lent at the time and place of play" only: nothing appears upon this case, to induce any suspicion that it was lent for any bad purpose.

The statutes meant to prevent excessive gaming, and to vacate all securities whatsoever for money won at play; and the genuine, true and sound construction of 9 Ann. is to understand it as intended to prevent any securities being taken for money won at play, or lent to play with, when the borrower had lost all his ready cash: but not to make the contract itself void, where the money is fairly and bona fide lent, though at the time and place of play.

As to the interest that shall be given to the plaintiff upon the sum lent, in the assessment of the damages—[1083] this is an action that sounds in damages: and the true measure undoubtedly is the damage which the plaintiff sustains by the non-performance of the contract; and that damage is the whole interest due upon the sum lent; viz. from the time of its being payable, up to the time of signing the judgment. Nay, even then, he may suffer; he may still be kept out of his money, by a writ of error, for a still further time. According to my memory, Lord Coke's exposition of the \*<sup>2</sup> statute is, that the "costs of the writ" shall extend to all the legal costs of the suit.

\*<sup>1</sup> 9 Ann. c. 14, § 1.

\*<sup>2</sup> V. 2 Inst. 288, on Stat. Glouc. 6 Edw.

The present case, notwithstanding the questions that have been agitated in arguing it, comes out to be no case at all ; no point at all ; no law at all.

Indeed, "whether an action can be supported in England, on a contract which is void by the law of England, but valid by the law of the country where the matter was transacted," is a great question : († though I should have no great doubt about that). But that case does not exist here : for it is not here stated, "that such a debt as this, for money won at play in France, is recoverable in the ordinary Courts of Justice there ;" but quite the contrary. So that the laws of France and of England are the same as to the money won : the contract is void as to that, by the laws of both countries.

And as to this wild, illegal, fantastical Court of Honour, the Court of the Marshals of France, acting only in personam, contrary to the universal and general laws even of the country where the transaction happened, and contrary to the genius and spirit of our own law too ; it would be absurd to suppose, that the bare, possible accidental chance of a recovery in that Court should be a foundation for maintaining an action here, upon a matter prohibited by the laws of both countries.

Besides, Sir John Bland himself, as it seems, was not, and the present defendant, the person now before this Court, could never have been the object of the jurisdiction of that Court. The remedy there, in its utmost extent, was only in personam ; and this defendant is an administratrix, only.

A strong reason for the plaintiff's recovering in this action the money lent, is, that the bill of exchange is payable in England ; and therefore it shall be determined according to the laws of England, where it is payable. As in the case of *Sir John Champant v. Ld. Ranelagh*, [1084] Mich. 1700, in Chancery, (reported in *Precedents in Chancery* (a)<sup>1</sup> 128). A bond was made in England, and sent over to Ireland, and the money to be paid there ; but it was not mentioned what interest should be paid : my Lord Keeper was of opinion, "that it should carry Irish interest." Therefore, as this money was payable in England, the law of England must be the rule of recovering it.

I give no opinion as to the other point ; yet I cannot help thinking, that where a person appeals to the law of England, he must take his remedy according to the law of England, to which he has appealed.

There is no difference, in this case, between the statute law, and the common law of England : a contract cannot be maintained upon the one, that is void by the other.

The law of the place where the thing happens does not always prevail. In many countries a contract may be maintained by a courtesan for the price of her prostitution ; and one may suppose an action to be brought here, upon such a contract which arose in such a country ; but that would never be allowed in this country. Therefore the *lex loci* cannot in all cases govern and direct.

The sentences of foreign Courts have always some degree of regard paid to them, by the Courts of Justice here ; and it is very right that an attention should be paid to them, as far as they ought to have weight in the case depending.

But if a man originally appeals to the law of England for redress, he must take his redress according to that law to which he has appealed for such redress. Therefore if this rule of determination was different, by the law of France, from our rule here, yet I should incline, that the law of England, where the action was brought, should prevail against the law of France, if they did really clash with each other ; because the party seeking redress has chosen to apply here. (a)<sup>2</sup> But I give no opinion at all, on this point.

As to the money lent—there can be no doubt ; because there is no law either in England, or France, that hinders the plaintiff from maintaining his action for it.

[† The printer or reporter must here have most plainly erred.]

(a)<sup>1</sup> S. C. 2 Vern. 395, reported directly contrary to Pr. in Ch.—See also 2 Atk. 382, and qu. 3 Atk. 727. Contra, 1 Vez. 427. Contra, 14 Vin. 461. Eq. Abr. 288, 289.

(a)<sup>2</sup> But in cases of loans, interest shall be paid according to the law of the country where the debt was contracted, though sued for it here, Eq. Abr. 288, 289, and so it is if the money be payable there and the creditor there. And it is not only the law of England, but (it seems) of every other country to adjudge of covenants according to the laws of the country where made.

As to the carrying down the interest to a fixed time.

The Court took time to consider that single point. [1085] And on Saturday 22d of November,

Lord Mansfield delivered the resolution of the Court, upon that point, which was to the following effect :

We have given our opinion already upon all the parts of this case, except the single point of carrying down the interest: which opinion was "that the plaintiff could only recover 300l. the principal sum really and bonâ fide lent by the plaintiff to Sir John Bland, at Paris."

The remaining questions are—"Whether it should carry interest:" and, "to what time such interest ought to be computed and allowed."

As to the former of these two questions, the case stated is "that the bill of exchange was given at Paris, for 300l. there lent by the plaintiff to Sir John Bland; for which he gave the plaintiff a security, void, in point of law, as a security." But the giving the bill of exchange, upon such consideration, is stated in the case, as a fact admitted: and shews that, upon the loan the intention and agreement of the parties was, "that the money should carry interest, if not repaid within the limited time."

The contract remains good, though he gave a void security to perform it. So that it is a liquidated sum which carries interest from the time at which it was agreed to be paid.

But the question is, "whether it is to stop at the commencement of the action; or to be carried on to the time of liquidating the debt by the verdict or by the judgment."

This difference is very small, in the present case, and scarce worth litigating between these parties. But I am glad of the opportunity which this case offers, of discussing the question and settling the point, to be a rule for all cases of the same nature that may hereafter arise.

The general practice of associates, in taking damages in these cases, is (I am informed) to stop at the commencement of the action, and to allow the interest no further down. But this practice, however general, is not founded in law, but in mistake and misapprehension. And this will appear very plain, whether it be considered upon the foot of natural justice, or law.

[1086] First, in point of justice—Nothing can be more agreeable to justice, than that the interest should be carried down quite to the actual payment of the money. But as that cannot be, it should be carried on as far as to the time when the demand is <sup>\*1</sup> completely liquidated.

Although this be nominally an action for damages, and damages be nominally recovered in it; yet it is really and effectually brought for a specific performance of the contract. For where the money is made payable by an agreement between parties, and a time given for the payment of it, this is a contract to pay the money at the given time; and to pay interest for it from the given day, in case of failure of payment at that day. So that the action is, in effect, brought to obtain a specific performance of this contract. For pecuniary damages upon a contract for payment of money, are, from the nature of the thing, a specific performance; and the relief is defective, so far as all the money is not paid.

Then, to consider it upon the common and statute law.

There is no statute, nor any principle of the common law, against it. We have looked into all the statutes that can be supposed to concern this practice; and there is no statute that has any reference to the matter.

The damages given by statutes, are where the action is against such as come in under wrong-doers only; or where a specific thing is to be recovered.

It is agreeable to the principles of the common law, that wherever a duty has incurred, pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given upon the action already depending.

Of this, there are many instances. In a writ of <sup>\*2</sup> account, the first judgment is, "quod computet:" and on such account, all articles of account, though incurred since the writ, shall be included, and the whole brought down to the time when the auditors

<sup>\*1</sup> V. post, *Bodilly v. Bellamy*, 22d Nov. 1760, S. P. pa. 1096, and 1098.

<sup>\*2</sup> See New Abridgment of the Law, vol. 1, pa. 21, (very short and clear).



make an end of their account. So in the ancient writ of annuity ; intermediate sums grown due pending the action, shall be included in the judgment ; because a new action cannot be brought for them.

On the Statute of Gloucester, 6 Ed. 1, (whereby damages are given in real actions, on a writ of entry to recover the specific lands : ) that statute gives damages generally, [1087] without saying till what time : yet the construction upon it has been, "that they shall compute all the damages that have arisen, pendente brevi." \*<sup>1</sup>

When a new action may be brought, and a satisfaction obtained thereupon, for any duties or demands which have arisen since the commencement of the depending suit ; that duty or demand shall not be included in the judgment upon the former action. As in covenant for nonpayment of rent, or of an annuity payable at different times, you may bring a new action toties quoties as often as the respective sums become due and payable. So in trespass and in tort : new actions may be brought, as often as new injuries and wrongs are repeated : and therefore damages shall be assessed only up to the time of the wrong complained of.

But where a man brings an action of assumpsit, for principal and interest, upon a contract obliging the defendant to pay such principal money with interest from such a time, he complains of the non-payment of both ; the interest is an accessory to the principal ; and he can not bring a new action for any interest grown due between the commencement of his action, and the judgment in it.

Here the plaintiff cannot bring a new action for the interest : for he has already had a satisfaction upon the defendant's promise.

The Court of Chancery has, in cases of this kind, often a concurrent jurisdiction with the Courts of Common Law, on account of assets ; (not an extraordinary, but an ordinary jurisdiction, by reason of the fund). And it seems absurd, that two Courts of Justice who have concurrent jurisdiction, should go by different rules : they ought to act uniformly, as far as may be. The Court of Chancery follows the Ecclesiastical Court, in cases where they have concurrent jurisdiction. Now in Chancery, interest is computed even up to the day when it is conjectured or agreed that the Master's report will be confirmed, (though a future day,) which they fix according to probable conjecture. I do not know of any Court, in any country, (and I have looked into the matter,) which does not carry interest down to the time of the last act by which the sum is liquidated.

Why then may not juries compute interest to the time of the verdict, or even till the end of four days within the next term ; (before which time the plaintiff cannot sign his judgment) ?

I think I can see how this mistake has happened ; I dare say that associates have not distinguished between [1088] this species of action, (it being called an action of trespass on the case,) and \*<sup>2</sup> common actions of trespass ; (such as actions for assaults, batteries, false imprisonments, &c.).

Carrying down the interest does a plaintiff complete justice. It is agreeable to the principles of the common law, and interferes with no statute. It takes from defendants the temptation to make use of all the unjust dilatories of chicane. For, if interest is to stop at the commencement of the suit ; where the sum is large, the defendant may gain by protracting the cause in the most expensive and vexatious manner ; and the more the plaintiff is injured, the less he will be relieved.

Here, the jury having left the matter quite open to us, we can bring the interest down to the time of the liquidation and ascertainment of the sum really due from the defendant to the plaintiff ; which is the time of giving the judgment. And the sum, (a trifle indeed in this case,) for which the judgment is to be entered, will then be about 375l. (a little more or less). Therefore let judgment be entered for that sum.

Rule—That "the postea be forthwith delivered to the plaintiff's attorney ; and that the plaintiff shall be at liberty to enter up judgment on the verdict obtained in this cause : but it is further ordered that such judgment shall only stand security to the plaintiff for the sum of 375l. parcel of the sum of 672l. (the damages assessed by the jury ;) and the plaintiff's costs to be taxed by Mr. Owen."

\*<sup>1</sup> V. 2 Inst. 283.

\*<sup>2</sup> See the distinction between these, in the case of *Harward v. Bankes*, in this term, post, p. 1114.

Thursday, 20th Nov. 1760.

☞ This being grand-jury day, it was intended by the sheriff, and pressed by the two knights of the shire for Middlesex, that all the principal gentlemen of the county (not fewer than fourscore in number) should be sworn of this grand jury, in order to their being included in an address to His Majesty, from and in the name of the grand jury of Middlesex, upon his accession to the Crown. But, upon the sheriff's mention of this to me, it seemed to me to be irregular and improper to swear more than twenty-three. Because if a number amounting to two full juries or more should be sworn, it might happen that a complete jury of twelve might find a bill to be a true one, though other twelve or even many more than twelve of the very same jury might reject it as an untrue one; which would be inconvenient as well as contradictory, and even somewhat absurd and ridiculous.

Lord Mansfield, upon being apprized of this, said it would be monstrous to swear fourscore; and that the officer could not properly swear more than three and twenty.

[1089] GOODTITLE, EX DIMISS. PAUL, ESQ. *versus* PAUL, Spinster. Friday, 21st Nov. 1760. [S. C. 1 Black. 255, and cited 1 Brown. 70, see also 6 Durn. 349.] Lands at C. in tenure of A. B. devised by will, comprise woods and timber excepted in the lease, being words of additional description.

Upon the trial of an ejectment before Lord Mansfield at Hertford Assizes, a case was reserved for the opinion of the Court: and the single question, was "whether certain woodlands passed, by the will of the late Dr. Paul, to his widow; or descended to his son and heir, as undevised."

The ejectment was brought by the son for the recovery of them; by the description of "twenty acres of woodland in the parish of Bovington in the county of Hertford."

The substance of the case stated was, that Dr. Paul, being seised of divers freehold and copyhold estate, and (amongst others) of the premises in question, made his will, dated 4th October 1752, in manner following. As to my worldly estate, I dispose of it in manner following—Then he leaves fortunes to his two daughters; and 20l. to his son George, (the lessor of the plaintiff, who was his only son and heir,) for mourning. He then gives all his stocks, securities, &c. &c. to his wife. Then the will proceeds thus—"Whereas I am intitled to a leasehold estate, being a house and yard in Ave-Mary Lane, I give the same to my dear wife. I have purchased a barn and field, in reversion expectant on the death of Lady Williams, of Mr. Ralph Day: I give and devise the same to my dear wife, subject to her sole disposal. I give, devise and bequeath my two farms purchased of the trustees of His late Grace of Chandos, in the parish of Little Stanmore; one in the occupation of Henry Grub, the other in the occupation (lately) of Mr. Jully, to my dear wife; subject to her disposal by will, or by deed, or sale. I give, devise, and bequeath all my estate in Fleet-Street, consisting of houses in Johnson's Court, Boar's Head-Court, the Bolt and Tun Inn, and Bolt and Tun Passage, to my dear wife; with all the right and property of enjoying them; and also my estate in Saint Mary Axe, in the occupation of Mr. Jacob Castre, in as full and ample a manner as I enjoy the same. I give, devise, and bequeath my freehold and copyhold estate in the parish of Aldenham, in the tenure of John Wrench, and my freehold house and orchard in the back lane of Bushey, to my dear wife: subject to her sole disposal, by will, deed, or sale; as also my copyhold lands in Shedlington in Bedfordshire. I give, devise and bequeath my dwelling-house and the lands therewith held, in Bushey, and the farm in the tenure [1090] of John Staines; together with my blacksmith's shop in the tenure of James Wilking, and the little house adjoining, to my dear wife, in as full and ample manner as I enjoy the same, and subject to her disposal as effectually as I have power to give. I also give my dear wife my estate at Chain-Gate in Southwark, conveyed from my daughter Valentina Snow. I give and devise to my dear wife my farm at Bovington in the tenure of John Smith, subject to her disposal in as full and absolute manner as I could dispose of the same if living. Lastly, I make my dear wife Susannah Paul my sole executrix; and give, devise and grant to her and her heirs all my estate real and personal, freehold and copyhold, mentioned in this my will: and I give her full



power to sell, give, or grant the same in fee-simple, in as ample a manner as I could do if living. I wrote this with my own hands; being in good health."

That in the year 1718 Jonathan Hammond, as heir to his father, was admitted to the farm at Bovington in the above will mentioned: for which, one quit-rent was reserved, and one heriot: and his admission is as follows: viz. "Ad curiam baron Henshaw Halsey arm' domini manerij præd', ibidem tent' diebus Martiris et Mercurij viz. decimo et undecimo diebus Junij anno regni Domini nostri Georgij D. G. M. Br. Fr. et Hiberniæ regis F. D. &c. quarto, annoq; Domini 1718, coram Carolo Pultney armigero tunc seneschallo ibidem. Ad hanc præsentatum est per homagium, quod Jonathan Hammond alias Cooper, senior, de Great Marlow in com' Bucks, generosus, unus customar' tenent' hujus manerij, qui de domino maner' præd' tenuit sibi et heredibus suis, per copiam rotulorum hujus curiæ, unum messuagium sive tenementum et firmam tent, per copiam rotulorum, in parochia de Bovendon, vocat' Great Shantocks, per annualem reddit' 3l. 6s. 2½d. obiit inde seiscitus: ratione inde accidit domino pro heriotto, unus equus, valoris 6l. 5s. et quod Jonathan Hammond alias Cooper, de Great Marlow præd' generosus, est ejus filius et hæres, et plenæ ætatis: qui quidem Jonathan Hammond alias Cooper, presens hic in curia, petit à domini manerij præd' se admitti tenent' ad' præmiss: prædict' cum eorum pertinentiis. Cui dominus prædictus, per seneschallum suum, concessit inde seisinam per virgam; habend' et tenend' premissa præd' cum eorum pertinentiis præfato Jonathan' Hammond alias Cooper hæred' et assign' suis imperpetuum, per vergam, ad voluntatem domino, secund' consuetudinem manerij [1091] præd', per annualem reddit' 3l. 6s. 2½d. et alia servitia inde priùs debet' et de jure consuet': deditq; domino pro fine pro tali statu sic inde habend' 1l. 13s. 1¼d. et admissus est inde tenens, et fecit domino fidelitatem."

That the said Jonathan Hammond kept the whole of the estate to which he was so admitted, in his own hands, till the 19th of March 1719; and then by lease of that date, demised to William Smith his son, all that messuage or tenement and farm, with all and every the closes, fields, pieces, and parcels, of arable land, lay meadow, and pasture ground, with their appurtenances thereto belonging or appertaining, situate, lying and being in the parish of Bovington in the county of Hertford, and which said messuage or tenement and farm is commonly called or known by the name of Great Shantocks Farm, and is now in the possession of John Harding his under-tenants or assigns, or by whatsoever other names the same now is or hath been called or known; and also all houses, out-houses, edifices, buildings, barns, stables, yards, orchards, gardens, backsides, ways, waters, common profits, and commodities, hereditaments, and appurtenances, whatsoever to the said intended to be hereby demised messuage or tenement, or farm lands and premises, belonging or appertaining, or therewith letten or enjoyed, or accepted or taken as part or parcel thereof; except and always reserved out of the said demise, unto the said Jonathan Hammond his heirs and assigns, all and all manner of wood, wood-ground, hedge-rows, timber, and trees whatsoever, with the lops, tops, and shrowds of the same, (other than the lops of pollard-trees, and other than fruit-trees for their fruit only,) now standing, or growing, or being, or which shall at any time or times hereafter stand or be in or upon the demised premises or any part thereof; with free liberty of ingress, egress, and regress, to and for the said Jonathan Hammond his heirs and assigns, with workmen, servants, horses, carts, and carriages, at all seasonable times, to fell, sell, cut down, hew out, have, take, carry, and dispose of the said wood, under-wood, hedge-rows, timber, and trees at their pleasure, doing no wilful spoil or damage to the said William Smith and John Smith their executors, administrators, or assigns, their standing corn or mowing grass; to hold the said messuage, or tenement, and farm, arable lands, lay, meadow, and pasture grounds, except before excepted, unto the said William Smith and John Smith their executors, administrators, or assigns, from the Feast-Day of St. Michael the Archangel then next ensuing, for three years at 85l. per annum.

That in the year 1721, Dr. Paul purchased from the said Jonathan Hammond all the premises to which the said Jonathan Hammond had been admitted as aforesaid; of which premises a plan had been made in the year 1719; which after the purchase, was hung up by Dr. Paul in his hall. That this plan was intitled "an exact draught of the estate and farm of Dr. George Paul, called Shantocks, lying in the parish of Bovington in the county [1092] of Hertford about three miles east from Chesham four



south from Berkhamstead, four south-west from Hempstead, and about twenty-two north-west from London ; containing

	A	R	P
"Arable	171	2	12
"Wood	20	0	30
	191	3	2"

That William Smith, the father, and John Smith, the son, without any new lease, enjoyed what had been so demised by the said Jonathan Hammond : and Dr. Paul kept in his own hands, till the time of his death, the premises excepted ; which consist of hedge-rows, which in some places are three poles thick, and in others less and only two ; and of chalk dells where wood has grown up after the chalk has been taken away, entirely surrounded by the lands in the tenure of the tenant ; and also of one entire wood of six acres, entirely inclosed by the lands in the tenure of the tenant or by the lands of other persons.

The question is, "whether the premises so excepted in the lease to Smith, and so occupied by Dr. Paul himself at the time of making his will, were by such will devised to his widow."

Mr. Eliab Harvey was of counsel for the plaintiff, the heir at law ; and argued that the woods which were excepted out of the lease from Mr. Jonathan Hammond to William Smith and John Smith, and were occupied by Dr. Paul himself, did not pass to the widow, by this will ; but descended to the plaintiff, his son and heir, as being undeviseed at all.

He urged, that the plaintiff's case was intitled to a favourable construction ; as he appears to be an only son and heir at law, disinherited by his father, without any apparent reason, (perhaps from caprice only :) and therefore mere presumptive arguments ought not to hurt him.

He observed, that the words of this devise are "I give to my wife my farm at Bovingdon in the tenure of John Smith:" but the testator does not say "all my farm at Bovingdon ;" nor does he express it—"And in the tenure of John Smith." It is only "my farm at Bovingdon in the tenure of J. S." The Court will not, in prejudice to the heir at law, reject those words "in the tenure of J. S." which make the description of what the testator meant to devise to his wife : for the expression in the first part of the will is not certain, but doubtful.

[1093] He cited Bacon's || *Maxims of the Law* : Cro. Jac. 21, *Tuttlesham v. Roberts*. Cro. Car. 129, *Chamberlain v. Turner*. Plowd. 191 b. *Wrotesley v. Adams* ; and *Shaw v. Bull*, Cases in B. R. temp. W. 3, pa. 592, and prayed to have the postea delivered to the plaintiff.

Mr. Thomas Clerk (of Lincoln's Inn) was for the defendant : but the Court saved him the trouble of speaking.

Lord Mansfield.—This is too plain a case, to need any thing to be said on the defendant's side.

I never deny making a case for the opinion of the Court, whenever it is asked of me, by the counsel for either party, at Nisi Prius ; provided that the case be set down to be argued within four days. But I did and still do think the present case to be a very plain one.

I am sorry that Dr. Paul has not thought fit to make a better provision for his only son : but he certainly meant and intended to give all his estate to his wife. He not only expresses this intention as to all his estates freehold and copyhold, generally ; but he likewise enumerates the particulars : he gives them all to her, absolutely ; and he likewise gives her a power to dispose of them in as full and ample a manner as he himself could do, if living. He puts into his will, all possible words that can give every thing to her.

The question turns only upon the description of the thing meant to be here given. The words "in the tenure of John Smith" cannot be understood as a restriction : they are an additional description ; which will † not vitiate any thing that is sufficiently described before. He had before given her "his farm at Bovingdon" ; (which had gone at one rent, and had been used and passed as one entire thing ; and for which,

one entire quit-rent had been paid;) and he adds, as a further description, that it was "in the tenure of John Smith."

What was not in lease to Smith, is to be considered in two lights; viz. hedge-row trees and chalk-dell trees: and also six acres of wood.

But the hedge-rows and chalk-dells themselves are actually in the tenure of John Smith; though the trees are excepted.

As to the six acres of wood-land—indeed the soil is excepted out of Smith's lease, as well as the trees. But [1094] Dr. Paul gives his wife a power to dispose of the farm in as full and absolute a manner as he himself could dispose of the same, if living: and he himself might certainly dispose of the soil of these six acres.

It is manifestly intended, that the whole farm should pass by this will: and the testator never thought of any restriction of his devise, but meant these words "in the tenure of J. S."—only as an additional and fuller description of a thing sufficiently ascertained before.

Mr. Just. Denison concurred, that the testator's intention certainly was, to devise the whole farm to his wife; and that he never thought of the exception of the wood-lands, nor intended to restrain the devise: and that the words "in the tenure of J. S." are only an additional description.

Mr. Just. Wilmot was of the same opinion: and he likewise thought it a clear case. The testator meant this as an additional description, and not as a restriction. He certainly did not intend to die intestate, as to any part of his estate. The words—"in the tenure of J. S." are not to be considered as words of limitation or restraint. "My farm at Bovington," is, "all my farm at B." If the testator had meant otherwise, he would have specified that part of it which he meant to exclude and except out of this devise: but this devise of the farm is tantamount to his devising it by the specific name of Shantacks Farm. The nature of the property shews it. The very exceptions in the lease indicate that it was intended to keep these excepted parts connected with the farm, and not severed from it. And the testator could never mean to give Mrs. Paul the lops and mast of the pollards, and the fruit of the fruit-trees, and not the trees themselves. And yet she would, upon this will, be intitled to these; as appears fully in *Richard Liford's case*, 11 Co. 48.

Per. Cur. unanimously,

Let there be judgment for the defendant.

**BODILY versus BELLAMY.** Saturday, 22d Nov. 1760. [S. C. 1 Black. 267.] Indian interest when made principal here, bears English interest. [See 1 H. Bl. 230. 2 Ves. jun. 717. 1 Bosanq. 151. 6 Ves. 416. 2 Durn. 53, 58. 2 Brown. 645.] [Vide Str. 931. 4 Burr. 2128. Bull. 178. Sider. 442. 2 Durn. 57.]

Mr. Norton, on behalf of the plaintiff, shewed cause against a rule which had been obtained by Mr. Morton, (of counsel for the defendant,) "for the plaintiff to shew cause why, upon payment of the whole penalty of the bond, together with all the costs in this Court, and also the costs of the writ of error brought upon the judgment given by this Court, the execution should not be stayed, and satisfaction entered upon the record."

[1095] The case was very particular.

It was an action brought here, in this Court, upon a bond given at Calcutta (in Bengal) in the East Indies, where both parties then resided, and where the plaintiff still resides; but the defendant is in England: at which place (Calcutta) the allowed interest is 9l. per cent.; which is the rate payable by the condition of the bond on which the present action was brought.

The declaration was in debt, for 1546l. 14s. 6d. It contained two counts. One was upon the bond, for the penalty of 9165 rupees of Calcutta, of the value of 1031l. 3s. of lawful money of Great Britain: the other was upon a mutuatus for 4582 rupees, of the value of 515l. 11s. 6d. (residue of the said sum of 1546l. 14s. 6d.). The plaintiff laid his damage at 10l.

The plea was, "non est factum," as to the first count; and "nil debet," as to the second. The action was brought in 1756: and the cause was tried before Lord Mansfield, in Michaelmas term, 1759.

Upon the trial, the bond was proved: but no evidence at all was given upon the second count, of any money lent to the defendant; nor had he in fact borrowed any

other money of the plaintiff than the very sum for which he gave the bond. Notwithstanding which, the verdict was taken (through mistake, or inadvertency) for the plaintiff generally, upon both counts: and the judgment was entered accordingly, and remained unimpeached.

At the time of the judgment, the penalty of the bond was sufficient to have answered the whole of the debt, interest, and costs then incurred.

But the defendant had affected very great delay, in various methods. He had brought a bill in equity for an injunction; and had taken exceptions to the answer; and hindered the getting the injunction dissolved, till Hilary term 1759; when (after arguing the exceptions) it was dissolved on the merits. He then immediately brought a writ of error in the Exchequer Chamber, merely for delay; and assigned the common errors. Then he pleaded "nul tiel record" to the scire facias upon the judgment. So that he prevented the plaintiff from signing his final judgment, till the 13th day of this very month (nine days ago).

These delays having cost much time and money too (as the costs taxed always fall short of the costs out of pocket,) and the interest running on; the case was so altered, that at this time, the penalty of the bond [1096] alone was become insufficient, (by about 150*l.*) to answer the total of the debt, interest, and costs now incurred.

It was therefore insisted by Mr. Norton, on behalf of the plaintiff, that the Court will not interfere to give their assistance to the defendant, contrary to the plain, clear, obvious justice of the case. He admitted, that if no evidence was given at the trial, on the second count, of any money borrowed by the defendant of the plaintiff, there should indeed have been a verdict taken for the defendant, upon that count; and it was a mistake, to neglect it: but he is too late to complain of that mistake now. If he had complained in proper time, the penalty of the bond would then have answered the plaintiff's whole demand at that time due to him: but as the defendant had wilfully and obstinately delayed the plaintiff, till the case is much otherwise, he has no pretence to apply to the Court to stop the plaintiff's taking out his execution upon the judgment as it now stands.

Lord Mansfield—It is admitted that there is a mistake in the taking this verdict; and consequently, in the judgment. It may be proper then, first to consider "what is the fair honest justice of the case:" and "whether the plaintiff cannot come at it, although this mistake should be rectified." If he can, it is to no purpose, for the defendant to desire it to be rectified: his wisest way will be, to make satisfaction immediately, without more expence.

The plaintiff does not insist to avail himself of the mistake in the verdict and judgment, beyond his just demand.

The plaintiff is in justice intitled to recover the sum really lent to the defendant, together with Indian interest till the signing of the judgment; but with only the legal interest of this country (which is no more than five per cent.) from the time of the liquidation of the debt by the judgment.

The plaintiff, having been kept out of his money by a writ of error brought after a verdict, is intitled to a satisfaction for this damage, under the statute of <sup>\*1</sup> Car. 2; which obliges the plaintiff in error to give security as well for damages as costs: or he may bring an action of debt on the judgment, and have damages pro detentione debiti.

There are four Courts, (all included under the same Act of Parliament,) to which writs of error may be made returnable; namely, the House of Lords; the Court holden [1097] before the Lord Chancellor and Treasurer and Judges (under 31 Ed. 3) for examining erroneous judgments in the Exchequer; the Court of Exchequer-Chamber, holden before the Judges of the Common Pleas and Barons of the Exchequer (under 27 Eliz. c. 8) for examining into errors in the judgments of <sup>\*2</sup> this Court; and this Court itself, for correcting the errors of the King's Bench in Ireland, Common Pleas here, and other Courts.

In the first of these, (the House of Lords,) they give sometimes very large, some-

<sup>\*1</sup> V. 13 Car. 2, stat. 2, s. 8, 9, 10.

<sup>\*2</sup> N.B. This is confined to causes not commencing here by original: for where the action commences in this Court by original, the writ of error is returnable in Parliament.



times very small costs, in their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the Court below.

In the second, it is done by the Lord Chancellor or Lord Keeper personally : and the practice is, to give interest from the day of signing the judgment to the day of affirming it there ; computed according to the current, not according to the strictly legal rate of interest.

In the third, (the Exchequer-Chamber,) the course is, for the officer to settle it, unless any particular direction be given by the Court : and he, in taxing the costs, allows double the money out of pocket or thereabouts, but adds \*1 no interest.

In this Court, upon writs of error from C. B. &c. the officer taxes the costs of affirmance ; and taxes them in the same manner as he taxes other costs, though somewhat more liberally : but our officer never has any regard to interest, nor allows it as of course. The Court themselves have sometimes indeed ordered interest to be computed on the sum liquidated by the judgment below : one instance of this was in the case of *The Bishop of London and Leven*, against *The Mercer's Company*, and is mentioned in 2 Strange, 931, that was a writ of error upon a quare impedit ; and the judgment below was for 70l. for half a year's value of the church, and for a writ to the bishop : which judgment having been affirmed here, the defendants in error moved, in Easter term 5 G. 2, for costs and damages on 3 H. 7, c. 10. And they would have had the damages computed according to the value of the church, during the time of their being kept out of their presentation. The Court, after deliberation, agreed that it was in their discretion, to settle the quantum of damages ; but they did not think it right to give damages to the patron, in proportion to the profits of the benefice ; because he himself would not have been intitled to receive them. They declared therefore, that the measure they went by was the interest of the money recovered, the legal interest from the time of bringing the writ of error to the time of affirming the judgment. And they directed the Master to compute the damages accordingly, viz. legal interest upon the 70l. recovered ; and to add it to the costs.

So here, in the present case, interest ought to be paid after the rate of 9 per cent. according to the Indian allowance, till the ascertainment of the sum to be paid by signing the judgment ; and from that time, till the actual payment of the money, after the rate of 5 per cent. only, upon the accumulated sum ascertained by the judgment : for that is the real damage which the plaintiff has sustained by the delay of his execution and the detention of his debt.

The justice of the case is plain ; and the law is agreeable to it.

Mr. Morton agreed that his client, the defendant, had better acquiesce in paying the plaintiff what was justly and fairly due to him, voluntarily and without further litigation, than to render himself liable to the costs of another action.

Wherefore he gave up his present motion : and no rule was taken upon it.

BONFIELD, QUI TAM, &c. *versus* MILNER. 1760. Declaration in a *qui tam* for usury, amended in altering the date of the note, all being in paper. [See 2 Durn. 707. 4 Burr. 2570. 5 Burr. 2834. 2 Vin. 403. 6 Durn. 173. 7 Durn. 55.]

In a *qui tam* action, for usury, Mr. Stowe shewed cause against making absolute a rule of Mr. Yates's, for discharging a rule which had been before obtained by Mr. Stowe himself, for amending the declaration, in altering the date of the note ; (all being in paper). He cited *Griffith, qui tam, &c. v. Hollyer*, Trin. 29, 30 G. 2, B. R. where the plaintiff had leave to amend his declaration, by laying the venue at Alcester in Warwickshire, instead of Woodstock in Oxfordshire ; and the Court were clear "that it might be done at any time whilst the proceedings were in paper ;" and Mr. Just. Denison declared and repeated "that it was an amendment at common law."

Mr. Norton, and Mr. Yates, contra—The last day of last term, this motion was \*2 denied to Mr. Stowe. Here is issue joined, and entered on the roll : and many terms have elapsed since the commencement of this action : and the amendment proposed is to vary the count, to add a new count, which is a new kind of action ; for it is to alter the date of the notes.

\*1 V. post, p. 2127, *Welford v. Davidson*, 8th July, 1767.

\*2 *Hodson, qui tam, &c. v. Milner*, Trin. 1760, (a case very like this, though not precisely the same).

The statutes do not extend to penal actions: and at common law, they come too late.

[1099] In *Sir William Turner's case*,<sup>†</sup> it is not allowed after issue joined: and Mr. Stowe's former rule was <sup>†</sup> discharged, on that authority, upon Mr. Altham's motion.

Lord Mansfield—The rule is, "that whilst all is in paper, you may amend." Here, he has only mistaken the date. In the Exchequer, they amend penal informations. To be sure, the Statutes of Amendment do not extend to penal actions.(a) This is an amendment at common law.

Mr. Just. Denison—There is no difference between civil and penal actions; where they apply as for an amendment at common law, and all is in paper.

|| Per Cur. unanimously,

Mr. Yate's rule to shew cause "why upon payment of the plaintiff's costs of making the former rule of last term absolute, together with the costs of this application, the said former rule (of Wednesday prox. post. tres Trin.) should not be discharged," was now itself discharged.

SIR WILLIAM YEA *versus* FOURAKER. Monday, 24th Nov. 1760. [S. C. Bull. 149.]

A debt acknowledged after an action is brought, takes it out of the Statute of Limitations.

[Held overruled, *Bateman v. Pinder*, 1842, 3 Q. B. 575.]

In an action upon a promissory note, tried before Mr. Just. Noel upon the Western Circuit, it was there ruled by him, and confirmed by this Court, without argument, upon a motion here for a new trial, "that an acknowledgment of the debt, after the commencement of the action, takes it out of the Statute of Limitations."(b)

REX *versus* PETER WRIGHT, ROBERT VOSS, ET AL'. 1760.

On the motion of Mr. Norton, who moved on behalf of the relations and friends of one Mrs. Frances Savage, a woman addicted to and almost destroyed by liquor, representing that she was in the hands of very improper persons, who were suspected to be using artifices with her, in order to the obtaining a will from her, when she was under very improper circumstances of mind to make one; and was too much under their influence, even if her understanding and memory had been [1100] more perfect, and less disordered by intemperate drinking: a rule was made upon the defendants to shew cause why an information should not be exhibited against them for the misdemeanors charged in the affidavits.

It was also added to the rule, at first (and without any rule to shew cause as to this part of it,) "that Frank Nichols, Dr. of Physic, Robert Halifax, apothecary, Catharine Forcer, widow (who was mother-in-law to Mrs. Savage, then a widow,) Thomas Lloyd, gentleman (attorney for Mrs. Forcer,) John Little and Anne his wife (relations to Mrs. Savage,) Margaret Francis, a nurse, and Jane Francis, a maid-servant, should at all proper times and seasonable hours, respectively be admitted and have free access to the said Mrs. Francis Savage, widow, daughter-in-law of the said Catharine Forcer, at the dwelling-house of the said Robert Voss (one of the

<sup>†</sup> 2 Mod. 144.

<sup>†</sup> *Hodgson, qui tam, &c. v. Milner*, Trin. 1760.

(a) There is nothing excepted out of the stat. 8 Hen. 6, c. 12, which is properly a Stat. of Amendment, but appeals and indictments of treason and felony. Per Cur' *Wynne v. Middleton*, East. 18 G. 2, Str. 1227.

|| Note—The present resolution (though contrary to *Sir William Turner's case*, is agreeable to many latter determinations, particularly to *D'Onle v. Daniel*, Tr. 1732, 5, 6 G. 2. *Strode v. Tilly*, H. 15 G. 2. *Rivet v. Cholmley*, H. 17 G. 2. *Hallet v. Hallet*, Tr. 21 G. 2, and *Griffith v. Hollier*, Tr. 1756; all which were *qui tam* actions, and all in this Court. (*Hodson qui tam v. Milner*, was in the hurry of the last day of a term; and only two Judges in Court.)

(b) Holt said the Stat. of Limitations was one of the best of statutes, and the pleading thereof no disparagement to any body, and defendant had judgment nisi. *Green v. Rivit*, 7 Mod. 12. See also 6 Durn. 191. 4 East, 602.

defendants) in Furnival's Inn Court, Holborn, to consult with, advise, and assist the said Frances Savage."

N.B. It was represented, that she was too infirm and weak, to be brought into Court by an habeas corpus: (and in fact she died the next day).

DOE, EX DIMISS. LONG, *versus* LAMING. Tuesday, 25th Nov. 1760. [S. C. 1 Bl. 265.] A devise to one, and her heirs, may in particular circumstances, make the heirs take by purchase. [See Cowp. 410. 2 Atk. 220. 2 Str. 729. 2 Freem. 186. 2 Bl. Rep. 695, 1002. Doug. 306. Brown. 206. Amb. 562. 4 Durn. 82. 1 Bos. 206. 4 Brown. 543. 5 East, 553. 6 Durn. 31. 7 Durn. 532. 1 Bosanq. 219. 1 East, 229. 3 East, 537.]

[Referred to, *Goodtitle v. Herring*, 1801, 1 East, 273. Distinguished, *Doe d. Bagnall v. Harvey*, 1825, 4 Barn. & C. 623; 7 Dowl. & R. 93. Applied, *Doe d. Atkinson v. Featherstone*, 1831, 1 Barn. & Ad. 950. Commented on, *Jack v. Featherston*, 1835, 9 Bli. N. S. 276; 3 Cl. & F. 76. Discussed, *Montgomery v. Montgomery*, 1845, 3 Jo. & Lat. 52; 8 Ir. Eq. R. 746.]

This was a special case, which arose upon an ejectment brought for gavel-kind lands in Kent, tried before Lord Mansfield at Nisi Prius.

The ejectment was brought by the heir at law of one Martin Long, for an undivided fourth part of one messuage, &c. in the parish of St. John the Baptist in the Isle of Thanet in Kent.

Special case stated for the opinion of the Court—

Martin Long, being seised in fee, &c. made his will, &c. and thereby devised thus — "I give and devise one equal undivided fourth part, &c. unto my nephew Martin Read, and to the heirs of his body lawfully to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common and not as joint-tenants. Also I give and devise one other equal undivided fourth part, &c. unto my niece in law Grace Read, widow of my late nephew Edward Read deceased; and to the heirs of her (a) body lawfully begotten, as well males as females, and to their heirs and assigns for ever, to be divided equally share and share alike, as tenants in common [1101] and not as joint-tenants. (b) Also I give and devise one other equal undivided fourth part, &c. unto my niece Anne, now wife of William Cornish, and to the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally share and share, as tenants in common and not as joint-tenants. Also I give and devise one other equal undivided fourth part, &c. unto my niece Sarah (c) now wife of S. Hooper, and to the heirs females and males of her body lawfully begotten or to be begotten, to be divided (as before,) and to their heirs and assigns for ever."

There were likewise in this will, other devises of other estates; viz. "I give and devise unto my nephew J. Tickner his heirs and assigns for ever, all that, &c. &c." "I give and devise my farm, &c. unto my sister Catharine, wife of William Abbot, and to her assigns, for and during the term of her natural life: and from and after

(a) This is a mistake; for in the will, as in the brief, the word was his and not her: and yet the reporter in page 1111, makes Lord Mansfield argue on a supposition that it was her, which must be a mistake of the reporter's; for it cannot be supposed that Lord Mansfield would found any part of his argument on a mistaking of the words of the will; or if that could be supposed, yet the other Judges, and even in such a case the counsel, would certainly have set him right.

(b) The like limitations in a deed as in this case were decreed to create an estate tail, in the first taker, (5 MS. 628, notes;) but there were not words of limitation superadded in that case to words of limitation, as there are in this case. See also 3 Durn. 145. And qu. whether there must not necessarily have been some blunder in drawing the will, or in the clerk's making a fair copy of it, and the blunder not discovered? And qu. as to a devise of a term for years in words not very unlike to those in this case? 7 Durnf. 555.

(c) Eq. Abr. Cas. 4. 3 Brown. 82. Amb. 499, 502. 4 Durn. 82, 300. Doug. 231. 2 Bl. Rep. 1002. Fearn, 107, 108.



her decease, I give the same unto my nephew her son William Abbot and the heirs of his body lawfully to be begotten, for ever: and for want of such issue, I give and devise the same to the right heirs of me, for ever."

"And as concerning my messuages, &c. I give and devise the same to Elizabeth Long, her heirs and assigns for ever."

"And as concerning, &c. I give and devise the same to my sister Sarah Tailor and her assigns, during her natural life, provided she keep the same in repair: and from and after her decease, I give the same to my sister Elizabeth Long her heirs and assigns for ever."

"Also I give and bequeath to my niece Sarah now wife of William Long, and to the heirs of her body, the sum of 150l. of like money to be divided between them equally."

The testator lived two years after making this will: he died in May 1751.

At the time of making the said will, the testator's said niece Anne Cornish, wife of Thomas Cornish, had two daughters (by her said husband) then living; viz. Elizabeth and Anne.

Anne Cornish, the testator's niece, died after the time of making the will; but in the life-time of the testator: and her two daughters, Elizabeth and Anne, survived both their said mother and also the testator Martin Long.

[1102] The whole premises are gavel-kind.

The question submitted to the Court is—"Whether, by the death of Anne Cornish (the mother) in the life-time of the testator, the devise, as to her one fourth part, was void or lapsed: (d) or whether the said one-fourth part devised as above, or any and what part thereof on the testator's death, descended to the lessor of the plaintiff, as heir at law to the testator."

Mr. Filmer, Junior, argued this case for the plaintiff.

He endeavoured to maintain that either the whole of the one-fourth part devised to Anne Cornish was lapsed by her dying in the testator's life-time; or, at least, that some part of it was so; and that what was lapsed would consequently descend to the lessor of the plaintiff, as heir at law to the testator.

Anne Cornish, the testator's niece, would have taken, he said, if she had survived the testator, an estate in tail general; or, if not so, then she must have taken one third part of the fee simple, as tenant in common with her two daughters: if the former, the whole is lapsed; if the latter, one third only.

But he conceived that she would have taken an estate in general tail, by purchase, under this devise.

The word "heirs" (in the plural number,) is a word of legal limitation: and there is no instance, in case of a mere legal estate, where "heirs of the body" have been construed to be words of purchase. The case of *Bayshaw v. Spence* was a trust.

The Court will keep to the legal technical interpretation.

The case of *Goodright v. Pulleyn et Al*, M. 11 G. 1, B. R. reported in 2 Ld. Raym. 1437, is material to this point.

There was likewise a case before the council, on 18th March 1730, at which Ld. Raymond and Ld. Ch. J. Eyre were both present. It was between *Morris, on the demise of William Andrews, and Isaac le Gay and John Wood*: upon an appeal from Barbadoes. It was a devise "to Lucretia, for life; then to the heirs of the

(d) The 1st point was that the will should be construed as giving an estate tail to A. C.; and consequently by her death in the testator's life, the devise of this fourth part was lapsed; and the 2d point was that if the above construction should not be admitted, it must be on this ground that the words "heirs of her body lawfully begotten or to be begotten as well females as males," must be construed in the same sense as the word children; and then the case would be the same with the common case, put Co. Lit. 9 a. and in other books of "a devise to A. and his children (he having children at the time) and to their heirs," which has always been taken to make A. and his children joint-tenants in fee; and if this construction had been allowed of, then by the death of the testator's niece Anne, in his life-time, one-third of the one fourth devised to her and her children would have survived if it had been a joint devise; and consequently as it was not so, but a devise to them as tenants in common, the one-third of the one fourth which the niece Anne would have taken had she survived the testator, must by her death in his life have become lapsed.

body of Lucretia, and their heirs : and if she died without such heir of her body, then over." This was holden to be an estate tail in Lucretia.

[1103] There were also two late cases in Chancery ; viz. *Wright v. Pearson*, June 6th 1758, Trin. 31 G. 2, where Thomas Raleigh was holden to take an estate tail : (this case upon a trust-estate). The other was *King v. Burrhell*, 20th November 1759, before the Lord Keeper Henley. John Blunt devised to his wife, for her life ; then to John Harris, for life ; then to the heir male of John Harris, and his heirs ; and for want of such issue, then over. John Harris was holden to have taken an estate tail ; though there were words of limitation over. An appeal was brought ; but afterwards deserted.

The word "heirs," in the plural, with words of limitation added to it, has never been construed to be a word of purchase : but the word "heir," in the singular has been construed to be a word of limitation.

An estate tail to Anne Cornish best answers the apparent intention of the testator.

But if "the heirs of her body" are to be here construed as words of purchase ; then Anne Cornish and her two daughters must take an estate in fee simple, as tenants in common and not as joint-tenants ; each of them one-third of the whole one fourth part : and consequently, as she was (in that construction of the devise) made tenant in common, in thirds, with her two daughters, but died before the testator ; her one-third lapsed by her death, and descends to the plaintiff as heir at law.

Mr. Thomas Clarke (of Lincoln's Inn) argued for the defendant.

He proposed to consider the question, under two general heads ; 1st, the intention of the testator, to be collected from the whole will ; 2dly, the operation of law, to effectuate such intention.

First—The intention of the testator plainly was, "that all the children of his niece Anne Cornish, both sons and daughters should take : and they only :" though it is not indeed so clear, whether he meant that they should take as tenants in common with their mother ; or after her death. He probably meant it as a description of heirs in gavel-kind : but he certainly meant that they should take as purchasers ; and that they should take an estate in fee ; and not that Anne Cornish should take an estate tail.

This intention is plainly to be collected, he said, from several other clauses in the will. The several other devises shew, that, by "heirs of the body," the testator meant children : particularly, the bequest to Sarah the [1104] wife of William Long, and to the heirs of her body, of the sum of 150l. to be divided between them equally ; which can be taken in no other sense. And in the devise to William Abbot and the heirs of his body, he explains his meaning, by adding "and for want of such issue."

Secondly—The operation of law will effectuate the intention of the testator, where it is plain and manifest. And here is a plain manifest intention of the testator, "that his devisees should take by purchase, and not by descent."

And "heirs of the body," (in the plural) may be words of purchase, where the intention of the testator is clear and evident. There is no such distinction<sup>†1</sup> as that which Mr. Filmer has laid down "that where the words of limitation are grafted upon the word heir in the singular number, that word shall be construed a word of purchase ; but where the words of limitation are grafted upon the word heirs in the plural, that plural word heirs shall always be construed a word of limitation."

In the case of \* *Bagshaw v. Spencer*, "heirs of the body," were construed to be words of purchase. And in that case, Lord Hardwicke mentioned a case of † *Lisle v. Gray* : where the word was plural, and the same determination was made : and that case of *Lisle v. Gray*, was upon a deed, and at common law.

*Law v. Davies et Al*,<sup>†2</sup> M. 3 G. 1, B. R. was a devise "to Benjamin Jevon and the heirs of his body lawfully to be begotten ;" and words of limitation were super-added : yet it was holden to be an estate for life ; not in tail.

All the parts of a devise ought to be taken into the construction : and the intention of this testator was, "that all the devisees should here take by purchase."

<sup>†1</sup> Contra 1 Co. 66.

\* Mich. 1748, 22 G. 2, in Canc.

† Vide post.

<sup>†2</sup> FitzGibbon, 112, and 2 Ld. Raym. 1561.

And the words are sufficient and apt enough for that purpose. In proof of his allegation, he cited 1 Co. 95, *Shelley's case*, cited in 1 Ld. Raym. 205, by Ld. Ch. J. Treby, and confirmed by him. 1 Ld. Raym. 203, *Ludington v. Kime*: and *Clerk v. Day*, or *Cheeke v. Day*, there cited, in Pa. 205. || 1 Inst. 26 b. devise "to Roberge, and to the heirs of John Mandevile her late husband, on her body begotten," was adjudged only an estate for life in Roberge; and that the estate tail vested in her son; "heirs of the body of his father," being a good name of purchase.

If it be objected "that this intention could not operate to the daughters of Anne Cornish as heirs of the body of Anne Cornish who was then living, (for that nemo [1105] est hæres viventis:)" the case of *Burchett v. Durdant*, 2 Vent. 211, (which was six times determined, under different names,) is a full answer to that objection; and shews that persons may take an immediate and vested estate, under the denomination of "heirs of the body of a person living."

Upon the whole, the Court will depart from the strict rules of the words of rigid legal limitation, where the intention of the testator is manifest: and it is here sufficiently plain and clear, to induce the Court to do so in the present case.

N.B. This argument was begun upon the 21st of November: from which day, it was adjourned to the present 25th. And now—

Mr. Filmer replied—He denied, that the testator's intention was clear, plain and manifest; either upon the particular clause in question, or upon the whole will taken together. The intention supposed by Mr. Clarke is opposite to the testator's plain positive words. The plain words must be adhered to; and the impertinent or inconsistent words, rejected. *Shelley's case*, 1 Co. 89.

But if the intention was clear and plain, yet there is a difference between legal estates, and trusts: in *Bagshaw v. Spencer*, Ld. Hardwicke made this distinction: which he founded on the case of *Coulson v. Coulson*. And even in Chancery, there is a distinction (upon this point) between what they call a trust executed, and a trust executory.

As to the word "heirs" (in the plural,) being descriptive of the person, although nemo est hæres viventis—He observed that Mr. Justice Fortescue, in the case of *Goodright v. Pulleyn et Al'*, thought that the word "his" (heirs) would, in grammatical construction properly refer to \*Nicholas.

In all Mr. Clarke's cases, except *Law v. Davis*, there was a limitation for life: and that case stands upon its own circumstances. The words "heirs of the body" were there explained by the following words, "that is to say, to his 1st, 2d, 3d, and every other son and sons successively, &c."

So, in *Lisle v. Gray*, "heirs male" had a plain reference to the four sons.

The quotation from *Shelley's case*, 1 Co. 95 b. is only a case put by Anderson,<sup>(c)</sup> arguendo: the resolution is contrary.

As to *Ludington v. Kime*—it only proves that "issue" may be a word of purchase: but it does not prove, that "heirs of the body," may be so.

[1106] Upon the whole, Anne Cornish must have taken an estate tail; not an estate for her life only; but, at least, she was to have taken one third of the fee-simple, as tenant in common with her two daughters; for a devise to A. et liberis suis, and to their heirs," is a joint-fee to all. So is Co. Lit. 9 a. express; which is allowed and affirmed in the case of *Oates, on the demise of Elizabeth Hatterley v. Jackson*, 2 Strange, 1172.

Lord Mansfield. The words are—"To my niece A. C. and to the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever: to be divided equally, share and share alike, as tenants in common, and not as joint-tenants."

The question is, "whether it be contrary to the rules of law to understand, in this case, 'heirs of the body of A. C.' as a description of children: for that such was the intention of the testator, there can be little doubt."

It is to be lamented, that questions of this kind have occasioned so much

|| See it also in Viner's Abr. tit. Remainder, p. 393. Note on letter G. pl. 7.

\* See 2 Ld. Raym. 1440.

(c) Anderson was not there a Judge, but was the Queen's serjeant, and one who argued as counsel for the plaintiff.



litigation and expence. The best way to settle them, is, to reduce the matter, if possible, to some certain rules.(f)

It is clear, that where an estate is given to the ancestor "and his heirs" (either general or special,) the term denotes the quantity of the estate which the ancestor takes; viz. either fee-simple, or fee-tail.(g)

It is clear too, that a person to take as a purchaser, may be described from every course of descent; as heir at law, heir in borough-English, heir or heir male of the body.

By an ancient maxim of law, although the estate be limited to the ancestor expressly "for life, and after his death to his heirs," (general or special,) the heir shall take by descent, and the fee shall vest in the ancestor.

This maxim was originally introduced in favour of the lord, to prevent his being deprived of the fruits of the tenure; and likewise for the sake of specialty creditors.(h)

The ancestor, had the limitation been construed a contingent remainder, might have destroyed it for his own benefit. If he did not destroy it, the lord would have lost the fruits of his tenure; and the specialty creditors, their debts. Therefore the law said, "Be the intention as it may, where an estate is given to an ancestor and his heirs, the fee shall vest in him."

[1107] The reason of this maxim(i) has long ceased; because tenures are now abolished, and contingent remainders may be preserved from being defeated before they come in esse; yet, having become a rule of property, it is adhered to in all cases literally within it, although the reason has ceased. But where there are circumstances which take the case out of the letter of this rule, it is departed from, in favour of intention; because the reason of the rule has ceased.

In the case of *King v. Melling*, (1 Vent. 231,) a case was cited by Ld. Ch. J. Hale, where a man devised "to his eldest son for life, et non aliter; and after his decease, to the sons of his body:" it was holden, to be but an estate for life, by reason of the words\* "et non aliter." Yet the "non aliter" was implied, if it had not been expressed: but it shewed the clear intention of the testator; and the construction was made so as to effectuate that intention.

And in a later case of *Backhouse v. Wells*, M. & H. 12 Ann. where the devise was "to J. B. for his life only, without impeachment of waste; and from and after his death, then to the issue male of his body lawfully to be begotten; with remainder to the heirs males of the body of that issue." The whole Court were of opinion, that the devisee, was, by that devise, made tenant for life, with remainder to the issue in tail. They† held, that the words "for life only," clearly and expressly shewed the intention of the testator; and thereby took the case out of the general rule, and turned the words commonly used, as words of limitation, into words of purchase.

(f) This and all other judgments like it, must occasion an increase of litigation and expence, by rendering the constructions of wills uncertain, whereas the adhering to rules and precedents would have a contrary effect. The judgment in this case is contrary to authorities, as observed post, 1111, and warranted by none.

(g) This reason is an argument against the judgment in this case; because the description in the present case is clearly not applicable to any possible course of descent.

(h) The trustee and not the cestui qui trust, is tenant to the lord; therefore this reason never held with regard to trust. Qu. Whether trusts were assets? it seems not. And qu. also, the recital in the Statute of Uses or clauses in Acts of Parliament that made them so?

(i) One of the reasons of the maxims is mentioned in the last page, to be for the sake of the specialty creditors, and therefore only part of the reasons have ceased; but supposing they had all ceased, yet the law will continue the same until altered; as, for instance, the reason for the entire descent to the eldest son, which was introduced by the feudal law, namely, for the defence of the realm, has long since ceased by the abolition of military tenures, but yet the rule of descent remains.

\* See this cited case discussed at large, in the case of *Robinson v. Robinson*, M. 1756, 29 G. 2, B. R. ante, pa. 38.

† V. Lucas's Rep. 181 to 184. Fortescue's Rep. 139, and Abr. of Cases in Equity, 184, pl. 27.

Indeed, such a construction as this, cannot be made, but in cases where it is agreeable to the clear intention of the testator, that this should be the construction. For though the devise be "for life only," yet if the intention of the testator should appear, upon the whole will taken together, to be manifestly otherwise; it shall, in such case, be construed an estate tail; as in the case of ‡ *Robinson v. Robinson*, M. 1756, 30 G. 2, B. R.

In the case of \* *Lisle v. Grey* (j) (which was upon a deed) the words "heirs male of the body," were, by the necessary construction arising from the context, turned into words of \* purchase.

In the case of *Allgood v. Withers*,† where one Isaac Allgood had by deed conveyed his freehold land to trustees and their heirs, and his leasehold to trustees and their executors, upon trust that they should apply the rents and the benefit of redemption, to the plaintiff Hannah Withers for life: and after her death, to the heirs [1108] of the body of the said Hannah Withers and of Isaac Allgood, (since deceased) and of Hannah Glass and Mary Allgood, their heirs, executors and assigns, during the continuance of the estate in the premises; the question was, whether Hannah Withers took for life, or in tail: and Lord Talbot held, "that she took an estate for life; and that the heirs took as purchasers."

In the case of *Bagshaw and Spencer*, all the cases upon this subject were ransacked and thoroughly considered; and Lord Hardwicke held "that heirs of the body, (after an estate for life to the father,) should be construed words of purchase."

To take off the authority of decisions in Chancery, it was contended at the Bar, "that as to this point, there was a distinction between a trust and a legal estate; and that even in Chancery, there was a distinction upon this point between what they call a trust executed, and a trust executory."

It is true, these distinctions are to be met with, and have often been mentioned: but there does not seem to be much solidity in either.(k)

All trusts are executory; they are to be executed by a conveyance: and the parties have a right to apply to a Court of Equity, for such conveyance.

In *Bagshaw and Spencer*, the trust was executed, in the sense of the distinction, and as contrasted with a trust executory.

There seems to be as little ground, in respect of this point, for the other distinction between a trust and a legal estate.

A Court of Equity is as much bound by positive rules and general maxims concerning property (though the reason of them may now have ceased,) as a Court of Law is.

Whatever is sufficient, upon a devise, to make an exception out of the rule, holds in the case of a legal estate, as well as in the case of a trust. If the intention of the testator be contrary to the rules of law, it can no more take place in a Court of Equity, than in a Court of Law; if the intention be illegal, it is equally void in both.(l) A

‡ V. ante, pa. 38, (ut supra).

\* V. Sir Tho. Jones, 114. 2 Lev. 223. Pollexf. 582. Raym. 273, 302, 315.

(j) In *Lisle v. Grey*, after the limitation to Edward the father for life, there were limitations to the first son, and the heirs male of his body, with like remainders to the second, third, and fourth sons in tail-male, and so "to all and every other, the heir male of the body of Edward respectively and successively, and to the heirs male of their bodies according to their seniority of birth," with remainders over, as appears from 2 Lev. 223, and T. Jones, 114, so that the words of reference and so, (which are relative and signify eodem modo,) and the words every other, make the words of the limitation in effect the same as a limitation to heir in the singular number; and therefore as words of limitation were superadded, that was within the same reason as *Archer's case*.

See also in 2 Vern. 131, a distinction as to the construction of devises, because the testator had only an equitable estate; but that seems wrong.

† In Chancery, on 4th July 1735. [See Vin. Abr. Rem. H. 2 Dal. 69. Fearne, 29.]

(k) 2 P. Wms. 478, 314. 1 Wms. 762 to 766, and the note there. 1 Co. 100 a. b. *Bagshaw v. Spencer*, cited post, 1109. 2 Atk. 1 Atk. 590, and 582. 1 Vez. 26, 27, and many other authorities long before these shew that the distinction should not have been so slightly spoken of.

(l) At law the legal operation controuls the intent; but in equity the intent

Court of Equity cannot support an intention in the testator to create a perpetuity, or to limit a fee upon a fee, or to make a chattel descend to heirs, or land to executors. On the other hand, if the intention be not contrary to law, a Court of Common Law is as much bound to construe and effectuate the will according [1109] to that intention of the testator, as a Court of Equity can be. Upon the very point now in question, the determinations have been agreeable to this reasoning,<sup>(m)</sup> therefore where the trust of a real estate was devised "to A. for life, and after his death to the heirs of his body," Lord Hardwicke decreed a conveyance to A. in tail; although the estate devised to A. expressly "for life," left no room to doubt of the testator's intention; but the rule of law said, "the heir of the body should take by descent, and not by purchase:" and he thought, the rule bound a trust, as well as a legal estate.\*<sup>1</sup>

Where there are circumstances which take a case out of the rule, the exception holds upon a legal estate, as much as upon a trust.

The case of *Lisle v. Gray* was a legal estate, upon a deed; and the judgment was affirmed, (though, by mistake, it is said in Sir Thomas Jones, to have been reversed).

Sir Joseph Jekyll's decree in *Papillon and Voyce*, was upon a legal estate: and Lord King, after considering, did not differ from him; but reversed the decree, expressly upon a new point, upon the discovery of articles in 1697.<sup>(n)</sup>

Some of the other cases I have mentioned, were likewise upon legal estates.

It is true, Ld. Hardwicke, in *Bagshaw and Spencer*, laid hold of this distinction, to avoid expressly overruling the certificate in *\*2 Coulson and Coulson*. But he certainly did not agree in opinion with that certificate. In speaking of it, when he delivered his judgment in *Bagshaw and Spencer*, he expressed himself thus—"If that case be law;" and one of the last things he did in the Court of Chancery was to send a like case to this Court for their opinion; and he told me, "he did it, to have *Coulson and Coulson* reconsidered."<sup>2</sup>

It appears therefore from all that I have been saying, that there is no such fixed invariable rule as has been supposed, "that words of limitation shall never in any case be construed as words of purchase."

And the present case is the strongest that I can form any imagination of, to justify a construction, "that the heirs of the body of Anne Cornish shall here take as purchasers." The devise cannot take effect at all, but must be absolutely void, unless the heirs of her body take as purchasers.<sup>(o)</sup>

[1110] It must be observed, that the lands devised by this will are gavel-kind. The testator had nephews and nieces, and great nephews and great nieces: and he provides for them, by four distinct clauses in his will, according to the four distinct stocks.

It is agreed, that where words of limitation are grafted upon the word "heir" in

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controuls the legal operation of the deed. Mr. Clarke, Master of the Rolls, in *Burgess v. Wheate*, 1 Black. 137.

<sup>(m)</sup> That the construction of the limitations of the trusts of a term, is in equity the same as the construction is at law of the limitations of the legal estate of a term, was agreed by Lord Nottingham and the assistant Judges, 3 Ch. Cas. 48, in which case he said, "being afraid that I may shake more settlements than I am willing to do, I am not disposed to keep so closely and strictly to the rules of law, as the Judges of the Common Law do, as not to look to the reasons and consequences that may follow upon the determinations of this case." Yet in the same page he afterwards says, "the trusts of a term in gross can be limited in law, for I am not setting up a rule of property in Chancery, other than that which is the rule of property at law."

\*<sup>1</sup> *Garth against Baldwin*, in Chancery, 18th July 1755. [Qu. 1 P. Wms. 765, 76. 62 P. Wms. 478, contra. 1 P. Wms. 145, acc. 1 P. Wms. 89, 90. Eq. Abr. 183, Cas. 24.]

<sup>(n)</sup> In 2 P. Wms. 478, in the note, it is said that the Lord Chancellor's opinion was, as there reported, viz. that as to the land devised, the devisee took an estate-tail; though the question as to the land was given up, the plaintiff having brought a supplemental bill, whereby it appeared he was by his father's marriage articles intitled to an estate-tail.

\*<sup>2</sup> *V. Perrin and Another v. Blake, Widow*, P. 1769, B. R.

<sup>(o)</sup> Qu. This is a reason from matter arising after the making the will: as to which see 8 Vin. 186, pl. 54. 1 P. Wms. 399, 400. 1 Vez. 153. 2 Vez. 237.



the singular number, such heir shall take by purchase. (p) This is settled ‡ in *Archer's case*, and was admitted in the case of *Dubber, on the demise of Trollope v. Trollope*, P. 8 G. 2, B. R. (though that case was distinguished from *Archer's case*, by having † no words of limitation superadded to the words "first heir male"). The distinction is, that where it appears to be the intention of the testator, that there should be a succession in tail, it would totally defeat that intention, if all were to vest in the first son: but where it does not appear that the testator intended a succession in tail, there indeed the using the word "heir" in the singular number, may be a circumstance of great weight.

Now the term "heirs" (y) (in the plural,) in the case of gavel-kind lands, answers to the term "heir" (in the singular) in the common case of lands which are not gavel-kind: for the word "heir" (in the singular) would not serve for gavel-kind lands; it must be "heirs" (in the plural).

Therefore all the arguments and reasonings that are applicable to the word "heir" (in the singular,) in the common case of lands not being gavel-kind, hold with equal strength and propriety, when applied to the plural termination "heirs" when the lands are gavel-kind.

And it is manifest that the testator does not here mean, that this one-fourth should go in a course of descent in gavel-kind: for he gives it to the heirs of her body, as well females, as males; and mentions females, not only expressly and particularly, but even prior to males. Therefore they can not take otherwise than as purchasers. It would be a void devise, if the words were to be construed as words of limitation: for he breaks the gavel-kind descent, by giving it to females as well as males. It cannot descend to females as well as males, by the rules of gavel-kind: and yet he seems to lay the chief stress upon the word "females." [He adds likewise, "and to their heirs and assigns for ever, to be divided equally share and share alike;" nay, he goes further—"As tenants in common and not as joint-tenants." But this could not be, if they were to take in the course of gavel-kind descent: for in such case, they must take as co-parceners.]

[1111] The testator's disposition of one of the proportions of his estate shews his intent as to the rest; I mean the devise of the one-fourth to the widow of his deceased nephew Edward Read, and to the heirs of her (r) body, &c. which can receive no other construction, but that those heirs of the body must take as purchasers. For though his nephew was dead, yet he uses the very same words in this devise as in the rest: but he could not mean that his nephew's widow should take an estate tail in that whole one fourth, or a joint fee with her children in any part of it. Therefore the necessary construction of that devise is a strong argument of his intention and meaning as to the rest.

As to Anne Cornish's taking a fee jointly with her two daughters, in thirds, as tenants in common; there can be no ground for such a construction. (s) For it is clearly the testator's intention, that the heirs of Anne Cornish's body should not take till after her death; and as the devise to her has no words of limitation added to it, it is of course a devise to her for her life; and what she would have taken, if she had survived the testator, would have been an estate for life.

(p) 8 Vin. 233, pl. 1213. Amb. 379, 380. Eq. Abr. 184, Ca. 27.

‡ Co. 66.

† V. Robinson on Gavelkind, p. 96, and Abridgment of Cases in Equity, vol. 2, p. 317, pl. 31.

(y) Males and females cannot take together as directed to take in this case.

(r) It should be his and not her.

(s) It is strange that this should have been said, when express authorities, and such as were never denied, had been before cited, by Mr. Filmer in page 1106, proving that if heirs of the body of A. C. were to be taken as a description of children (as before mentioned in page 1106), that then A. C. and her children would have taken a fee, if she had survived the testator; yet the reporter has made Justice Denison say the same post, 1112, and makes Justice Wilmot not only say so, but puts a reason in his mouth, not warranted by the words of the will.

N.B. In the cases cited, by Mr. Filmer, A. and his children took a joint fee; but here they could not take jointly, by reason of the express words in the will to the contrary.

Upon the whole, as no man can doubt of this testator's intention ; and as this is the only method of effectuating it ; and as there is no rule of law that prevents heirs taking as purchasers, where the intention of the testator requires that they should do so ; I am of opinion that judgment ought to be given for the defendant.

Mr. Just. Denison concurred with his Lordship in opinion, "that Courts of Law (as well as Courts of Equity) will always construe wills agreeably to the intention of the testator, if such intention be not contrary to and inconsistent with the rules of law : " and he shewed that the intention of the testator in the present case, must have been, "that the heirs of the body of his niece Anne Cornish should take as purchasers ; " making the like observations as his Lordship had done, upon the lands being gavel-kind, and their being devised to the heirs female as well as male.

And he held, that it is not disagreeable to or inconsistent with the rules of law, that "heirs of the body " should, in some cases, be construed as designatio personæ ; (a position, not to be disputed, at this time after so many concurring resolutions). And this case now before the Court is one of the cases where they must be so construed. Therefore the heirs of the body of A. C. must here take by purchase ; they can take no other way.

[1112] And there is no foundation for supposing that Anne Cornish, if she had survived her uncle, could have taken any estate jointly with her daughters, as tenants in common.

(Mr. Just. Foster was absent.)

Mr. Just. Wilmot premised, that the Court were obliged to the gentlemen who had argued this case at the Bar, for declining to go into that long string of cases usually cited upon this subject. For the principle that must govern all cases of this kind, is the intention of the testator, provided it be not inconsistent with the rules of law. And all cases which depend upon the intention of the testator (which is the pole-star for the direction of devises) are best determined upon comparing all the parts of the devise itself, without looking into a multitude of other cases : for each stands pretty much upon its own circumstances ; and one is no rule for another, or very seldom at least.

Here, the testator intended, beyond all doubt, that the children of his nephews and nieces should take the inheritance in fee simple, both males and females, per capita, as tenants in common. And this is a legal intention.

But this intention can not take effect by giving an estate in tail or in fee to the first taker : for the intention of the testator must be subservient to the law : and not the law to the intention of the testator. Now a testator, be his intention what it will, can not make an estate descend to males and females all together ; nor gavel-kind lands to descend to them as tenants in common. The testator's intention cannot, therefore, take place, by giving Anne Cornish an estate tail.

Well then ! what is to be done ? why (as my Lord Coke says) you are to mould the barbarous words and expressions of the testator, so as to effectuate his intention ; if you can do so, without going contrary to the rules of law : but you cannot do this, contrary to the rules of law.

The question therefore, in the present case, comes to this : "whether it be absolutely necessary, that the words heirs, or heirs males, or heirs of the body, must be in all cases, and under all circumstances, words of limitation."

Now it is certain, that in some cases and under some circumstances, they may be construed words of purchase ; either upon a will, or upon a deed. The case of *\*Lisle v. Gray* was upon a deed. And there is a case in Palm. [1113] 359, *Waker v. Snowe*, which was likewise upon a deed : "Edward Egerton conveyed lands by fine, to the use of himself for life, remainder to his first son and the heirs male of his body begotten, &c. and so to his six sons ; remainder to the right heir male of the said Edward Egerton to be begotten after the said sixth son, and of his heirs male. This was holden to be only a contingent estate, and not as estate tail in Edward Egerton ; because it was limited to particular persons." They are not to be construed as words of limitation, either upon a will or upon a deed, when the manifest intention of the testator or of the parties is declared to be, or clearly appears to be, "that they shall not be so construed."

\* V. ante, p. 1107.

Now it is plain, in the present case, that the testator did not mean to use the words "heirs of the body," as words of limitation: it is as clear as if he had expressly said, "I do not intend these words in that sense."

And as to Anne Cornish's taking an equal share in fee simple in common with her daughters—that construction can never hold; for it is most certain, that the testator did not intend the division into equal shares to be made till after Anne Cornish's death.

This same construction is further confirmed by the clause which devises one fourth to his niece in law Grace Read, the widow of his deceased nephew, and to the heirs of her body, in the same form of expression. For it can never be imagined, that it was his intention to give her, (who was only the widow of his nephew,) an equal share of the fee simple and inheritance, with his natural relations.(r)

Per Cur. unanimously,  
Judgment for the defendant.

HAWARD *versus* BANKES, ESQ. Wednes. 26th Nov. 1760. Trespass vi et armis, and trespass on the case, cannot be joined in the same action. [See 3 Wils. 408. 8 Durn. 189. 1 Bosanq. 475.] [8 Durn. 189, 191.]

[Distinguished, *Smith v. Kenrick*, 1849, 7 C. B. 563.]

Mr. Serj. Hewitt, supported by Mr. Aspinall, Mr. Campbell, and Mr. Winn, moved in arrest of judgment, after a verdict for the plaintiff.

This was an action upon the case, (or at least, it was so laid,) for damage done to the plaintiff's colliery, by what the defendant had done in his own colliery and within his own soil: which colliery belonging to the defendant lay near to that of the plaintiff, and communicated with it, though not immediately but mediately, there being some other collieries lying between them.

[1114] The declaration consisted of three counts, all laid as in trespass upon the case. A verdict passed for the plaintiff: and the judgment was taken as an entire judgment on all the three counts.

The objection now made by the defendant's counsel, in arrest of judgment, was, that two of these three counts are really and essentially in trespass, (though they are laid as in case;) and that trespass and trespass on the case can not be joined in the same action. Hardress, 60, *Preston v. Mercer*. 2 Ld. Raym. 1399, *Reynolds v. Clarke*. 1 Ld. Raym. 272, *Courtney v. Collett*. Carthew, 436, *S. C. Courtney v. Connell*. Register of Writs (two places) *De fossato terra el fimo impleto*; per quod, &c.

The distinction between † trespass and case, they said, was this: immediate damage to the plaintiff's property, is a ground for trespass; consequential damage to it, is a ground for case. Now two of these three counts are immediate acts, ("that the defendant caused great quantities of water to be conveyed through divers other collieries, into the plaintiff's colliery: whereby, &c.") and they are therefore, properly, in trespass vi et armis: but the third count lays the damage to be consequential; and is therefore rightly laid in case. So that it appears upon the face of the declaration, "that trespass and case are here joined together."

The plaintiff's counsel agreed the law; but denied the fact: for they insisted, "that all the three counts were strictly and properly trespass upon the case, and laid the damage to be consequential, and not immediate."

The Court (without hearing the plaintiff's counsel,) over-ruled the objection.

The plaintiff describes, in his declaration, a fact which, as it comes out at the trial, may or may not, be a proper strict trespass: it might, at the trial, be proved to be either trespass, or case; either one or the other of them, according to the evidence. And it appears, that it was here proved at the trial, to be trespass upon the case. If it had been proved to be trespass vi et armis, the plaintiff must, in that event, have been non-suited. Before the trial, it stood indifferent, whether it would come out to

(r) If it be asked, what words are there in the will to warrant this; the answer can only be warranted, (if at all) by confining the words to be divided to the latter part of the sentence, for if they are referred to the whole they will relate to the niece as well as to heirs.

Vide ante, p. 1087, 1088.



be the one, or the other. However, in the nature of the thing, it must be a consequential damage; as the act complained of was done upon the plaintiff's own soil.

Let the plaintiff be at liberty to enter up his judgment.

The end of \*<sup>1</sup> Michaelmas term 1760, 1 G. 3.

[1115] HILARY TERM, 1 GEO. 3, B. R. 1761.

The Court was now full again.\*<sup>2</sup>

REX *versus* TURLINGTON. Wednes. 28th Jan. 1761. Discharge from a mad-house by hab. corp.

On Saturday last, the 24th of January, a motion was made for a habeas corpus to be directed to Turlington, the keeper of a private mad-house, commanding him to bring up the body of Mrs. Deborah D'Vebre, who was confined there by her own husband.

The Court thought it fit to have a previous inspection of her, by proper persons, physicians and relations; and then to proceed, as the truth should come out upon such inspection. And a case was hinted at, where an inspection was ordered, in the \*<sup>3</sup> last term.

A rule was accordingly made, "that Doctor Robert Monroe, †<sup>1</sup> Peter Bodkin, and ¶ Edmund Kelly, shall, at all proper times and seasonable hours, respectively be admitted and have free access to Mrs. Deborah D'Vebre, the wife of Gabriel D'Vebre, in the affidavit mentioned, at the mad-house kept by Robert Turlington, at Chelsea, in order to consult with, advise and assist the said Deborah D'Vebre."

On Monday the 26th, an affidavit of Dr. Monroe's was read; and Dr. Monroe also personally assured the Court, "that he had seen and conversed with this woman, and examined her nurse; and saw no sort of reason to suspect that she was or had been disordered in her mind: on the contrary, he found her to be very sensible, and very cool and dispassionate."

Lord Mansfield—Take a writ of habeas corpus: and if this should appear to be the case, we ought to go further.

Mrs. D'Vebre was now brought into Court by Mr. Turlington. But no return was indorsed upon the writ.

[1116] She appeared to be absolutely free from the least appearance of insanity.

She was prepared to have sworn articles of the peace against her husband; and they were offered in Court ready ingrossed: but not being stamped, they could not be read.

She was permitted to go away with her attorney, to his house; he undertaking to produce her here to-morrow morning.

Note—She desired not to go back to the mad-house: and the Court would not permit her husband to take her, under the present circumstances of danger apprehended by her from him.

It afterwards ended in a compromise, and an agreement to separate.

SPRIGHTLY, ON THE DEMISE OF JOHN COLLINS, *versus* HUMPHRY DUNCH. Thurs. 29th Jan. 1761. In ejectment what service is good where tenant in possession absconds.

In ejectment—

On Mr. Clayton's motion, supported by Mr. Gould, who cited two cases out of Barnes; (vol. 2, Supplement 23,\*<sup>4</sup> 26).†<sup>2</sup> And on affidavit "that Boggust, the tenant

\*<sup>1</sup> Mr. Justice Foster was at Bath during this whole term.

\*<sup>2</sup> See the note at the end of last page.

\*<sup>3</sup> *Rex v. P. Wright, et Al*, 24th Nov. 1760. V. ante, 1100.

†<sup>1</sup> Her nearest relation.

¶ Her attorney.

\*<sup>4</sup> H. 26 G. 2, *Roe ex dimiss. Fernley and Tancred v. Doe*.

†<sup>2</sup> Tr. 27, 28 G. 2, *Fen ex dimiss. Knight v. Dean*. Note—These cases are not in the 1st edit. 1754.

in possession, absconded, and that the plaintiff had personally served his niece, who was the only manager of this house, and resided in it; and had also fixed up another copy of the declaration upon the premises:”

The Court perceiving the inconvenience that landlords might suffer by being kept out of possession, thought it reasonable to make a rule upon the tenant in possession to shew cause “why judgment should not be entered up against the casual ejector;” and accordingly did make such a rule; and they further ordered that notice of the present rule, being given to any person in the house, should be sufficient; and if no person was in the house, then to be affixed to the door, &c.

On Wednesday, 11th February, this rule was made absolute without defence; on affidavit of notice being given to the niece, and also affixed to the door of the house. ||

[1117] *REX versus JOHN GARDNER, ESQ.* Thursday, 5th Feb. 1761. Affirmation of a Quaker cannot be read in support of a criminal charge.

The affirmation of a Quaker, (John Lewis of Lantrishent in Monmouthshire) was offered in exculpation of Mr. Gardner, the defendant, upon shewing cause why an information should not be exhibited against Mr. Gardner for a misdemeanor.

The reading of this affirmation was objected to, by the prosecutor’s counsel; and not much insisted upon, by the counsel for the defendant.

The Court held clearly, that a Quaker’s affirmation could not be read in support of a criminal charge: but they thought that an affirmation might be read in defence of a criminal charge, if the person charged was himself a Quaker, in order to exculpate himself.

In this third case, of a Quaker’s collateral evidence, in assistance of the exculpation of another person, when the Quaker himself was not charged at all, they thought his affirmation ought not to be read: and accordingly, it was withdrawn.

*BIDDLECOMBE versus KERVELL.* Friday, 5th Feb. 1761. Stat. 9 and 10 W. 3, c. 36, for the preservation of timber in the New Forest explained.

This was an action of replevin, upon a distress of hogs taken in the New Forest in Hampshire. The defendant makes conscience, as bailiff to the King; and justifies the taking the hogs, &c. as damage feasant in the said New Forest in the King’s soil.

Plea in bar—For that, though the soil is the King’s, yet the King (5 Ja. 1) granted to the Earl of Southampton, &c. a right of common for, &c. and pannage for hogs, &c. within the same forest, &c. at all times of the year, as well in the fence month, as at other times, &c. except, &c. Then it deduces the title to, &c. in whom the right was, at the time of making the <sup>\*1</sup> statute of 9 and 10 W. 3, c. 36, intitled “An Act for the Increase and Preservation of Timber in the New Forest in the county of Southampton:” and sets forth that inclosures of 1000 acres were made, agreeable to the Act: but not of any more than one thousand acres.

[1118] It then deduces the title down to the Duke of Montague; and shews a demise from him to the plaintiff, under which, he claims a right of common and pannage in those parts of the New Forest which are not inclosed; and shews enjoyment thereof accordingly: and therefore concludes that the defendant took them *de injuria sua propria*, &c.

The replication of the avowant admits the original right of common and pannage to have been as stated; but relies on the <sup>\*2</sup> clause in the Act, “that every person having any right of common, of pasture, or pannage, or any privileges within the said forest or any part thereof, should enjoy the same for the future, in manner following; viz. their said right of pannage, between 14th September and 11th November yearly,

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Vide post, S. P. accord. *Goodright, ex dimiss. Methold v. Norright*; 23d May, 1761; and *Fenn, ex dimiss. Tyrrel, et Al<sup>i</sup> v. Denn*, 26th May, 1761, post, 1181.

<sup>\*1</sup> This statute (s. 1.) gives the King liberty to inclose two thousand acres; (1000 immediately, and the other 1000 at a specified time;) † and afterwards 200 in each year, for twenty successive years.

<sup>\*2</sup> Sect. 9.

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† See the note in next page.

from and after Michaelmas 1716, and not before; on forfeiture of any hog, pig or swine that from and after the Feast of St. Michael next, and before the time aforesaid shall be found in the wastes of the said forest: and their said right of common of pasture shall be and is hereby continued to them in and through such of the said waste ground of the said forest, at such time and times as the same shall not be inclosed as aforesaid; the time of the fence-month, (viz. 15 days before and 15 days after the Feast of St. John the Baptist, yearly) and the time of the winter-heyning, (viz. from the 11th November to the 23d of April yearly) excepted."

Then it states, that the hogs, &c. were found damage-feasant, between the 11th of November and 23d April, &c. within the time of the winter-heyning; and therefore he had a right to take them damage feasant, &c. and did so: which he avows and justifies.

The rejoinder states that such a time (specifying the day) was the first session of Parliament held after the year 1699;† and that at the end of that sessions, the remaining one thousand acres were not admeasured, set out, or inclosed, nor are yet admeasured, &c. and avers that even at this time, 1000 acres and no more are inclosed.

To this rejoinder, the avowant demurs.

Mr. Hussey argued for the avowant; and undertook to maintain, that the Act of 9 & 10 W. 3, c. 36, meant to restrain the right of common and of pannage; whether the inclosure of the remaining thousand acres was ‡ ever made, or not.

[1119] The question depends chiefly on \* the 9th section of this Act: which Mr. Hussey discussed and argued upon, at large.

Mr. Burland contra—for the plaintiff in replevin.

The 1st question is, whether the proviso ever intended to take away the plaintiff's right.

2d question—Whether (if it did,) the plaintiff's right is taken away, by inclosing 1000 acres only.

First—It only meant to take away prescriptive rights of common: v. 20 C. 2, c. 3, for the increase and preservation of timber within the forest of Dean; (from whence this proviso is literally transcribed). And he cited *Sir Francis Barrington's case*, 8 Co. 136.

Secondly—This right could not be taken away by a partial inclosure.

Mr. Hussey, in reply—(1st) Hogs can not be within a prescriptive right: the right for them must depend upon grant. And this is a distinct independent provision. (2d.) Some part must be many years before it could be inclosed. It was not necessary to inclose the remainder, at the precise time mentioned in the Act.

Lord Mansfield held it clear, that the statute meant that the right of common in the inclosed parts, should be restrained absolutely, so long as they should remain inclosed; but be continued in the un-inclosed parts only, under certain limitations and exceptions; but the right of pannage is absolutely taken away, for eighteen years; and after that, restrained to a particular limited time; and these hogs were there found, at a time when they ought not to have been there.

2d. The inclosure of the whole is not necessary: it is not a condition precedent, "that the whole shall be first inclosed, before the restriction of common shall at all take place."

Mr. Just. Denison and Mr. Just. Foster agreed with his Lordship in opinion.

Mr. Just. Wilmot—1st. This is a common appendant by grant. The present question only respects pannage: the action is brought for taking hogs only. The Act gives the Crown the power of inclosing 6000 acres in the whole, for the sake of increasing and preserving the growth of [1120] timber; and this is to be always free from common and all rights, &c. whilst it remains inclosed: but as to the uninclosed, the right remains as it was, under certain limitations and exceptions.

But the right of pannage is quite taken away for eighteen years; and is even

† Note the particular time specified by the statute (s. 1,) for admeasuring, setting out, and inclosing the second thousand acres was "from and immediately after the determination of the first sessions of Parliament which should be held after the year of our Lord 1699."

‡ Note—In fact, the inclosure of 1000 acres was made; and the other thousand were not inclosed.

\* V. 9, 10 W. 3, c. 36.



then restrained to a certain limited time, viz. between 14th September and 11th November.

2dly. And these are two distinct clauses. The inclosure is not a condition precedent. *Sir Francis Barrington's case* does not prove any thing in the present case, nor interfere with any thing that I have said.

Per Cur. Judgment for the defendant,  
(Mr. Hussey's client.)

HALLET ESQ. AND OTHERS *versus* EAST-INDIA COMPANY. Tuesday, 10th Feb. 1761.

Payment of money into Court, where the sum demanded is a sum certain or capable of being ascertained by computation, a payment into Court, shall be admitted, and so much struck out of the declaration.

Upon shewing cause against a rule why the defendants should not have leave to bring 2670l. into Court, upon two of the assigned breaches only,\* (viz. for freight and for demorage,) in an action of covenant brought upon a charter-party, by the owners of a ship, against the East-India Company who had taken it up in their service; and that the said 2670l. should be struck out of the declaration; (in which several other breaches were assigned, as well as these two;)

Lord Mansfield observed, that in motions of this kind, where the defendant applies to pay money into Court, and to have the demand thereupon struck out of the declaration, the law arises upon the fact; and the true and sensible distinction is, "that where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the defendant to pay the money into Court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril."

In the present case, it being easy to ascertain by mere computation the demorage at so much per day, and the freight at so much per tun, (notwithstanding that different sorts of goods are to pay different rates per tun;) and to settle the account very exactly, from facts that must be notoriously known in the ship; and nothing else remaining to be settled, nor any thing further being left for the judgment and discretion of the jury to be exercised upon; the [1121] defendants ought, in the present case, to be at liberty to pay the money into Court, upon these two counts: but then, on the other hand, the plaintiffs ought to have inspection of the ship's papers, now remaining in the hands of the company; in order to enable them to judge whether it would be prudent and advisable for them to accept the money so brought in; or to proceed in their cause. And this method will be most advantageous to both sides.

This proposal was readily agreed to, on both sides: and a rule was made accordingly.

The original rule was made on the motion of Mr. Norton and Mr. Winn, on behalf of the defendants, and was worded thus.—"That the plaintiffs should shew cause why the defendants should not have leave to bring into Court the sum of 2670l. with respect to the freight and demorage in this cause; and thereupon, unless the plaintiffs shall accept thereof, with costs to be taxed by Mr. Owen, in full discharge of the several breaches assigned in this suit, on account of non-payment of freight and demorage; the said 2670l. shall be struck out of the plaintiff's demands on that account, and paid out of Court, to the plaintiffs or their attorney; and upon the trial of the issue, the plaintiffs shall not be permitted to give evidence for the same."

Note—The meaning of this rule is—that if the plaintiffs do not accept the sum brought into Court, the same is to be struck out of the declaration; and the plaintiffs upon the trial, are not admitted to give evidence for the sum brought into Court: and if the plaintiffs, upon the trial, do not prove more due to them than the money brought into Court, there must be a verdict for the defendants. But the plaintiffs are at liberty to accept the sum brought into Court, in respect to the breaches assigned for non-payment of freight and demorage, and to proceed as to any other breaches mentioned in the declaration (excepting those two,) if they think proper.

This rule was made absolute: and it was now further added, "that a true freight-

\* See the very words of this rule, *infra*, 1121, together with an explanation of its meaning. [Contra, 2 Barnes, 231, generally.]

note be delivered to the plaintiffs; and that the plaintiffs shall have inspection of all papers, books, &c. that may ascertain the ship's freight and earnings."

[1122] REX *versus* JOHN PERROT. 1761. Bankrupt refusing to answer questions to the satisfaction of the commissioners respecting his effects, held good cause of commitment of the bankrupt to Newgate by them.

The defendant being brought up from Newgate, by habeas corpus, appeared upon the return to have been committed by commissioners of bankruptcy, to be safely kept and detained, without bail or mainprize, "until such time as he shall submit himself to the said commissioners or the major part of them, and full answer make, to their satisfaction, to the question so put by them to him as aforesaid:" which question was specified in their warrant, to have been put to him by them in writing, upon the last day of his examination, after his having obtained forty-six days beyond the ordinary time; and to have been propounded to him in these words, viz. "As you do admit that you have spent the last week previous to this your examination with Mr. Maynard (one of your assignees) to settle and adjust your accounts and to draw up a true state thereof to enable you to close such your examination; and do likewise admit, that upon such state thereof, it appears that after giving you credit for all sums of money paid by you, and making you debtor for all goods sold and delivered to you, from your first entering into trade to the time of your bankruptcy, it appears that there is a deficiency of the sum of 13,513l. Give a true and particular account what is become of the same: and how and in what manner you have applied and disposed thereof." To which question so put by the commissioners as aforesaid, the said John Perrot did wilfully and obstinately refuse to give any other than the following general answer, (that is to say) "that on goods sold this last year, I have lost upwards of 2000l. and by mournings, I have lost upwards of 1000l. and that for nine or ten years, I have (and I am sorry to say it) been extremely extravagant, and spent large sums of money. John Perrot." Which answer of the said John Perrot not being satisfactory to us the said commissioners—these are therefore to will, require and authorize you immediately upon receipt hereof to arrest, &c. and him safely to convey, &c. and to deliver, &c. safely to keep and detain, without bail or mainprize, until such time as he shall submit himself to us the said commissioners or to the major part of the said commissioners by the said commission named and authorized, and full answer make to our or their satisfaction, to the question so put to him by us as aforesaid.

Two reasons were argued on the part of the defendant, why he ought to be discharged from this imprisonment. 1st. That the answer which he had already given was a full, sufficient and satisfactory answer, and the best and only one that could be given by an idle extravagant man who [1123] had never kept any accounts: and, consequently, that the imprisoning him until he shall give a more full and satisfactory answer to the question, was an imprisonment for life.

The second reason was, that the power and jurisdiction of the commissioners, to take the bankrupt's examination and disclosure, was temporary, and limited, and confined to the time allowed to the bankrupt to come in and surrender himself and submit to be examined; after which limited time, the commissioners had no power to examine him at all: consequently, they had no jurisdiction to commit him for any longer time than their own power to examine him lasted; which did not exceed the time allowed him to come in and surrender himself and submit to be examined. And his counsel compared it to a commitment by the House of Commons; which ended with their session.

In support of these objections, they relied upon the construction of the Bankrupt-Acts; and particularly of 5 G. 2, c. 30, § 1, 2, 3.

On the other side, it was insisted—1st. That the bankrupt's answer was nugatory and insufficient; and 2dly. That the power and jurisdiction of the commissioners to examine the bankrupt, and obtain a disclosure and discovery of his estate and effects, and the manner in which he had disposed of them, was not limited and confined to the last minute allowed him for his surrender and submission; but might be pursued and proceeded upon at any subsequent time. And for this, they relied on the end and intention and genuine construction of all the Bankrupt-Acts, and particularly of 1 J. 1, c. 15, § 7, 8, and 5 G. 2, c. 30, § 16.

Lord Mansfield—If the question put was improper; or if the question be proper,

and the answer satisfactory, the man ought to be discharged. But this is a proper question ; and the answer is very insufficient and unsatisfactory.

The construction offered by the counsel who object to this commitment, is founded upon mere arbitrary implication : the Legislature say no such thing. On the contrary, the 5 G. 2, c. 30, § 16, gives power to the commissioners to commit the bankrupt until he shall submit himself, and full answer make to their satisfaction : and section 17th gives power to the Court or Judge, to recommit him to the same prison, there to remain as aforesaid, until he shall confirm as aforesaid.

The examination is not confined to be within the time limited for the bankrupt to come in and surrender and submit to be examined.

[1124] The bankrupt must indeed surrender within the limited time ; and he must submit within the limited time, to be examined from time to time ; and he must, upon his examination, disclose and discover, and deliver up his estate and effects : but the Act does not require the examination to be full and perfect, and \* completed within the limited time ; nor is it proper that it should be so. A man's memory may fail him at one time, and be refreshed at another ; or his first answer may be equivocal, or imperfect : and why should he not be called upon to explain and complete it ? The power of the commissioners is general, and not limited to the compass of time given to the bankrupt to come in.

The last examination within the limited time is material indeed to the bankrupt himself, (because he can not afterwards contradict himself :) but he may be compelled by the commissioners to make further answer, after that time. The bankrupt may omit to come in, till the very last minute of his time : and if he then surrenders and submits to be examined, this will save his felony : but it may be absolutely impossible for him to make a full discovery and disclosure of his estate and effects, or to give full answers to proper questions within this space of time.

But here the commissioners have, within the limited time, required a further answer to their question, and committed him for refusing to give it. This commitment was legal, at the time when it was made : and I am clearly satisfied, that he can not redeem himself from his imprisonment, but on giving a full answer to the question. If he should give a full answer, and the commissioners not be satisfied with it, he will then be intitled to his proper remedy.

The objection has been strongly argued : but there is no case to support it. It is a new invention, and would entirely defeat the end and intention of the Bankrupt-Acts.

The three Judges were all equally clear that the man ought to be remanded.

Mr. Just. Foster added that the powers under the statute of 1 Ja. 1, c. 15, continue still in force, notwithstanding the subsequent statutes ; and that none of them preclude a further examination.

Mr. Just. Wilmot also concurred in this ; and said, that all the Bankrupt-Acts ought to be taken together, so as to answer the great general end and intention of the Legislature : the clauses operate together, and are auxiliary to [1125] each other ; and they certainly give a power of further examination. There are vast numbers of questions that may be asked under the examination, more than can be under the mere surrender and submission : that may require further time, or even arise afterwards. The submission alone is not enough : he must submit to be examined from time to time ; and he ought not to be discharged till he has fully answered. His present answer is most clearly deficient.

Per Cur. unanimously,

The defendant was remanded.

V. post, pa. 1215. Monday 8th June 1761.

REX *versus* WHEATLY. Thurs. 12th Feb. 1761. [S. C. 1 Bl. 273.] Delivering less beer than contracted for as the due quantity, not indictable.

[Referred to, *R. v. Brailsford* [1905], 2 K. B. 745.]

Mr. Norton, for the prosecutor, shewed cause why judgment should not be arrested ; a rule for that purpose having been obtained, upon a motion made by Mr.

\* V. 5 G. 2, c. 30, s. 1.



Morton on Monday 26th January last, in arrest of judgment upon this indictment for knowingly selling amber-beer short of the due and just measure, (whereof the defendant had been convicted).

The charge in the indictment was, (a) "that Thomas Wheatly late of the parish of St. Luke in the county of Middlesex brewer, being a person of evil name, fame and of dishonest conversation, and devising and intending to deceive and defraud one Richard Webb of his monies, on, &c. at, &c. falsely, fraudulently and deceitfully did sell and deliver and cause to be sold and delivered to the said Richard Webb sixteen gallons and no more of a certain malt liquor commonly called amber, for and as eighteen gallons of the same liquor; which said liquor so as aforesaid sold and delivered did then and there want two gallons of the due and just measure of eighteen gallons, for which the same was sold and delivered as aforesaid; (the said Thomas Wheatly then and there well knowing the same liquor so by him sold and delivered to want two gallons of the due and just measure as aforesaid;) and he the said Thomas Wheatly did receive of the said Richard Webb the sum of fifteen shillings, &c. for eighteen gallons, &c. pretended to have been sold and delivered, &c. although there was only sixteen gallons so as aforesaid delivered: and he the said Thomas Wheatly him the said Richard Webb of two gallons of, &c. fraudulently and unlawfully did deceive and defraud; to the great damage and fraud of the said Richard Webb, to the evil example of others in the like case offending, and against the peace of our Sovereign Lord the King his Crown and dignity."

[1126] Mr. Morton and Mr. Yates, who were of counsel for the defendant, (to arrest the judgment,) objected that the fact charged was nothing more than a mere breach of a civil contract; not an indictable offence. To prove this, they cited *Rex v. Combrun*, P. 1751, 24 G. 2, B. R. which was exactly and punctually the same case as the present, only mutatis mutandis. And *Rex v. Driffeld*, Tr. 1754, 27, 28 G. 2, B. R. S. P. An indictment for a cheat, in selling coals as and for two bushels, whereas it was a peck short of that measure; there the indictment was quashed on motion. *Rex v. Hannah Heath*—an indictment for selling and delivering seventeen gallons three quarts and half-pint of geneva, (and the like of brandy,) as and for a greater quantity, was quashed on motion.

In 1 Salk. 151, *Nehuff's case*, P. 4 Ann. B. R. a certiorari was granted to remove the indictment from the Old Bailey; because it was not a matter criminal: it was "borrowing 600l. and promising to send a pledge of fine cloth and gold dust; and sending only some coarse cloth, and no gold dust."

In Tremaine,\* title Indictments for Cheats.—All of them either lay a conspiracy, or shew something amounting to a false token.

A mere civil wrong will not support an indictment. And here is no criminal charge; it is not alledged "that he used false measures." The prosecutor should have examined and seen that it was the right and just quantity.

Mr. Norton, pro Rege, offered the following reasons why the judgment should not be arrested.

The defendant has been convicted of the fact. He may bring a writ of error, if the indictment is erroneous.

This is an indictable offence; it is a cheat, a public fraud, in the course of his trade: he is stated to be a brewer. There is a distinction between private frauds, and frauds in the course of trade. The same fact may be a ground for a private action, and for an indictment too.

None of the cited cases were after verdict. It might here (for aught that appears to the contrary) have been proved "that he sold this less quantity, by false measure:" and every thing shall be presumed in favour of a verdict. And here is a false pretence, at the least: and it appeared upon the trial to be a very foul case.

[1127] The counsel for the defendant, in reply, said that nothing can be intended or presumed, in a criminal case, but *secundum allegata ex probata*: it might happen without his own personal knowledge. And they denied any distinction between this being done privately, and its being done in the course of trade.

(a) There is nothing in this case or the next case but what had been often before determined; several of which cases are mentioned post, 1130. See also *Strange*, 793. *Cowp.* 324. 3 *Keb.* 244. 2 *Durn.* 583, 4, 5. 3 *Durn.* 99. 6 *Durn.* 567. 8 *Durn.* 538.

\* *V. Tremaine's Pleas of the Crown*, pa. 85 to 111.

Lord Mansfield—The question is, whether the fact here alledged be an indictable crime or not. The fact alledged is—

(Then his Lordship stated the charge \*<sup>1</sup> verbatim.)

The argument that has been urged by the prosecutor's counsel, from the present case's coming before the Court after a verdict, and the cases cited being only of quashing upon motion before any verdict, really turns the other way: because the Court may use a discretion, "whether it be right to quash upon motion, or put the defendant to demur;" but after verdict, they are obliged to arrest the judgment if they see the charge to be insufficient. And in a criminal charge, there is no latitude of intention, to include any thing more than is charged: the charge must be explicit enough to support itself.

Here, the fact is allowed; but the consequence is denied: the objection is, that the fact is not an offence indictable, though acknowledged to be true as charged.

And that the fact here charged should not be considered as an indictable offence, but left to a civil remedy by an action, is reasonable and right in the nature of the thing: because it is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held out the just measure or not.

The offence that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or to many of his customers, or uses them in the general course of his dealing: so, if a man defrauds another, under false tokens. For these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat: for ordinary care and caution is no guard against this.

Those cases are much more than mere private injuries: they are public offences. But here, it is a mere private imposition or deception: no false weights or measures [1128] are used; no false tokens given; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater; which the other carelessly accepted. It is only a non-performance of his contract: for which non-performance, he may bring his action.

The selling an unsound horse, as and for a sound one, is not indictable: the buyer should be more upon his guard.

The several cases cited are alone sufficient to prove, that the offence here charged is not an indictable offence. But besides these, my brother Denison informs me of another case, that has not been mentioned at the Bar. It was *M. 6 G. 1, B. R.* \*<sup>2</sup> *Rex v. Wilders, a Brewer*: he was indicted for a cheat, in sending in, to Mr. Hicks, an ale-house keeper, so many vessels of ale marked as containing such a measure, and writing a letter to Mr. Hicks, assuring him that they did contain that measure; when in fact they did not contain such measure, but so much less, &c. This indictment was quashed on argument, upon a motion: which is a stronger case than the present.

Therefore the law is clearly established and settled; and I think on right grounds: but on whatever grounds it might have been originally established, yet it ought to be adhered to, after it is established and settled.

Therefore, (though I may be sorry for it in the present case, as circumstanced;) the judgment must be arrested.

Mr. Just. Denison concurred with his Lordship.

This is nothing more than an action upon the case turned into an indictment. It is a private breach of contract. And if this were to be allowed of, it would alter the course of the law; by making the injured person a witness upon the indictment, which he could not be (for himself) in an action.

Here are no false weights, nor false measures: nor any false token at all; nor any conspiracy.

\*<sup>1</sup> V. ante, 1125.

\*<sup>2</sup> I have a like account of this case. The Court said that the prosecutor could not have been imposed upon, without his own carelessness; and instanced the case of selling an unsound horse, affirming him to be sound; and they held that such private unfair dealings, which did not affect the public, were not indictable crimes; unless accompanied with false tokens, or conspiracy, or selling by false weights or measures.

In the case of *The Queen v. Maccarty et Al* †<sup>1</sup> there were false tokens, or what was considered as such. In the case of || *The Queen v. Jones*, 1 Salk. 379, the defendant had received 20l. pretending to be sent by one who did [1129] not send him—Et per Cur. “It is not indictable, unless he came with false tokens; we are not to indict one man for making a fool of another; let him bring his action.”

If there be false tokens or a conspiracy, it is another case. *The Queen v. Maccarty* was a \*<sup>1</sup> conspiracy, as well as false tokens. *Rex v. Wilders* was a much stronger case than this; and was well considered; that was an imposition in the course of his trade; and the man had marked the vessels, as containing more gallons than they did really contain, and had written a letter to Mr. Hicks, attesting that they did so.

But the present case is no more than a mere breach of contract: he has not delivered the quantity which he undertook to deliver.

The Court use a discretion in quashing indictments on motion; but they are obliged to arrest judgment when the matter is not indictable. And this matter is not indictable: therefore the judgment ought to be arrested.

Mr. Just. Foster—We are obliged to follow settled and established rules already fixed by former determinations in cases of the same kind.

The case of *Rex v. Wilders* was a strong case: (too strong perhaps: for there were false tokens: the vessels were marked as containing a greater quantity than they really did).

Mr. Just. Wilmot concurred. This matter has been fully settled and established, and upon a reasonable foot. The true distinction that ought to be attended to in all cases of this kind, and which will solve them all, is this—that in such impositions or deceits where common prudence may guard persons against the suffering from them, the offence is not indictable, but the party is left to his civil remedy for the redress of the injury that has been done him: but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive, as people can not, by any ordinary care or prudence be guarded against, there it is an offence indictable.

In the case of *Rex v. Pinkney*, P. 6 G. 2, B. R. upon an indictment “for selling a sack of corn (at Rippon market) which he falsely affirmed to contain a Winchester bushel, ubi reverà, et in facto plurimum deficiebat, &c.” The indictment was quashed upon motion.

[1130] In the case now before us, the prosecutor might have measured the liquor, before he accepted it: and it was his own indolence and negligence if he did not. Therefore common prudence might have guarded him against suffering any inconvenience by the defendant’s offering him less than he had contracted for.

This was the case of *Rex v. Pinkney*: and it was there said, that if a shop-keeper, who deals in cloth, pretends to sell ten yards of cloth, but instead of ten yards bought of him, delivers only six, yet the buyer can not indict him for delivering only six; because he might have measured it, and seen whether it held out as it ought to do, or not. In this case of *Rex v. Pinkney*, and also in that case of *Rex v. Combrun*, a case of *Rex v. Nicholson*, at the sittings before Ld. Raymond after Michaelmas term, 4 G. 2, was mentioned; which was an indictment for selling six chaldron of coals, which ought to contain thirty-six bushels each, and delivering six bushels short: Lord Raymond was so clear in it, that he ordered the defendant to be acquitted.

Per Cur. unanimously,

The judgment must be \*<sup>2</sup> arrested.

REX versus DUNNAGE. 1761. Delivering less oats than the quantity contracted for as the due quantity, not indictable.

This case was exactly the same point with that of *Rex v. Wheatly*, which was determined this very morning.†<sup>2</sup>

The defendant stood indicted for knowingly selling and delivering three bushels

†<sup>1</sup> 6 Mod. 301. 2 Ld. Raym. 1179.

|| 2 Ld. Raym. 1013, and 6 Mod. 105, S. C.

\*<sup>1</sup> V. ut supra, and 6 Mod. 302, particularly.

\*<sup>2</sup> See the next case, S. P. accord.

†<sup>2</sup> V. ante, p. 1125 (the last preceding case).



and a half of oats, as and for four bushels, which wanted half a bushel of the just and due measure ; with intent to deceive and defraud, &c.

Upon Mr. Stowe's motion to quash this indictment, and Mr. Norton's agreeing that it could not be supported, since the determination of this Court this morning, in the case of *Rex v. Wheatly*.

This indictment was also quashed ;—the rule for shewing cause why it should not be so, being made absolute without argument.

V. *Rex v. Osborn*, post, pa. 1697, 10th June 1765.

[1131] The following case may be considered as one of this term ; because the certificate bears date in the vacation next following it, and nearer to Hilary term than to Easter term.

SELWYN, ESQ. *versus* SELWYN, Widow, AND OTHERS. 1761. [S. C. 1 Black. 222, 251, and Bull. 266, acc.] Lands pass by a will made before a recovery suffered, but after the deed, to lead the uses.

This case came out of Chancery, for the opinion of the Court of King's Bench.

It was twice argued here, and both times very elaborately and well ; first, by Mr. Sewell, for the plaintiff, and Mr. Charles Yorke, Solicitor-General, for the defendants, in Easter term 1760, 33 G. 2, and again in Michaelmas term 1760, 1 G. 3, by Mr. de Grey, for the plaintiff, and Mr. Norton for the defendants.

The causes in Chancery were thus intitled—

Between George Augustus Selwyn, Esq. now the eldest son	} plaintiff ;
and heir of John Selwyn, Esq. deceased,	
Mary Selwyn, widow and administratrix with the will	} defendants.
annexed of the said John Selwyn and others,	

And

Between the said Mary Selwyn widow	plaintiff ;
The said George Augustus Selwyn and others,	defendants.

The case stated several family-settlements and transactions ; (a) by which it appeared that the premises were limited in strict settlement to John Selwyn the Elder for life, remainder to his first and every other son by his wife Mary, successively, in tail male : remainder to John Selwyn the Elder and his heirs.

John Selwyn the Younger was the eldest son ; and, as such, seised of the remainder in tail male.

By bargain and sale, dated 20th April 1751, inrolled in the Common Pleas, between the said John Selwyn the Elder, and John Selwyn the Younger, of the first part, John Wakelin, gent. of the second part, and Francis Donce, gent. of the third part, it is witnessed, that for barring all estates tail, remainders and reversions of and [1132] in the messuages, farms, lands and hereditaments after mentioned, and for settling and limiting the same to and for the uses, intents and purposes, and in manner after mentioned, the said John Selwyn the Elder, and John Selwyn the Younger did grant, bargain, and sell unto the said John Wakelin and his heirs, all those two farms, lands and hereditaments in the possession of the said John Harris and William Harris mentioned in the said bargain and sale of the 12th of June 1750, with the appurtenances, and the said four farms in the indentures of lease and release of the 1st and 2d of April 1751, then in the several tenures of William Gascomb, John Print, Mary Print, and Jane Cannon, with their appurtenances, and the reversion and reversions, &c. to hold to and to the use of the said John Wakelin and his heirs, to the intent he might become tenant of the freehold, to the end a common recovery might be suffered of the premises comprised in that indenture of bargain and sale ; for which purpose it was agreed that the said Francis Donce should, on this side or before the end of Easter term then next, or of some subsequent term, prosecute a writ of entry upon disseisin of the same premises, against the said John Wakelin ; who was to appear and vouch over to warranty the said John Selwyn the Elder, who was to appear and vouch the said John Selwyn the Younger, who was to

(a) See 16 Vin. 138, pl. 5. 4 Burr. 1956, 1962. 3 P. Wms. 170. Vin. Abr. Relation (D), pl. 11 (E), pl. 6, 8 (C), pl. 7, 8. 12 Vin. 122. 18 Vin. 290. 1 Bosanq. 586. 5 Durn. 89. 2 Ves. jun. 424, 597. 3 East, 428.

vouch the common vouchee. And it was thereby declared and agreed, that from and immediately after the suffering the said common recovery so as aforesaid, or in any other manner, or at any other time suffered or to be suffered, the said common recovery, and all and every other common recovery or recoveries thentofore or thenafter to be had or suffered of the said premises, between the said parties, should enure, and the recoverors stand seised of the premises, to the uses after-mentioned, viz. to the use of the said John Selwyn the Elder for life, without impeachment of waste, with power to grant leases for any term not exceeding twenty-one years; remainder to the use of the said John Selwyn the Younger, his heirs and assigns for ever.

Easter term ended on the 20th of May 1751.

On the 30th of May 1751, the writ of entry was sued out.

This writ of entry was returnable in fifteen days from the Holy Trinity; which was the 16th day of June in the said year 1751. Trinity term begun on the 7th of June 1751.

On the 8th of June 1751, John Selwyn the Younger made his will in the words to or the effect following, viz. "This is the last will and testament of me John Selwyn the Younger; which I now make and publish in order to settle my real estate in such prudent manner as to [1133] continue the same in my own family. And for that purpose, I do hereby give and devise unto my honoured father John Selwyn, Esq. all that my manor or lordship of Luggershall in the county of Wilts, and all my manor of Matson in the county of Gloucester, with the rights, members, and appurtenances thereunto belonging, and all other my manors, messuages, farms, lands, tenements, rectories, advowsons, rents and hereditaments whatsoever, and all the freehold and other estate of inheritance whereof I the said John Selwyn the Younger, or any person or persons whatsoever, in trust for or to my use are or is seised or possessed either in possession, reversion, remainder or expectancy, and all my estate, right, title and interest therein; to hold the same unto and to the use of my said father, his heirs and assigns for ever."

On the 12th of June 1751, the bargain and sale of the 20th of April 1751, was acknowledged by John Selwyn the Elder, before Mr. Just. Gundry in Court, and afterwards inrolled.

The writ of entry sur disseisin en le post was returnable on the 16th June in the same year.

The writ of seisin was tested 19th June; returnable forthwith.

The sheriff executed the writ of seisin, on the 22d of June 1751: and on the 26th of the same June, he made his return on the above writ.

Trinity term ended on the 26th of June.

John Selwyn the Younger died, on the 27th of June 1751, without altering or republishing his will.

On the hearing of these causes before the Right Honourable the Lord Keeper of the Great Seal of Great Britain, on the 11th of December 1758, his Lordship ordered that a case should be made for the opinion of the Judges of the Court of King's Bench upon the following

Question—Whether the several lands, tenements and hereditaments comprized in the deed of the 20th of April 1751, passed by the will of John Selwyn the son.

The question turned upon two points;

1st. Whether John Selwyn the Younger, at the date of his will, had any use, estate or interest in the premises, to devise:

2d. If he had, whether the subsequent recovery was a revocation.

[1134] The certificate returned to the Court of Chancery was dated on 2d March 1761; and was in the following words, viz.

"Having heard counsel, and considered this case, (which the parties, by agreement between themselves, delayed arguing,) we are of opinion that the several lands, tenements, and hereditaments comprized in the deed of the 20th April 1751, passed by the will of John Selwyn the son.

"MANSFIELD, M. FOSTER,  
"T. DENISON, E. WILMOT."

Agreeable to ancient usage, upon cases referred out of Chancery, the Court did not give the reasons of their opinion, nor mention the ground upon which they formed it. Therefore I have omitted the arguments at the Bar, which were very elaborate

very learned, and very ingenious;) because they took in many topics which the Court might not form their judgment upon.

In the course of the arguments, the Court repeatedly expressed their approbation of the case of *Sir John Ferrers and Sir John Curson* against *Sir Richard Fermor and Others*.\* And therefore it is likely that they considered the whole as one conveyance, which must relate to the date of the bargain and sale; which was perfected, made absolute, and delivered from objections, by the subsequent ceremonies.

It is probable too, from some expressions dropped, they might think that John Selwyn the Younger, by virtue of the bargain and sale, had a voidable contingent executory use, to arise out of the subsequent common recovery;—that such a use was devisable;—and that the subsequent recovery executed such use, and made it absolute.

Note—It had been at first urged, on behalf of the defendants against the plaintiff the heir at law, “that the will was made subsequent to the recovery: for that the will was made on the 8th of June, 1751, and the term begun on the 7th; and the recovery shall relate to the first day of the term, as the whole recovery is, both in law and in fact, the transaction of one day: and therefore the judgment in the recovery shall be considered as prior to the return of the writ of entry, and to the making of the will, and that there is nothing appear-[1135]-ing upon the record, to prevent the Court from considering it in this light.” But Mr. Norton gave up this point, (and the Court had hinted at the difficulty of supporting it,) as this was a case that came out of Chancery upon facts particularly stated; and it is † here stated expressly that this writ of entry was returnable in fifteen “days from the Holy Trinity, which was the sixteenth of June:” so that if this must be taken as the fact, “that the writ of entry was returnable on the second return of the term,” and there can be no judgment till after appearance, then the relation to the first day of the term is out of the case, and the recovery cannot be till the second return of that term.

The end of Hilary term, 1761, 1 G. 3.

[1136] EASTER TERM, 1 GEO. III. B. R. 1760.

ZOUCH, *EX* DIMISS. WOOLSTON, *versus* WOOLSTON, ET AL'. Wednes. 15th April, 1761. [S. C. 1 Bl. 281.] A tenant for life, with full power to jointure as in the next page, may execute it in part, and afterwards execute it for the rest on the same wife. [There is nothing new in this; see 2 Brown, 25, 27. 2 Durn. 725. 4 Ves. 712. 3 Brown, 35.]

This was a case upon a special verdict in ejectment.

The question arose upon a devise by the will of Christopher Woolston, who died seised in fee of lands in Staverton, Broadhempston, and Westogell, in Devonshire. All the defendants, except Elizabeth Woolston, were found not guilty generally: and she also was found not guilty, as to the lands in Staverton; but, as to the residue of the trespass relating to the lands in Broadhempston and Westogell, the jury found specially.

The special finding was as follows—

Christopher Woolston being seised in fee, on the 11th of August, 1707, of the lands, &c. in the declaration described, in the parishes of Staverton, Broadhempston, and Westogell in the county of Devon, and of other lands in Tor-Newton and Tor-Bryon, did, by will of that date, devise to his wife Mary, Benjamin Abraham, and John Pope, and their heirs, all his messuages, &c. in those parishes, to the following uses. As to the lands in Tor-Bryan, to the use of the said trustees, for forty years after his decease: and as to the messuages, &c. in Staverton, Broadhempston and Westogell, to the use of his eldest son James, for life; remainder to trustees, to preserve contingent remainders; remainder to the first and every other son of James, in tail male; and in default of such issue, the like limitations to his, (the testator's) son John, &c.; remainder to the daughters of James, in tail; with like remainders to the daughters of John, and the like to the testator's own daughters; remainder, as to Westogell, to the use of his own right heirs; and as to Staverton and Broad-

\* Cro. Jac. 643.

† V. ante, p. 1132.



hempston, to his cousin ——— Woolston, in tail, with remainder to his own right heirs. And as to the lands, messuages, &c. in Tor-Newton and Tor-Bryan, subject to the term of [1137] forty years, he limited them, first to his son John, and then to his son James, first for life, and then with limitations over, (like the preceding ones;) with remainder to his own right heirs: and the trust of the term was declared to be, to raise 1000l. out of the rents and profits of the premises in Tor-Bryan, for his daughter Elizabeth; payable, one moiety at her marriage, and the residue within three months after; and in the mean time 30l. a year for maintenance; and then the term to cease.

Then comes this proviso, namely,

“Provided always, and it is my will, intent, and meaning, that the said James Woolston and John Woolston, severally and respectively, when they or either of them shall have an estate in possession, to his or their respective proper use or uses, of and in the aforesaid messuages, lands, tenements and hereditaments, for his or their life or lives, by virtue of the several limitations hereinbefore mentioned, shall have full power, liberty, and authority, from time to time during his or their respective life or lives, by deed or deeds, writing or writings, to be by him or them respectively subscribed and sealed in the presence of two or more credible witnesses, to assign, limit or appoint, to, or to the use or in trust for any woman or women that shall be his or their respective wife or wives, for and during the natural life and lives of such woman or women for or in the name or in lieu of their jointure or jointures, all or any part of the several messuages, lands, tenements, and hereditaments to him or them the said James Woolston and John Woolston herein before respectively limited as aforesaid.”

The testator died on the 12th of August 1707.

James entered into his part under the devise; and John also, into his part.

John died seised, leaving only one son, named also John, who is the lessor of the plaintiff.

James, being so seised, took to wife the defendant, then Elizabeth Bogan; and, previous to the marriage, by indenture dated 31st May 1712, duly executed between the said James Woolston of the first part, William Bogan, of Gatecomb, in the said county, Esq. and John Lagassic, clerk, of the second part, and the said Elizabeth Bogan (sister to the said William Bogan) of the third part (reciting the said will as to the devise to James, and the proviso,) in consideration of the intended marriage, and in part-performance of certain articles of agreement (on the [1138] day before) between the said parties, James Woolston, having by virtue of his father's will an estate in possession to his own proper use for his life in the several messuages, &c. so devised, doth according to the power to him given, and by virtue thereof and of all and every other power and powers and authorities which to him doth or may belong, assign, limit, and appoint, to the said William Bogan and John Lagassic and the survivor of them and his heirs, all that capital messuage, &c. and all other messuages, lands, &c. in Staverton, and his messuages and all other his lands in Westogell, and the reversion and reversions, &c. To hold, as to the lands in Staverton, to the trustees, to the use of Elizabeth Bogan for life, for and in the name and in lieu of her jointure, (to commence from and after the marriage and the death of James;) and as to the other premises in Westogell, to the use of the said Elizabeth Bogan during the joint-lives of herself and of Prudence Woolston widow of the testator's eldest brother, for and in the name and in lieu of her jointure, (to commence from and after the marriage and the death of James).

In this indenture is contained a proviso, that if the said Elizabeth Bogan do not, within three months after request made, at the costs of such person as shall then be tenant of the freehold or be seised of all or any part of the messuages, lands, &c. whereof the said James Woolston shall during the coverture be seised of any estate of inheritance, release all and every dower and claim of dower, and all her right and interest unto the several messuages, lands, &c. (her said jointure excepted,) every thing contained in this indenture should be void.

There was also in this indenture, a covenant from James Woolston with the trustees, that he has full power thus to appoint the premises in Staverton and Westogell: and that the said Elizabeth and his sons by her shall enjoy according to the intent of this deed and of the will, free from all incumbrances except an

annuity of 50l. per annum payable (out of Blacker) to the said Prudence: and he covenants to make further assurance, within ten years, if required.

Afterwards, during the coverture, James, by deed poll dated the 15th of February 1738, (containing a recital of the abovementioned devise to him, and of the said indenture tripartite of 31st May 1712, and of the proviso therein contained and abovementioned, and that the then intended marriage took effect,) for and in consideration of the great love and affection which he bore to the said Elizabeth now his wife, and for a better provision and maintenance for her, releases to Norton Nelson and Margaret his wife executrix of William Bogan the surviving trustee in the indenture of 31st May 1712, the provisos contained in the said indenture and in the articles of agreement therein mentioned.

[1139] Afterwards, by indenture dated 3d October 1751, reciting to the same effect as is recited in the deed poll of 15th February 1738, and also reciting that the said Prudence Woolston (the widow) was dead, and that James Woolston had received the sum of 600l. and upwards which had fallen to his wife Elizabeth since their marriage; so that the jointure made for her by the said indenture tripartite of 31st May 1712, was no way equivalent to the fortune he had received with her, he the said James Woolston, in consideration of the premises and of love and affection to the said Elizabeth his wife, as an increase to her jointure, (being then in possession, &c. *ut supra*,) assigns, limits, and appoints, in pursuance and by virtue of the power given him by the will, and of all other powers and authorities that were in him, all the messuages, lands, &c. devised to him by his father's will, in the several parishes of Westogell, Broadhempston and Staverton (specifying them particularly,) to trustees, to the use of the said Elizabeth and her assigns for her life, as an augmentation of her jointure.

The jury then find the value of all the lands devised to James Woolston to be 196l. 10s. per annum; viz. Staverton 90l. Broadhempston 60l. Westogell 46l. 10s. And that the lands devised to John were of the yearly value of 230l.

James died on 30th November 1756, without issue male; leaving only one daughter now living; and ten grandchildren by another daughter, nine of which are now living.

Elizabeth entered into all the premises devised by the will of Christopher and comprised in the said indentures; and is still possessed thereof.

John, the son of John and lessor of the plaintiff, is and has been ever since the death of John his father, seised of the rest.

Prudence died before James, and before his making the deed dated 3d October 1751.

The lessor of the plaintiff entered into the premises in Broadhempston and Westogell on 30 June 31 G. 2, and demised to the plaintiff, &c. But whether, upon the whole matter, the said Elizabeth be guilty of the trespass as to the premises in Broadhempston and Westogell, the jury know not; but pray the advice of the Court: and if it shall seem to the Court "that she is guilty thereof," then they find her guilty; but if, &c. then not guilty.

[1140] The question arose upon the proviso in the will of Christopher Woolston empowering his two sons to make jointures, and upon the execution of that power.

It was argued, on Friday last, the 10th of April 1761, by Mr. Gould for the plaintiff; and now by Mr. Dunning for the defendant.

Mr. Gould—The question (in a narrow compass) is whether James Woolston had not completely exhausted his power, by executing his indenture of 31st May 1712: or whether any power remained in him after the making of that deed.

He begun with laying down some of the \*general rules as to the execution of powers; and then proposed to consider, 1st. The sense and substance of the present power; 2dly. Whether it was exhausted.

First—The intent was to enable James to make a jointure on his future wife or wives, as often as he should marry.

Secondly—It has been completely exhausted with respect to this wife, by the first deed; which has no express reservation, nor intended any. It is like the case of powers of revocation; which can be executed but once, and not toties quoties. This was settled in the case of *Hele v. Bond*, Prec. in Chancery 474.

<sup>+</sup> 1 Salk. 240. Lucas, 31. 1 P. Wms. 149. 8 Rep. 69 b. 2 Strange, 992.



The lands in Staverton were charged with an annuity of 50l. per annum to Prudence: and the intention was, "that Staverton when clear of that annuity, should be her jointure;" and she and her issue were to enjoy those lands in Staverton.

He said he could find no cases that were quite applicable to the present. *Harvey v. Harvey*,† in Cane' is not.

Mr. Dunning now argued for the defendant—He entered into the origin, and went through the history of powers: which he divided into three sorts;

1st. Naked powers, unaccompanied with any interest: (which he allowed, were to be construed strictly;)

2d. Powers given to donees in particular estates: (which, though to be construed strictly in favour of remainder-men, yet are extended by Ld. Harcourt, in the case of *Beal v. Beal*, 1 Peere Wms. 244).

[1141] 3d. Powers reserved by the donor, for the benefit of himself, or of his heir who would have been intitled to the fee, if it had not been limited by the donor's act. Of this last sort, is the present power: where the donor reserved a power to the tenant for life, which would otherwise have descended with the fee; and is part of the old dominion the donor had over his own estate.

These have received liberal constructions. Hob. 312, *Kibbet v. Lee*, Tr. 17 Jac. 1. *Orby v. Mohun*, Eq. Cases Abr. 343, pl. 5. 2 Vern. 531. Prec. in Chancery 257. 3 Chanc. Rep. 102. Rep. Eq. 45. *Lady Coventry v. Earl of Coventry et Al'*: Eq. Ca. Abr. 348, pl. 19. Lucas, 463. 9 Modern, 12. Viner's Abr. tit. Powers, 477, A. 13, pl. 4.

The point is—Whether the second deed of appointment in this case is well warranted by the power.

The objection can only be to the manner of executing it; viz. doing it by two deeds instead of one: for it is admitted "it might have been done by one deed."

But the words of the power are, "by deed or deeds:" which warrants the doing it by two. Powers of leasing, jointuring, selling, revoking, &c. may be executed at different times, and by different deeds: as was *Lady Jane Coke's case*, (then Lady Jane Holt).

As to the case of *Hele v. Bond*, Prec. in Chancery 474, that determination was right; for there the power of revocation was executed over the whole estate.

He denied that there was any thing in the first appointment which takes away or bars James's right to make a second: though he admitted that he might not at that time have any formed positive intention to do so.

The proviso in the indenture of 31st May 1712, "that Elizabeth Bogan should release all claim to dower," was to bar her, not him. And he has released that proviso.

Besides, she never could have dower out of these lands. And the covenant "to enjoy" is only an expressio eorum quæ tacitè insunt: it does not include nor relate to the remainder-men; but is only a transaction between the husband and wife and her issue; and is only for enjoyment ac-[1142]-cording to the intent of the deed and Christopher's will. So that this covenant would not extinguish the power, or release it, or extend to the remainder-men, but leaves the matter just as it found it: it only operated on the subject matter of that particular deed.

Therefore these two appointments are not at all incompatible; but are agreeable to the intent of the power and of the parties.

And there was even a pecuniary consideration for the second jointure, viz. her additional fortune: (though love and affection alone were sufficient).

As to authorities—the only one, he said, that seems to impeach the liberality he contended for, is the case of *Rattle v. Popham*, 2 Strange, 992, M. 8 G. 2, B. R. And there indeed, the Court looked upon themselves to be bound down to a strict construction, by *Whitlock's case*, 8 Rep. 69 b.

But *Harvey v. Harvey*, in \*Barnardiston's Rep. in Chancery, 103, 109, was since

† 12th Nov. 1739, and 22d July 1740. See Equity Cases Abridged, vol. 2, p. 669, 670, pl. 20, 21, 22. [And S. C. 1 Atk. 561.]

\* Ld. Mansfield absolutely forbid the citing that book: for it would be only misleading students, to put them upon reading it. He said, it was marvellous however, to those who knew the serjeant and his manner of taking notes, that he



that case. He then cited it from a manuscript; and argued from it to the present case. He also mentioned the case of *Scrope v. Offley*, in Dom' Proc' 25th March 1736; which he said was unlike to the present case, and also to that of *Harvey v. Harvey*; for the latter is in point, and proves "that such a power as this is may be executed at several times." If the settlement in 1712, was not intended to be a full and complete execution of this power, it shall not prevent the making a further provision afterwards. Here, the remainder-man is a mere volunteer; there, he was a purchaser.

That case was indeed in a Court of Equity. But the constructions of this Court, and of a Court of Equity, ought to be the same: else, a defective execution of a power would be in a better case than a legal execution of it.

Mr. Gould, in reply—The power was exhausted by the first deed, according to the substantial intent of the power given by the will. The husband had power, it is true, to limit from time to time upon different wives: or upon one wife, at several times and by different deeds. But upon this deed, it manifestly appears to be, and to be intended to be a complete jointure by this first deed of 1712: and no subsequent event (as the not having issue male, for instance,) can make any alteration.

The contracting parties, her own relations and friends, intended that the lands in Staverton should be the full and whole provision for the jointure of the defendant [1143] Elizabeth: but as there was an annuity of 50l. a year issuing out of those lands during the life of Prudence, therefore the farm called Metley, lying in Westogell, was also settled upon her during the joint lives of herself and Prudence, as a security against that incumbrance upon Staverton. And she was obliged by the proviso, to release all right and title of dower to James's lands of inheritance.

The covenant from James is confined, "according to the limitations in the will:" and the power given by the will was, "to make a jointure of all or any part of the lands."

I admit that if James had declared this to be only in part of her jointure, or expressly reserved a power to add any more, he might afterwards have augmented it; but not having made any such declaration or reservation, the power is exhausted. And it is just like the case of *Hele v. Bond*, (a case very solemnly determined).

As to the case of *Harvey v. Harvey*—there, the power never was executed at all. The power was to settle lands: he settled a rent-charge. It was, at law, no execution of the power. It came into Chancery, to supply the defect, and make it good, which it was not before. And the third deed there shewed the intention "that it should be according to the power reserved to Edward Harvey by the deed of 1715."

The \* case of *Scrope v. Offley* is strong for the plaintiff here.

Lord Mansfield—The material facts stated, are, the devise by Christopher to his two sons, in strict settlement; and the power given them "to settle jointures:" which power James made use of, upon his marriage in 1712, by settling lands in Staverton, with a provisional addition during two joint lives, of lands in Westogell, (there being an annuity of 50l. per annum payable to the testator's elder brother's widow out of Staverton). In this deed of settlement, there is a proviso for the wife's releasing dower, and also a covenant from James, "that he had power to make the appointment," and for enjoyment under it. He afterwards releases her agreement to give up her claim to dower. Then comes the indenture of October 1751, in augmentation of her jointure. There is nothing stated in the verdict, nor any question made about the dower.

The single question is whether the additional jointure is warranted by the power, and is a good execution of it; or whether the power was totally exhausted by the settlement in 1712.

[1144] This question depends upon two points: 1st. What is the original construction of the power; 2d. Whether the settlement of 1712, has barred James the husband from making any further settlement upon the same wife; (provided it be such as is warranted by the original construction of the power).

The first point is—Whether it be necessary that this power must be executed all at once; or whether it may be executed at different times.

should so often stumble upon what was right: but yet, that there was not one case in his book, which was so throughout.

\* In Dom. Proc. 24th March 1735-6.

The proviso in Christopher's will which gives this power, gives it at large, without any restraint: all is left in the discretion of the husband. It is no bar of dower; because it is only "for or in the name or in lieu of jointure:" (which does not bar dower). The only limitation to it is, that she cannot enjoy it longer than her life.

It looks as if the drawer of the clause in the will, which gives this power, had it in view, "that it might be done at different times, and repeated more than once." For the words are that the husband shall have power "from time to time during his life, by deed or deeds, writing or writings, to limit all or any part of the estate to any woman or women that shall be his wife or wives, for and during their life or lives;" and it has no meaning, other than by applying these words to each respective wife that he might marry, and construing them to empower the husband to make different settlements upon the same wife.

The answer given to this is, "that this manner of expression is meant to take in the case of marrying different wives, one after another."

But that might have been done without these particular words, and by a more general manner of expression than is here used.

So that upon the very frame and creation of the power, it is to be executed at different times, if it shall be so thought proper.

The power in the case of *Harvey v. Harvey* was in different words from these, and not so strong as these: the power there was "to settle so much of the premises as should be of the yearly value of 603l. for a jointure and provision for such wife during her natural life." [1145] That was for a jointure; one specific entire thing: not "upon a wife\* or wives;" not "from time to time:" nor "by deed or deeds, writing or writings." It was there urged, "that the power was executed." The Lord Chancellor (Lord Hardwicke) was clear that he might execute the power at different times; less than the whole, at first; and then more. It was in that case admitted by Mr. Wilbraham, "that it might be executed at different times." And so Lord Hardwicke again held, at the re-hearing.

This case now before us is infinitely stronger than that of *Harvey v. Harvey*: and it is certain, that in the present case, the power might have been executed at different times, upon the original construction of it.

Second point—This being so, it brings us to the operation of the deed of settlement in 1712; and leads us to inquire, in the first place, what James intended by this deed, which limits the lands in Staverton and the farm in Westogell to the use of the defendant Elizabeth.

It is urged that they are given her "for and in the name and in lieu of her jointure;" and that there is a covenant, "that she and his sons by her shall enjoy."

Now if this was a dispute with the son of the marriage, I should, even in that case, think that James had not exhausted his power by this first deed, so as to bar himself from adding a further provision. For this is not said to be in full of her jointure, or in bar of any further provision, or in full satisfaction of it, or any such thing: and the covenant relates to Christopher's title and power of devising; and is for enjoyment according to the will, and to support the title to the estate under the will. So that this covenant does not carry the thing further than if there had been no such covenant in the deed; it is only *expressio eorum quæ tacitè insunt*.

He might, notwithstanding that covenant, have executed the power for the benefit of another wife, if he had married one. And it is not natural to suppose that Elizabeth's friends should tie him up against her, and not against a future wife, who would be a step-mother to her children.

The case of *Scrope v. Offley* is not like this case. That case turned upon the words—"to be thereafter made, committed or done by them, or either of them." And there could be no incumbence but the second jointure.

[1146] But if there could have been a doubt, if the dispute had been with the son or other issue of the marriage; yet this is a dispute with the remainder-man: and it can not be imagined that it could be the intention of James himself or of any of the parties to this deed, "that he should preclude himself from making a further provision for his wife, for the benefit of the remainder-man, who was no party to the deed, but a mere stranger to it, and enjoyed a good estate under the will." The

\* The words were, "that if Edward marries any other wife, that then and so often Edward may settle, &c."



remainder-man could never be in the contemplation of the parties who made this deed.

And as to this point—the case of *Harvey v. Harvey* is very applicable. That was “in full for her jointure, and in full recompence and satisfaction of dower or thirds at common law;” and that power was a power “to settle a jointure;” and he had by the deed directed all the residue to be paid over to the remainder-man. But Lord Hardwicke observed, that though the husband barred her to claim, yet he did not bar himself to give.

He was, in that case, clear that the former settlement was no bar against the husband's making an additional provision for his wife under the power: and so am I, here. There might be many reasons very sufficient to induce him to make an additional provision for her. For instance, alterations might have happened to his family or fortune, subsequent to the former settlement. Here is a circumstance recited and not contradicted, though not expressly found; an additional fortune came to his wife since the former settlement was made: so that it became really his duty to make an additional provision for her; as he had no issue male. And there is nothing in the settlement of 1712, to prevent it.

There is good sense in what Mr. Dunning said, “that executions of powers should have the same construction, force and effect in Courts of Law, which they have in Courts of Equity;” because the Statute of Uses transferred that mode of real property, from equity to the common law. Whatever is a good power or execution in equity, the statute makes good at law.

But in some of the early cases, they reasoned in Courts of Law, upon these equitable powers, from notions applicable to naked authorities unconnected with any interest, or to mere legal powers introduced by other statutes, (such as leases by ecclesiastical persons, or tenants in tail;) instead of adopting the liberality of Courts of Equity, and considering these powers brought into the common law by the Statute of Uses, merely as a mode of ownership or property.

[1147] Considering them in this light, no doubt could ever have been made “whether a man might not do less than his power;” or if he did more, “whether it should not be good to the extent of his power.”

Courts of Equity reasoned as they would have done if the statute had not been made: and were forced to assume a jurisdiction to correct the too strict and narrow construction put upon powers and the execution of them.

And yet whatever is an equitable ought to be deemed a legal execution of a power: for there can be no circumstances to affect a remainder-man personally in conscience, where a power is not duly executed, any more than the issue in tail or the successor of an ecclesiastical person if a lease is not duly made.

In the case of \* *Rattle v. Popham*, this Court thought themselves bound by † *Whillock's case*; and held the lease not to be warranted by the power. The widow brought her bill in the Court of Chancery; and Lord Talbot, arguing from the same premises, the power and the lease, without any other circumstance, held the lease to be warranted by the power. He said, it was not a defective, but a blundering execution: and he decreed the defendant to pay all the costs both at law and in equity.

But there are no precedents which can stand in the way of our determining this case, as it ought to be determined, liberally, equitably, and according to the true intention of the parties.

Mr. Just. Denison declared himself satisfied with these reasons so fully given by Lord Mansfield, and that he was of the same opinion.

Mr. Just. Wilmot—Courts of Law and Courts of Equity ought to concur in supporting the execution of these powers, which are very convenient to be inserted in marriage settlements, and are very useful to families; and they ought not to listen to nice distinctions that savour of the sophistry of schools; but to be guided by true good sense and manly reason.

After the Statute of Uses, it is much to be lamented that the Courts of Common Law had not adopted all the rules and maxims of Courts of Equity, by which they were guided in their determinations upon them. This would have prevented the absurdity of the same party's receiving costs in one Court, and paying them in another, upon the very same litigation.



[1148] But the present case wants no support. Here, the two points are, 1st. Where this power was, in its original creation, intended to be such as might be executed at different times, and consequently might be so, if the tenant for life thought proper to use it in that manner: 2dly. Whether the deed in 1712 prevented and barred the tenant for life from repeating it a second time.

First—The intention is clear, that it was originally intended to be executed at different times, even upon the same woman.

Then it is to be inquired whether it might be so executed, within the rules of law.

The determination in the \*case of *Hele v. Bond* was certainly right. There the power of revocation was executed over the whole estate. The power reserved to A. was “to revoke the uses of the settlement, and declare new ones:” and he did revoke the old use, and limit new ones, without annexing any new power of revocation to these new uses. There the first power of revocation did not ride over the new uses: it was executed over the whole estate.

Here the question is, whether this power be so indivisible, that it can be only executed once.

*Digges's* case is in point, “that a person who has such a power of revocation may revoke part at one time and part at another; but not the same part twice, unless he reserves a new power of revocation.” 1 Co. 173 b.

And this power in the present case relates to all and every part of the estate, by the express terms of the proviso. It can not therefore be necessary to be all done uno flatu; but may be executed at different times; and it is highly reasonable that it should be so. There may be many cogent reasons to render it convenient: as children being more or less numerous; a wife's additional fortune, or her good behaviour and merit; or many other circumstances of a family. And what is such a power, but a mode of conveyance putting the tenant for life into the same condition as if he was tenant in fee quoad hoc? therefore it may be executed at different times.

Second question—Then the only question is, whether the deed in 1712 prevents this, and bars James from making any further provision for his wife.

[1149] Now as to the frame of the deed, it must be observed that the practice in conveyancing is to release the power and all further claim to it, whenever the power is completely executed, that there is no intention to go any further in the exercise of it.

And as to the covenant—this covenant means no more than the usual covenant for enjoyment according to the limitations in the will; “that his wife and her issue shall enjoy it, subject to the power given by his father's will.”

Therefore even if there had been issue male, and this a litigation with that male issue of the marriage, I should still have been of this opinion that I have now declared: but, as there is no issue male, it would be absurd to make the husband stipulate that he should not provide for his daughter or daughters and their children.

And the proviso “that the wife should release her claim to dower,” does not stand in the way; nor the release of that proviso: for though the husband might mean to bind her from claiming any more, yet he did not mean to bind himself from giving her more, if he should think fit. It would be absurd to suppose that the parties to the deed understood or meant it in that light. Therefore no inference can be drawn from this proviso.

Per Cur. unanimously,  
Judgment for the defendant.

REX *versus* SIR WILLOUGHBY ASTON, BART. AND JOHN DODD, ESQ. ET AL. Thurs.  
16th April, 1761. A substitute must be considered as a militia man.

Mr. Aston and Mr. Schutz shewed cause against a rule obtained in the last term upon the motion of Mr. Norton, for Sir Willoughby and Mr. Dodd, as justices of the peace for the county of Berks, and Mr. James Head, treasurer of the said county, to shew cause why a writ or writs of mandamus should not be awarded, directed to them all, requiring them the said justices to make an order or orders upon the said treasurer, to re-imburse the parishioners of the parish and borough of Newbury in the same county the sum of 114l. 1s. expended by the officers of that parish, for the relief of

the wives and children of several militia-men ordered out in actual service, in pursuance of orders of the said two justices made for that purpose in the months of August, September and November in the year 1759; and requiring him the said treasurer to pay the same.<sup>(a)</sup>

[1150] Mr. Aston made a doubt whether the direction of the writ was rightly prayed; or whether it ought not rather to have been prayed to be directed to the \* sessions. But however, he said, the justices at sessions were very ready to make any order that the Court should think right; as soon as they should be informed what the opinion or sense of the Court is; and that they would do this voluntarily, without being compelled by mandamus: but that at present, and until they should know the sense of the Court, they were of opinion

1st. That a substitute of a militia-man is not properly a militia-man within the meaning of 31 G. 2, c. 26, § 28.

2dly. That, as the town of Newbury does not contribute to the county-stock, but have a separate stock of their own (which was admitted to be true,) they were not intitled to be reimbursed out of the county-stock, for the weekly allowance made to the families of any Newbury men who served as substitutes: but that such allowance ought to be paid out of the Newbury stock, and not out of the county-stock.

Mr. Norton, contra, insisted, 1st. That a substitute was properly a militia-man, within the meaning of the Act of 31 G. 2, c. 26, § 28. Especially, since the construction which the Legislature themselves have put upon it, by the subsequent Act of 34 G. 2, c. 22, § 1, 6, and particularly by the preamble of this latter statute.

2dly. That the parish of Newbury have a great many of their inhabitants who are willing to serve as substitutes for others; and that many Newbury-men serve as substitutes for other Newbury-men; and many of them, as substitutes for such militia-men as are resident out of Newbury, and inhabitants of other parts of the county. And he thought his request was very fair and equitable; for that he did not desire to be reimbursed out of the county-stock, for the allowances made to the families of any Newbury-men that had served as substitutes for other Newbury-men, but of those Newbury-men only, who had been ordered out into actual service, as substitutes for such militia-men as were not inhabitants of Newbury, but of other parts of the county at large; pursuant to 31 G. 2, c. 26, § 28, whereby it is enacted "that when any militia-man shall be ordered out into actual service, leaving a family not of ability to support themselves during his absence, the overseer or overseers of the parish where such family shall reside shall allow to such family such weekly allowance for their support, until the return of such militia-man, as shall be ordered by any one justice of the peace; such allowance to be re-im- [1151]-bursed out of the county stock, by the treasurer of the county: and such treasurer shall be allowed the same in his accounts."

Lord Mansfield was clear in his opinion, against that of the justices, in both points.

1st. A substitute must, since the Act of 33 G. 2, c. 22, be considered as a militia-man within the 31 G. 2, c. 26. For though there might have been a doubt upon the former Act (at the first making of it) "whether a substitute was a militia-man for this purpose;" yet this doubt is removed by the latter Act, which is a plain declaratory legislative exposition of the former: the preamble recites this very clause, and puts this construction upon it "that substitutes are militia-men within it."

2dly. As to the reimbursement out of the county-stock, for the allowances made (under a proper order) to the families of such Newbury-men as have been substitutes for inhabitants of the other parts of the county—it is very reasonable and equitable: and they do not claim it for the family of any one who was substitute for a person drawn out of the list for their own district.

Mr. Just. Denison and Mr. Just. Wilmot were of the same opinion.

However as this question was a very general one, and might affect other parts of the kingdom as well as this county of Berks they offered Mr. Aston to consider further of it, if he had any doubt about their present opinion.

But Mr. Aston declared he had not; and he answered for the justices, that they would conform themselves to the opinion of the Court; which they were only desirous to be apprised of, in order to make it the rule of their conduct.

(a) The Militia Acts upon which this case arose, have been since wholly repealed, and new provisions made.

\* *V. Patel's case*, 6 Mod. 228, 310.

Upon which declaration, the Court thought it unnecessary to make any rule or order in form, upon the present occasion.

BEVAN *versus* PROTHESK. 1761. Rec. fa. loq. stays all further proceedings in a County-Court, if delivered after interlocutory, but before final judgment.

In a long motion about the stay of proceedings in an Inferior Court—

This Court held, that the delivery of a recordari facias loquelam, to the clerk of a County-Court, after interlocutory [1152] judgment and before final judgment, is a stop to all further proceedings in that Court.

They likewise held, that the officer of the Inferior Court can not refuse paying obedience to the writ, under pretence of his fees not being paid to him; for he is obliged to obey the writ; and has a proper remedy, which he may take, for such fees as are due to him.

STEVENS *versus* EVANS ET AL'. Tuesday, 21st April, 1761. [S. C. 1 Black. 284, and see 6 Durn. 580.] Administrator not liable to pay poor's rate, for the intestate, at least not distrainable without summons.

[Referred to, *Danby v. Watson*, 1877, 46 L. J. M. C. 181.]

This was an action of trover, for cattle: in which, a special case was agreed upon, for the Court's opinion.

The special case states, that on the 12th of April 1759, an assessment was made and allowed at a vestry of the inhabitants of the parish of Wix in Essex, to re-imburse to Steven Durant, the overseer, the monies laid out in the half year ended on Easter Monday then next ensuing the date, for the necessary relief of the poor of the said parish of Wix, by the said Stephen Durant, the overseer, &c. Which assessment was in due manner allowed and confirmed by two justices of the peace, &c. and published in the church, &c. That William Vesey was therein assessed 9l. 11s. That afterwards, viz. on the 18th July 1759, William Vesey died intestate. That on 12th December 1759, administration of his goods, &c. was granted to John Stevens, the plaintiff; who possessed himself of his personal estate, and particularly of the cattle in the declaration mentioned.

That on the 14th of January 1760, two justices of peace executed a warrant; in which warrant, the said rate or assessment is recited; and the warrant also recites that whereas it appeared on the oath of Stephen Durant the late overseer, "that the said 9l. 11s. had been lawfully demanded of the said William Vesey deceased and of his widow and representative Susannah Vesey, since his decease, who hath refused and doth refuse to pay the same:" it requires the churchwardens, overseers, and constables, &c. to make a distress of the goods and chattels of the late William Vesey; and if within six days next after such distress, the said sum of 9l. 11s. and also reasonable charges of the distress, [rendering the overplus to her the said Susannah Vesey,] be not paid on demand, then to sell, &c. And if no distress be to be had, then to certify the same; so that such further proceeding may be had therein, as to the law doth appertain.

By virtue of this warrant, the defendant Goby (then constable) and the other defendant Durant (the late overseer) at Wix aforesaid, on the 19th. of January 1760, dis-[1153]-trained the cattle, and sold them for 15l. Which cattle so distrained, were the cattle of the said William Vesey in his life-time and at his death, and were distrained on the lands in the said parish of Wix occupied by the said William Vesey in his life-time.

That the overplus, after payment of the rate, was tendered back.

That notice of the action was given to the justices.

The question upon this case, is whether the distraining and taking and selling the cattle which were the goods of William Vesey, in the hands of the plaintiff, his administrator, by virtue of the said warrant, was lawful or not.

This case stood now in the paper, for argument.

Mr. Norton, on behalf of the plaintiff, argued that it was not lawful: and an action of trover is maintainable against the parish officers for taking them.

1st objection. It is a bad rate, and illegal.



First—It is a rate made to re-imburse an overseer: which is a bad rate, as was settled in *Tawney's case*, 2 Ld. Raym. 1009, and 6 Mod. 97, *Dominia Regina v. Paroch' de Littleport*, S. C. and 2 Salk. 531, S. C. *Tawney's case*. For the overseer was not obliged to advance the money without a previous rate: and he may re-imburse himself out of the next, made in his own time.

Secondly—It is a rate made for half a year ending on Easter Monday next: whereas a rate can not be made for longer than a month. 6 Mod. 98, *Tawney's case*, ut supra; but called there *Dominia Regina v. Par. de Littleport*. The case of *Tracey v. Talbot*,\* in 2 Salk. 532, is in point.

2d objection. There was no refusal by the representative to pay the money. Now there can be no distress, without a previous demand and refusal. The refusal was really by Vesey, who is dead; and by the widow who was not in fact (though she is in the case stated to be) his representative.

But supposing the objections not to hold, and that the rate and warrant are good; yet the goods of Vesey are not distrainable, in the hands of his personal representative, for a rate made upon Vesey himself. There is no instance of it, nor any case to support this: therefore it ought not [1154] to be supported. Nor is there any necessity for it; for the poor can not suffer by the non-payment of this money. There are other provisions for raising the money.

This is a casus omissus; and lex non curat de minimis, (as this is). The Acts of Parliament give no such power to the justices, as to grant such a warrant: and nothing can be intended in favour of their jurisdiction. It is for this reason, that with regard to the wages of servants they are confined to wages of servants in husbandry only, and can not exercise such jurisdiction in respect to the wages of other servants.

As to any inferred power, (for there is no express power,) none can be pretended, but from 43 Eliz. c. 2: for 17 G. 2, c. 38, makes no alteration in the method of compelling payment of the rate.

It is not the thing that is rated by 43 Eliz. c. 2, § 1, but only the person, (the occupier;) and section 4 gives the means of compelling it: and the occupier alone is the person there meant; and the refusal to contribute according to the assessment made upon him, is treated as an offence; and the offender is to be sent to gaol. But the executor or administrator is not an offender: it is a personal charge. An overseer could not bring an action for it, even against the person charged; he must pursue the particular remedy appointed by the Act. And if so, the Court will never extend the remedy, against a representative.

If an administrator should pay this rate, he might be guilty of a devastavit. And the compulsion by distress will not alter the case, or be an excuse for a devastavit.

In what course of debt is this rate to be ranked? how is the administrator to know what preference it is to have?

There is indeed a legislative exposition made, upon this head, in another statute relating to the poor laws: I mean 17 G. 2, c. 38, § 3: which provides a remedy for the case of the death of an overseer who has parish-money in his hands; and gives the preference of this sort of debt to all others; directing the executors or administrators of the overseer to pay it out of the assets, "before any of his other debts are paid and satisfied."

Therefore, as the Legislature have made a declaration in that case, and not in this, it is plain that they did not mean so in this case, but meant to leave it to the ordinary course of administration.

[1155] Mr. Bishop, contra, for the justices of peace, and for the parish officers.

1st. The Court will not now enter into any objection to the rate.

The only questions therefore are as to the warrant, and as to the assets being distrainable in the hands of the representative.

As to the demand of the money upon Vesey himself, it was made upon him; and is so stated: and as to the demand upon the representative—the end and intention of this special case, was to settle the material point, the real question "whether the goods of the person rated are or are not distrainable in the hands of the representative."

The practice is with us, that they are. It is no answer, to say that other people

are liable to pay, if the person rated does not. The question is, whether the representative of the person rated, is or is not liable.

The authority to make this warrant, and to make the distress in obedience to it, is founded upon the stat. of 43 Eliz. c. 2, § 4, which gives this remedy by warrant and distress, upon refusal to pay. (a)

The demand of the money is to be made, and in the present case was actually made upon the person assessed: and that made it a debt from him. There was no need of a demand upon the representative: the assets were already become liable, and remained so in his hands.

As to the danger of a devastavit—a representative could not be guilty of a devastavit even by paying a simple contract-debt before a bond-debt, if he had no notice of the bond-debt: and the distress made upon him would be a justification to him for paying it under the compulsion of such distress. The Act of 17 G. 2, c. 38, § 3, makes a debt of this sort, payable before any other debts of the deceased overseer.

I do not say, that the executor or administrator could be sent to gaol, for non-payment of this debt: but yet, the assets in his hands are distrainable, as the proper fund out of which it is to be paid; especially, as no action would lie for it (as Mr. Norton agrees).

Mr. Norton, in reply—No answer at all has been given to my objection to the rate itself.

[1156] And I say, that even if the administrator was admitted to be liable to pay, yet still there ought to have been a previous demand upon him.

No such practice as what Mr. Bishop speaks of, is stated in the case; and therefore the Court will intend that there is none such: and I believe there is none. I never heard of it before; I take it to be directly the other way.

And, at all events, the poor can not suffer; for there are other persons who must make up the deficiency, in case this man do not pay.

This is scarce a solvent estate; because the widow has renounced administration, and it is granted to a creditor.

This is a charge upon the person, which dies with him; like costs payable by one who dies; (for which a bill, in the Court of Chancery, can not be revived: and so in this Court, upon informations, they are gone by the death of the party).

And the administrator can not possibly know in what course of administration to pay this rate. If an executor or administrator pays a debt of a lower nature, at that time knowing of others of an higher, it is undoubtedly a devastavit: and here there may be debts of an higher nature, which the administrator may know of. And if he is obliged to pay it under compulsion, he ought to pay it without compulsion; and vice versâ.

It is a charge imposed; not a debt. The case was \* left open, upon its being stated at the trial, to all or any other objection that could be made upon the face of it. There were other debts besides this.

Mr. Just. Denison.—That makes no difference.

The question is stated particularly upon this case; and is confined to the levying the money upon the representative of the person charged.

I should think, the event must have often happened, in fact and experience.

The practice is not stated; but however, the question is what the law is; not what the practice is.

[1157] It is a rule, "that upon a new statute which prescribes a particular remedy; no remedy can be taken, but the particular remedy prescribed by the statute." Therefore clearly, no action of debt will lie for a poor's rate.

This remedy given by the Act of 43 Eliz. must be considered with analogy to other like cases. This statute considers the person rated and refusing to pay, as an offender: and it gives no authority to distrain the goods of the offender. Therefore

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(a) The words of that statute are as here mentioned only refuse, and so are the words of 17 G. 2, c. 38, § 7, which gives the power to levy by distress; but in s. 11 which gives the like power to succeeding overseers for reimbursing their predecessors, which words are refuse or neglect; and qu. whether the word neglect makes any difference; that is, whether there can be any neglect unless there hath been a demand?

\* Mr. Bishop denied this.

no goods are liable to be distrained, by the words of this Act, but the goods of the offender himself.

The Act of 17 G. 2, c. 38, § 3, is no inconsiderable argument, that there was no remedy before the making of the provision in that Act of 17 G. 2, c. 38, "that such sort of debts should have a preference of payment, to all others."

I never apprehended, that the goods of the person assessed to the rate can be charged in the hands of the representative. And therefore (as at present advised,) I should think that this action will lie for taking them.

I agree that this is in the nature of an execution: but yet it is personal; and I do not know that it is a lien upon the assets.

Mr. Just. Wilmot concurred; and said he had no doubt about it.

He thought, the intention of the special case, which states a particular question, appeared to be to submit this question only to the Court.

As to the objections that have been made to the rate, the first is of no great importance: for though you can not make a rate to reimburse overseers; yet the overseer may immediately (whilst in office) reimburse himself, out of the next money raised for the rate.\*

And as to the second—he said, he believed that whatever the † law might be, the practice was, not to make these rates † monthly.(b)

On the merits—it is not expressly stated in this case, "that a demand was made even upon Vesey, (the person assessed,) and that he refused payment:" though it is so recited in the warrant. But that is not material: for I [1158] have not the least doubt, but that the representative ought to have been convened before the justices, and asked "what he had to say why he should not pay the rate assessed upon Vesey his intestate." This case seems to be like a *scire facias* upon a judgment; upon which, execution can not be sued out against the representatives, without asking them what they have to alledge why it should not be taken out.

At the time of the teste, they were the *bona et catalla* of the representative. If the teste had been prior to the death, they would have been *bona et catalla* of the deceased: but if tested after his death, they are not his *bona et catalla*; but the *bona et catalla* of the representative.

Therefore if the money had been demanded of the representative, I should have had great doubt whether this warrant and distress would not have been good: for I cannot think that by the death of the person charged with this rate, the assessment before made upon him, and demanded of him, would have been quite gone and lost to the parish, and could not have been any way come at. For though it may be a charge upon the person, (as had been objected,) yet it is a charge upon him in respect of the thing occupied; and though he be called an offender, if he refuse to pay it, yet he can be no otherwise considered as an offender, than every other debtor who refuses or neglects to pay his debts, and thereby renders his person and goods liable to be taken in execution, is so far treated as an offender, till he shall comply with the judgment awarded.

And in experience, I know it to be the case,(c) that these payments by executors or administrators are often allowed, (I daresay, I have known it done fifty times,) to go in discharge of the assets of the testator or intestate. I do not say, in what course of administration of assets, but it has been very often allowed, I am sure; though I do not remember that it has been settled in what course of administration. Indeed it might be of too much consequence, to put it into the power of justices of peace to determine upon the administration of assets, as to the course in which they were to be administered.

In a case of *Wallis, Administrator, v. Hewitt*, at Guildhall, at the sittings after

\* See *Tawney's case*, ut supra accord.

† The law seems to be that they should either be made monthly, or at least divided and distributed into so much per month. *V. Tawney's case*, and also *Tracy v. Talbot*, 2 Salk. 532, and *Rex v. Justices of Middlesex*, Hil. 9 G. 2, B. R.

(b) The words in 43 Eliz. c. 2, § 1, gives power to raise it weekly or otherwise, and that they need not raise it monthly. See 1 Const. 64.

(c) By 17 G. 2, c. 38, § 3, executors or administrators of overseers of the poor shall pay all money remaining due and received by the overseer, before any of his other debts.



Hil. term, 5 G. 2, before Ld. Ch. Just. Eyre, in an action of trespass, two aldermen of London had made a warrant to distrain a man for a poor-rate. The man died intestate: but before that, there had been a demand made upon him and refusal by him, and a warrant of distress granted upon his refusal; and then he died—Eyre Ch.J. held that a distress could not be made after his death; or if it could, yet the represen-[1159]-tative ought to have been summoned: and he held the property to be changed. A case was made for the opinion of the Court of Common Pleas: but I could not hear what became of it. Lord Chief Justice Eyre was a great lawyer.

It would be strange, that a distress should be taken upon a man's goods without hearing him: and it would make strange confusion in the administration of assets. He may have paid or retained judgment-debts prior to this distress for the rate.

I have no doubt that the plaintiff here is entitled to his judgment.

Mr. Gould was retained to take notes for the defendant. But he said that if Mr. Norton insisted upon the want of a demand from the representative, he could not pretend to maintain the case on the part of the defendants.

Mr. Just. Denison and Mr. Just. Wilmot said, that was an essential circumstance.

Per Cur. unanimously,

Rule for the *postea* to be delivered to the plaintiff.

SMALL, *EX DIMISS. BAKER, versus COLE AND SKINNER*. 1761. Verdict cures defect in setting out a title, though it cannot cure a defective title.

This was a case in ejectment, after a verdict for the plaintiff.

On Saturday the 11th of this month, Mr. Norton, on behalf of the defendant, moved in arrest of judgment; for that the lease declared upon was, on the face of it, void; being laid to be made in the thirty-third year of King George the Third, "to hold from the quarter-day then last past:" an impossible time at present, as it is now but the first year of His present Majesty's reign.

The fact was that the pleadings were intituled of Hilary term, in the first year of King George the Third; and the lease is laid to be made "in the 33d year of the said King; to hold ut supra:" which he alledged to be a fatal objection to the very title of the plaintiff; and that it can not be amended in this suit of ejectment.

A rule was then made, to shew cause: and

Mr. Gould, on behalf of the plaintiff, now shewed cause why the judgment should not be arrested.

[1160] He agreed the state of the case to be, that the placita were of Hilary term in the first year of George the Third; and that it was alledged in the declaration, that the defendant entered, &c. "against the peace of our said lord the King;" and that it lays the demise to have been made on the 30th of May in the thirty-third year of His said Majesty.

But he answered and observed, 1st. That this is after a verdict: 2dly. That it is aided and assisted by some or one of the Statutes of Jeofails; and therefore shall not be regarded by the Court, but altogether disregarded and over-looked.

First—An ejectment being a fictitious action, and the defendant confessing lease, entry, and ouster, he consequently confesses a lease sufficient to bring the title in question: and it must be a lease of a subsisting term. But as there could be no 33d year of this King; therefore the Court will apply those words, "the 33d year," secundum subjectam materiam, when it comes before them after a verdict.

In 2 Strange, 1011, *Rex v. Bishop of Landaff*, in a quare impedit; a verdict was solemnly determined to have cured the want of alledging a presentation. And if this be considered as an impossible day, then the lease took effect from the delivery of the deed. In the case of *Acton v. Eels*, 2 Salk. 662, it was held to be a time impossible, and as if no day at all had been alledged: and judgment was given for the plaintiff.

Secondly—It is aided by the Statute of Jeofails. The 32 H. 8, c. 30, § 1, cures it, as a jeofail; being after a verdict. This can be no more than a mere jeofail; it is a mere misprision of the clerk: therefore the Court will overlook it, and give judgment without any regard to it. 2 Strange, 1011, *Rex v. Bishop of Landaff*, is in point so.

Besides, it may be amended. In the case of *Muttit v. Denny*, 2 Strange, 807, a declaration in ejectment was amended after a verdict for the plaintiff; though there was nothing to amend by; on the authority of Cro. Jac. 306, and 1 Salk. 48, pl. 5,

*Bishop of Worcester's case.* And if it may be amended without any thing to amend by, the Court will surely overlook it, and not arrest judgment upon such a trifling objection.

Mr. Norton and Mr. Burland were of counsel for the defendant. They insisted that this title, made upon the plaintiff's own declaration, is such as he can not recover upon : for it appears upon the very face of it, "that he [1161] has no title at all."

The confession of lease, entry and ouster only confesses that there was in fact such a lease as is set out in the declaration. But if that be a bad lease, it may still be taken advantage of : as, for instance, where the lease appears not to commence till after the action brought.

And the intentment after verdict goes no further than to suppose that every thing was actually proved, which ought to have been proved. But this is, at this time, an impossible lease. It is an essential defect in the demise : and therefore it is neither aided by the verdict or by any Statute of Jeofails. This lease laid in the demise could not have been proved upon the trial. If it should be supposed that a lease, to commence from the 30th of May in the first year of the reign of George the Third, had been proved, it would have been a variance from the declaration : and if it really was a lease dated as it is laid in the declaration, such a lease would give the plaintiff no sort of title.

This is not absolutely and at all events, an impossible date ; but only a future date : it may be a good title hereafter ; though it is not so now, as the time alledged is not yet come. So that the plaintiff's action is brought, before his term is commenced. And an ejectment can not be amended ; because it is the original process ; and the original process can never be amended. So is 1 Ld. Raym. 728.\*<sup>1</sup> And there, (by the way,) the Court compelled the defendant to confess lease, entry and ouster, though it was objected "that the plaintiff could not have judgment, though the verdict was given for him." In 1 Shower, 206, 207, in the case of *Bennet v. Gawdey*, Ld. Ch. J. Holt held the declaration in ejectment not amendable ; and that no other lease is confessed, but what is laid in the declaration. In 2 Barnes, 153, *Roe v. Doe, ex dimiss. Stevenson*—the demise laid in the declaration can not be amended, 2 Barnes, 13,† is in point also.

They also cited Yelv. 182,‡ *Davis v. Purdy*.

Mr. Gould proceeding to reply : but

The § Court told him, there was no occasion to trouble himself.

Mr. Just. Denison—To be sure, you can | not alter the title, if it be defective : but this is only a title defectively or improperly set out. There can be no doubt but that a proper title was proved at the trial.

[1162] If the demise had been laid "in the 33d year of His late Majesty," undoubtedly in that case, the Court would have supplied the words "King George the Second." And this seems to be just such a kind of defect as that would have been.

This is not an uncertain description ; but only a title defectively set out, by the mere mistake of the clerk.\*<sup>2</sup> And being in \*<sup>2</sup> ejectment, there is the more reason for our over-ruling this nice objection.

I think there is no need of any amendment at all.

Mr. Just. Wilmut was very clear in the same opinion : and he said, it was so plain a case, that there was no occasion to use many words about it. Therefore he would only declare his entire concurrence, that the rule should be discharged.

Per Cur. The rule was discharged.

\*<sup>1</sup> V. Carthew, 401, and 1 Salk. 48, pl. 6, S. C. by the name of *Puleston v. Warburton*, P. 9 W. 3, B. R. [See also 4 Burr. 2448.]

† *Driver on the demise of Scrutton v. Scrutton, et Al.*

‡ But there it was "ejusdem mensis Maij anno 6to supradicto."

§ Lord Mansfield and Mr. Just. Foster, were both absent.

|| V. 2 Strange, 1011, S. P. accord. [3 Wils. 275.]

\*<sup>2</sup> V. post, p. 2447. *Doe, Lessee of Hardman, v. Pilkington and Russel.*

REX *versus* PALMER AND BAINE, ESQUIRES, ET AL'. Wednes. 2d April, 1761. [S. C. Sayer's Law of Costs, 231.] Where justices of the peace are complained of without reason, they shall have costs.

Upon shewing cause why an information should not be granted against two justices of peace and others, for a misdemeanour, relating to the conviction of a poacher, and the circumstances attending it ;

The Court thought proper, upon fully hearing and considering all the affidavits, and what was urged by the counsel on both sides, to discharge the rule, as to all the defendants ; with costs to be paid to the justices, but without costs as to the others.

And they were, upon this occasion, most explicit in their declaration, "that even where a justice of peace acts illegally," (which, however, was not the present case,) "yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the Court will never punish him in this extraordinary course of an information ; but leave the party complaining, to the ordinary legal remedy or method of prosecution, by action or by indictment."

[1163] REX *versus* VIPONT AND OTHERS. Wednes. 9th April, 1761. Conviction of journeymen woolcombers for conspiring to raise their wages, quashed.

[Referred to, *R. v. Surrey JJ.* [1892], 2 Q. B. 722.]

This was a conviction that stood in the Crown-paper, and was as follows,—Borough of Derby, to wit. Be it remembered that on, &c. at, &c. Thomas Eaton of the said borough, hosier and wool-comber, cometh before us Joseph Bingham, Esq. mayor of the said borough, and John Smith, gentleman, two of His Majesty's justices of the peace of and for the said borough, and upon his oath before us deposed that Joseph Vipont, Henry Greatorex, John Hall, Edward Chapman, and Thomas Allen, journeymen wool-combers, who for some months next before their leaving his service as herein after is mentioned, were employed by the said Thomas Eaton in the wool-combing business, to work for him at reasonable wages, had, each for himself, at the said borough, confessed to him, "that they had, in the month of November last past, at the said borough, agreed one amongst another and with other journeymen wool-combers, to raise and advance their wages, and that they would not work with him or any other master in the wool-combing business, unless he and they would advance their wages ;" and that the said Thomas Eaton thereupon refused so to do ; and thereupon, all his said journey-men refused to work for him at their former reasonable wages, and had left his service. Whereupon, the said Joseph Vipont, Henry Greatorex, John Hall, Edward Chapman, and Thomas Allen, appearing before us to answer the said charge ; and having heard the said charge ; and, in the presence of the said Thomas Eaton, being called upon by us to shew cause why they should not be convicted for unlawfully entering into such combination as aforesaid contrary to the statute in that case made and provided ; and having nothing to say, nor being able to make out any thing whereby to defend themselves before us touching and concerning the premises aforesaid ; thereupon the aforesaid Joseph Vipont, Henry Greatorex, John Hall, Edward Chapman, and Thomas Allen, the day and year aforesaid, by the oath of the said Thomas Eaton, a credible witness, are convicted before us for unlawfully entering into such combination as aforesaid, at the said borough of Derby, to raise and advance their wages in the wool-combing business there, contrary to the Acts of Parliament in that case made and provided. Given under our hands and seals, &c.

This was a conviction on the Act of 12 G. 1, c. 34, "to prevent unlawful combinations of workmen employed in the woollen manufactures, and for better payment of [1164] their wages."

Mr. Serj. Davy, on behalf of the defendants, objected to it ;

1st. That no evidence is stated to have been given in the presence of the defendants ; only, the charge was read to them, in the presence of the prosecutor Thomas Eaton, the witness ; but it was not made out and proved by him *vivâ voce* before them, though they personally appeared, and consequently had a right of cross-examining the witnesses, upon their giving verbal evidence face to face : nor indeed is any evidence at all set out with sufficient particularity and preciseness.



2d objection—This fact, as charged, is not an offence within the \*<sup>1</sup> statute. These people were all of them journey-men to the same master at home; and not persons assembled and formed into unlawful clubs or unlawful societies †<sup>1</sup> abroad: which he would have had it understood that the statute required. And there was no written agreement, no resolution “not to work with him or any other master for such wages.”

3d objection. Here is no judgment: it is only said “that they are convicted for unlawfully entering into such combination.” It ought to proceed “quod forisfaciat,” and expressly adjudge the forfeiture. So is 2 Strange, 858. 3 G. 2, in ‡ *Rex v. Hawks*, where a conviction for killing a deer was quashed, because it was only “convictus est,” without any judgment “quod forisfaciat.”

They ought to have awarded the particular punishment; as the Act does not fix the duration of the punishment, but leaves the time of the imprisonment quite discretionary, “for any time not exceeding three months.” Therefore this case differs widely from cases where the punishment is ascertained and necessarily flows from the conviction.

The Court having immediately over-ruled the 2d objection as a frivolous one, and not to be seriously supported,

Mr. Caldecott, contra, for the plaintiff, applied himself to answer the first and third objections.

1st. It sufficiently appears on the face of the conviction, that the defendants heard the \*<sup>2</sup> evidence. However, it is not necessary that the evidence should be given in the presence of the defendants: for which, he cited *Rex v. Baker*, 2 Strange, 1240, in point, as he said, for him; but quite otherwise, as the serjeant †<sup>2</sup> alledged, and as the [1165] Court also explained it. And he observed that this conviction is as much in the present tense, as that was: the words of it are “they are convicted.”

As to the 3d objection—the justices have nothing to do but to convict: that is the judgment. Then after the conviction, the justices exercise their discretion: which they did here, by committing them for three months.

Mr. Serj. Davy in reply—1st. The case of *Rex v. Baker* proves directly contrary to Mr. Caldecott’s application of it. For there, the Court took it to be a hearing in the presence of the defendants; they there supposed the whole to pass at the very same time. Here, it is manifest that they were not present, at the time when Thomas Eaton gave his evidence.

Lord Mansfield stopped him; it being unnecessary to say any more about enforcing the objections, since the first and third were fatal.

1st. The evidence ought to be taken over again, in a defendant’s presence, unless he confesses. Now here they do not confess before the justices; and the evidence only is “that they had formerly confessed this combination to the witness.” And in the case of *Rex v. Baker*, the Court went upon the supposition, “that the defendant was present when the evidence was given, and did actually hear it given.”

In a conviction, the \*<sup>3</sup> evidence must be set out; that the Court may judge of it: and it must be given in the presence of the defendant, that he may have an opportunity of cross-examining.

3d objection—Here, the punishment is discretionary as to the length of the time of imprisonment: and here is no judgment at all; only a conviction. They ought to have gone on, and adjudged the forfeiture. Therefore on both these objections, this conviction ought to be quashed: for, however useful a statute this may be, for the benefit of trade, yet the justices must convict according to law.

\*<sup>1</sup> See the preamble and the whole first section.

†<sup>1</sup> But the words of the charge are “that they had agreed one amongst another and with other journeymen wool-combers.” V. ante, 1163.

‡ V. FitzG., 124, S. C.

\*<sup>2</sup> But the words are only, “having heard the said charge.”

†<sup>2</sup> Notwithstanding this allegation and explanation, the cases seem very much alike: and one of the Judges expressly said “that he knew no law that required the presence of the witnesses face to face.” And another said “perhaps it had been sufficient without either of the words read, or heard, it being alledged that the matter was fully understood by the defendant.”

\*<sup>3</sup> V. post, 2063, *Rex v. Kibbitt, Clerk*, [and 7 Durn. 153].

Mr. Just. Denison concurred in both points.

1st. The evidence must be given in the presence of the defendant, that he may have an opportunity to cross-examine.

In the case of *Rex v. Baker*, nothing wrong appeared upon the face of the conviction; and therefore the Court supposed and took it to have been rightly transacted.

[1166] As to the 3d objection—the time, the duration of the commitment ought to be ascertained upon the conviction. The statute does not fix it: it only says “for any time not exceeding three months.”

Mr. Just. Wilmot concurred in both.

1st. The witnesses ought to be examined in the presence of the party accused; that he may have the benefit of cross-examination. And here it appears plainly enough that Eaton the witness against these defendants was not so examined in their presence.

As to the 3d objection—a conviction is equal to a verdict and judgment. But this is a verdict without a judgment.

In the case of *Rex v. Hawkes*, H. 3 G. 2, B. R. it was settled “that there must be a judgment of forfeiture.” I have a full note of that case: it was a conviction for deer-stealing, on 3, 4 W. and M. c. 10. And there, though the penalty was certain, (a forfeiture of 20l. for every offence in mere hunting, and if a deer be killed, wounded, or taken, then 30l.) and though the Act of Parliament distributes the forfeiture; yet it was holden “that there must be a judgment to levy it:” for every execution must be founded on a judgment. The cases of *Regina v. \* Wingrave*, H. 2 Ann. B. R. and *Regina v. Serle*, in B. R. were there both quoted by Mr. † Fazakerly, in † support of the exception.

There was a case in Tr. 9 G. 1, B. R. *Rex v. Ashton*, upon a conviction for destroying fruit-trees, contrary to 1 G. 1, c. 48. The words of the conviction were “igitur consideratum est per nos, quod convictus est.” The Court held “that there ought to be a judgment quod forisfaciat, or quod ‡ committatur, &c.”

But this is a much stronger case; because here is a discretion to commit either to the house of correction, there to remain and be kept at hard labour for any time not exceeding three months; or to the common gaol of the county, &c. as they shall see cause, there to remain without bail or mainprize, for any time not exceeding three months.

Per. Cur. unanimously and clearly,

The conviction must be quashed.

[1167] LEWIS AND ANOTHER *versus* RUCKER. Saturday, 2d May, 1761. A valued policy is not to be considered as a wager policy.

[Referred to, *Balmoral Steamship Company v. Marten* [1901], 2 K. B. 905; [1902], A. C. 511.]

A rule having been obtained by the plaintiffs (the insured) for the defendant (the insurer) to shew cause why a verdict given for the defendant should not be set aside and a new trial had,

The Court, after hearing the matter fully debated by the counsel on both sides, took time to advise.

And Lord Mansfield now delivered their resolution: in doing which, he stated every thing requisite to be known, in so full and ample a manner as to render it quite unnecessary and even impertinent for me to pretend to prefix any preface or introduction to it.

What he said was to the following effect—

This was an action brought upon a policy, by the plaintiffs, for Mr. James Bourdieu, upon the goods aboard a ship called the “Vrow Martha,” at and from St. Thomas Island to Hamburgh, from the loading at St. Thomas Island until the ship should arrive and land the goods at Hamburgh.

\* Or *Wingate*.

† Yet see 1 Salk. 378, pl. 23, *King v. Chandler*, M. 1 Ann. B. R. most directly in point to the contrary, is a conviction on the very same Act of Parliament.

‡ For that Act gives no pecuniary forfeiture.

The goods (which consisted of sugars, coffee, and indigo,) were valued at 30l. per hogshead, the clayed sugars, and 20l. per hogshead the Muscovado sugars; and the coffee, and indigo were likewise respectively valued. The sugars were warranted free from average under 5l. per cent.; and all other goods, free from average under 3l. per cent. unless general, or the ship be stranded.

In the course of the voyage, the sea water got in; and when the ship arrived at Hamburgh, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained made it necessary to sell them immediately; and they were accordingly sold: and the difference between the price which they brought by reason of the damage, and that which they might then have been sold for at Hamburgh, if they had been sound, was as 20l. 0s. 8d. per hogshead; is to 23l. 7s. 8d. per hogshead; (i.e. if sound, they would have been worth 23l. 7s. 8d. per hogshead: as damaged, they were only worth 20l. 0s. 8d. a hogshead).

The defendant paid money into Court, by the following rule of estimating the damage: he paid the like proportion of the sum at which the sugars were valued in the policy, as the price of the damaged sugars bore to [1168] sound sugars at Hamburgh (the port of delivery). All this was admitted at the trial: though perhaps upon an accurate computation, there may be a mistake of about 17s. upon the money paid in. But no advantage was attempted to be taken of this slip, at the trial: it was admitted that the money paid in was sufficient, if the rule by which the defendant estimated the loss was right; and the only question at the trial was, "by what measure or rule the damage, (upon all the circumstances of this case,) ought to be estimated."

To distinguish this case, under its particular circumstances, out of any general rule, the plaintiffs' counsel called Mr. Samuel Chollett, clerk to Mr. Bourdieu: who proved that upon the 15th of February, (the time of the insurance,) sugars were worth at London and Hamburgh 35l. a hogshead; that the proposal of a congress to be holden, and the expectation of a peace, had on a sudden sunk the price of sugars; that before the ship arrived at Hamburgh, and before he could know that the sugars had received any damage, Mr. Bourdieu had sent orders "that the sugars should be housed at Hamburgh, and kept till the price should rise above 30l. a hogshead;" that he had many hundred hogsheads of sugar lying at Amsterdam, to which place he sent the like orders; that in fact, the congress not taking place, sugars arose 25l. per cent. That what he sold of the sugars he had at Amsterdam brought 30l. per hogshead and upwards; that he might have sold these sugars at the same price, if they had been kept according to his orders; and the only reason why they were not kept was, because they were rendered perishable from the sea-water which had got in. Therefore, said they, the necessity of an immediate sale and the consequence thereof ought to be computed into the damage.

The special jury, (amongst whom there were many knowing and considerable merchants,) found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it than any body else present; and formed their judgment from their own notions and experience, without much assistance from any thing that passed.

The counsel for the plaintiff, in the outset, chiefly rested upon the particular circumstances of this case.

The counsel for the defendant offered to call witnesses to prove the general usage of estimating the quantity of damages where goods are injured.

I was at first struck with the argument "that the immediate necessity of selling in this case might be taken into consideration, as an exception to the general rule;" and [1169] proposed that the cause might be left to the jury upon that point. Then Mr. Winn, for the defendant, argued "that the necessity of selling, and the consequence thereof ought not to be regarded:" and what he said had so much weight, that it very much changed my way of thinking.

There was nothing to sum up; but the jury asked whether I would give them any directions. I said, I left it to them, "whether the difference between the sound and the damaged sugars at the port of delivery, ought to be the rule: or, whether the necessity of an immediate sale, (certainly occasioned by the damage,) and the loss thereby, should be taken into consideration." I told them, though it had struck me at first, that this case might be an exception; yet, what the counsel for the defendant had said to the contrary seemed to have great weight.



The counsel for the plaintiff, not having replied nor gone into the general argument, upon an apprehension that my opinion was with them upon the particular circumstances of this case, were dissatisfied with the verdict; and said they would try the other cause in the paper upon the same policy: but, instead of that, they have moved for a new trial in this cause; (which I am extremely glad of).

No fact is disputed: the only question is, "whether (all the facts being agreed,) the jury have estimated the damage by a proper measure."

To make the matter more intelligible, I will first state the rule by which the defendant and jury have gone; and then I will examine whether the plaintiff has shewn a better.

The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price in money which either the sound or damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy 30*l*.—They are damaged, but sell for 40*l*. if they had been sound, they would have sold for 50*l*.—The difference is a fifth: the insurer then must pay a fifth of the prime cost, or value in the policy, (that is 6*l*). *E converso*;—If they come to a losing market, and sell for 10*l*. being damaged, but would have sold for 30*l*. if sound, the difference is one half: the insurer must pay half the prime cost, or value in the policy, (that is 15*l*.).

[1170] To this rule two objections have been made.

1st objection. That it is going by a different measure in the case of a partial, from that which governs in the case of a total loss: for, upon a total loss, the prime cost, or value in the policy must be paid.

Answer. The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage: the insurer engages, so far as the amount of the prime cost, or value in the policy, "that the thing shall come safe;" he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods; if they be totally lost, he must pay the prime cost, that is, the value of the thing he insured, at the outset; he has no concern in any subsequent value.

So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost: as if there be 100 hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold.

But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage: but if you can fix whether it be a 3d, 4th, or 5th worse, the damage is fixed to a mathematical certainty. How is this to be found out? not by any price at the outset port: but it must be at the port of delivery, where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it equally shews whether the damaged goods are a third, a fourth or a fifth worse than if they had come sound; consequently, whether the injury sustained be a third, fourth or fifth of the value of the thing: and, as the insurer pays the whole prime cost, if the thing be wholly lost: so, if it be only a 3d, 4th or 5th worse, he pays a 3d, 4th or 5th of the value of the goods so damaged.

2d obj. The next objection with which this case has been much intangled, is taken from this being a valued policy.

I am a little at a loss to apply the arguments drawn from thence. It is said "that a valued is a wager policy, (like interest or no interest:) if so, there can be no average loss; and the insured can only recover as for a total, abandoning what is saved, because the value specified is fictitious."

[1171] Answ. A valued policy is not to be considered as a wager policy, or like "interest or no interest:" if it was, it would be void by the Act of 19 G. 2, c. 37. The only effect of the valuation is fixing the amount of the prime cost; just as if the parties admitted it at the trial: but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity.

If it be under-valued, the merchant himself stands insurer of the surplus. If it be much over-valued, it must be done with a bad view; either to gain, contrary to the

19th of the late King ; or with some view to a fraudulent loss : therefore the insured never can be allowed in a Court of Justice to plead that he has greatly over-valued, or that his interest was a trifle only.

It is settled, "that upon valued policies, the merchant need only prove some interest, to take it out of 19 G. 2, because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing." But if it should come out in proof, that a man had insured 2000*l.* and had interest on board to the value of a cable only ; there never has been, and I believe there never will be a determination, that by such an evasion the Act of Parliament may be defeated.

There are many conveniences from allowing valued policies : but where they are used merely as a cover to a wager, they would be considered as an evasion.

The effect of the valuation is only fixing, conclusively, the prime cost. If it be an open policy, the prime cost must be proved : in a valued policy, it is agreed.

To argue "that there can be no adjustment of an average-loss upon a valued policy," is directly contrary to the very terms of the policy itself. It is expressly subject to average, if the loss upon sugars exceed 5*l.* per cent. : if it was not, the consequence would not be, that every partial loss must thereby become total : but the event, to intitle the insured to recover, would not happen, unless there was a total loss. Consequently, the plaintiffs in this case would not be intitled to recover at all : for there is no colour to say this was a total loss. Besides, the plaintiffs have taken to the goods, and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of two grounds.

[1172] 1st. Because the general rule of estimating should be the difference between the price the damaged goods sell for, and the prime cost (or value in the policy). Here, the damaged sold at 20*l.* 0*s.* 8*d.* per hogshead : and the underwriter should make it up 30*l.*

Ans*w.* It is impossible this should be the rule. It would involve the under-writer in the rise or fall of the market : it would subject him, in some cases, to pay vastly more than the loss ; in others, it would deprive the insured of any satisfaction, though there was a lease.

For instance—suppose the prime cost or value in the policy 30*l.* per hogshead ; the sugars are injured ; the price of the best is 20*l.* a hogshead ; the price of the damaged is 19*l.* 10*s.*—the loss is about a fortieth, and the insurer would be to pay above a third.

Suppose they come to a rising market, and the sound sugars sell for 40*l.* a hogshead, and the damaged for 35*l.* the loss is an eighth ; yet the insurer would be to pay nothing.

The 2d ground upon which the plaintiff contends that the 30*l.* should be made up, is, that it appears the sugars would have sold for that price, if the damage from the sea-water had not made an immediate sale necessary.

The moment the jury brought in their verdict, I was satisfied that they did right, in totally disregarding the particular circumstances of this case : and I wrote a memorandum, at Guild-Hall, in my note-book, "that the verdict seemed to me to be right."

As I expected the other cause would be tried, I thought a good deal of the point, and endeavoured to get what assistance I could by conversing with some gentlemen of experience in adjustments. The point has now been very fully argued at the Bar ; and the more I have thought, the more I have heard upon the subject, the more I am convinced that the jury did right to pay no regard to these circumstances.

The nature of the contract is, "that the goods shall come safe to the port of delivery ; or if they do not, to indemnify the plaintiff to the amount of the prime cost, or value in the policy." If they arrive, but lessened in value through damages received at sea, the nature of an indemnity speaks demonstrably, that it must be by putting the merchant in the same condition, (relation being had to the prime cost or value in the policy,) which he would have [1173] been in if the goods had arrived free from damage ; that is, by paying such proportion, or aliquot part of the prime cost, or value in the policy, as corresponds with the proportion, or aliquot part of the diminution in value occasioned by the damage.

The duty accrues upon the ship's arrival and landing her cargo at the port of delivery : the insured has then a right to demand satisfaction. The adjustment never



can depend upon future events or speculations. How long are they to wait? a week, a month, or a year?

In this case, the price rose: but if the congress had taken place, or a peace had been made, the price would have fallen. The defendant did not insure "that there should be no congress or peace." It is true, Mr. Bourdieu acted upon political speculation, and ordered the sugars to be kept till the price should be 30*l.* or upwards: but no private scheme or project of trade of the insured can affect the insurer; he knew nothing of it. The defendant did not undertake that the sugars should bear a price of 30*l.* a hogshead.

If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience. The under-writer knows nothing of them. The orders here were given after the signing of the policy. But the decisive answer is, that the under-writer has nothing to do with the price; and that the right of the insured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery.

We are of opinion that the plaintiffs are not intitled to have the price for which the damaged sugars were sold, made up 30*l.* per hogshead: and it seems to us as plain as any proposition in Euclid, that the rule by which the jury have gone is the right measure.

The rule must be discharged.

**REX versus BELL.** 1761. Butter exported from Ireland to Lisbon, and from Lisbon into this kingdom, is not to be considered as included in the statutes prohibiting the importation of it from Ireland into this kingdom.

This was a conviction for importing Irish butter from Lisbon into England, contrary to the Acts of 18 Car. 2, c. 2, 20 C. 2, c. 7, and 32 C. 2, c. 2: which conviction was to the effect following—

Town and county of the town of Kingston upon Hull—[1174] Be it remembered that on the 22d of August, 34 G. 2, at the said town and county, Edward Burrow Esq. collector of His Majesty's subsidies and customs within the port of the said town and county, and an inhabitant thereof, cometh in his own proper person before John Wood and William Cogan Esquires, two justices of our said lord the King assigned to keep the peace of our said lord the King within the said town and county; and suing as well for the poor of the parish of St. Trinity in the said town and county as for himself in this behalf, giveth the said justices to be informed and to understand, that certain butter, to wit, 547 barrels thereof, containing all together in weight 301 hundred-weight, was on the 8th day of July last past imported into this kingdom, to wit, at the port of the said town and county, the same butter and every part thereof having been exported from out of the kingdom of Ireland to Lisbon in the kingdom of Portugal, and having been from thence imported into this kingdom, to wit, at the port aforesaid, in fraud of the revenue of our said lord the King, and contrary to the form of the statutes in that case made and provided; and that the said butter had been duly and legally seised, at and in the said town on the 28th day of July aforesaid, between the hours of ten and twelve in the forenoon, and duly and legally preserved and kept from that time to the time of exhibiting this information; and that the owner or owners of the said butter or any part thereof, or any person for or on the behalf of him, them or any of them, had not made it appear unto any justice of the peace of and for the said town and county, by the oath of two credible witnesses or otherwise howsoever, "that the said butter was not imported, in manner and form aforesaid, from the said kingdom of Ireland into this kingdom." Whereupon the said justices did, on the said 2d day of August, duly and legally order Mr. Richard Bell of the said town and county, merchant, the consignee and apparent owner of the said butter and every part thereof, to be summoned to appear before them at the house of Archibald Brown, at the sign of the Dog and Duck in the said town and county, on the 5th day of the said month of August, then and there to answer the said information and premises. At which time and place, come before them the same justices, as well the said Edward Burrow as the said Richard Bell: and the said Richard Bell having heard the said information read to him, and being asked by the said justices; "why the said butter should not be forfeited," saith, "that he hath nothing to object against the truth of the said premises contained in the said information." Whereupon, and upon



the examination of a credible witness in that behalf, in the presence of the said Richard Bell, and because the said Richard Bell hath nothing to say nor can say any thing touching the said premises, but doth acknowledge the same to be true as the same are charged in the said information; it appears unto them the said justices, that the said information and every part thereof [1175] is true: and they the said justices do adjudge the same to be true accordingly. It is therefore considered and adjudged by them the said justices, that the said butter and every part thereof is forfeited; and that one moiety or half part thereof be disposed to the use of the poor of the said parish of St. Trinity in the said town and county, and the other moiety or half part thereof be to the proper use of the said Edward Burrow. Given under our hands and seals, at the town and county of the town of Kingston upon Hull, this 5th day of August in the 34th year of, &c. and in the year of our Lord 1760.

Mr. Morton, for the defendant, insisted that this conviction ought to be quashed. (See 18 C. 2, c. 2, 32 C. 2, c. 2, § 9, and 31 G. 2, c. 28.)

The butter was exported from Ireland to Lisbon; and from Lisbon re-exported to England, and imported here at Hull: which (he insisted) did not occasion a forfeiture of the butter. Therefore this conviction is wrong, in making it absolutely forfeited; even though it should be liable to the greater duty, and not to the less.

Besides, the distribution of the penalty is not agreeable to the Act of Parliament.

Mr. Norton, contra, in support of the conviction.

Irish butter, imported from Lisbon or any other place, is confiscateable, by 18 C. 2, c. 2, 32 C. 2, c. 2, § 9, and 20 C. 2, c. 7, § 3.

All these Acts are to be considered as one law: and by them, all Irish butter, imported hither from any place whatsoever, is forfeitable, just as much as if it was imported directly and immediately from Ireland. The Acts of Parliament would be nugatory, if they might be evaded by touching at the Isle of Man, or any other place.

The conviction is founded on these three Statutes of C. 2. And this importation from Lisbon is not protected by the Act of 31 G. 2, c. 28, which allows the importation of butter from Ireland into England during 6 months, paying 4d. per hundred weight; because the butter permitted by that Act to be imported must be imported immediately from Ireland.

He compared this law to some others, where the importation must be directly from the place:—12 G. 2, c. 21. (An Act for taking off the duties upon woollen and bay yarn imported from Ireland to England;) 23 G. 2, c. 9. [1176] (An Act to encourage the importation of pig and bar iron from His Majesty's colonies in America;) and 32 G. 2, c. 11, 12.

However, this conviction was unnecessary, and only *ex majori cautela*: for the goods were actually and *ipso facto* forfeited, by not being claimed and proved within forty-eight hours.

Mr. Morton was going to reply—

But Lord Mansfield said it was needless—Here is no suspicion of fraud. If there had, it might be a different case. It would not be worth while to go round by Lisbon, to evade the Act; and to pay 7s. 8d. to avoid paying 4d. And if it be within the prohibition, it is within the permission.

His Lordship however proposed to the parties, that the officer of the Customs (Mr. Edward Burrow, collector at Hull) should pay the proprietor, (the consignee,) the value of the butter at the time of the seizure, together with the costs.

And, in order to compromise the matter, and save the bringing an action, he ordered it to stand over from Saturday last to this day.

A third person having now named 26s. per barrel as the price that Mr. Burrow ought to refund to the consignee of it; and Mr. Norton thinking that too much, the compromise came to nothing; for Mr. Norton thought it better for his client to stand an action, and suffer judgment to go by default, and leave the matter to a jury, upon a writ of inquiry of the damages sustained by the seizure.

Whereupon per Cur.

The conviction was quashed.

The end of Easter term, 1761, 1 G. 3.

## [1177] TRINITY TERM, 1 GEO. III. B. R. 1761.

DENN, EX DIMISS. LUCAS *versus* FULFORD. Mr. Justice Foster was absent till Thursday 28th May, (the 7th day of the term). Tuesday, 26th May 1761. [S. C. 1 Black. 288. Sayer's L. of C. 126.] Close copies of proceedings in any Court, may be given in evidence in another Court without any but the common stamps. [See 3 Wils. 151. 6 Com. Dig. 31 (B 5). 1 Ves. jun. 153. 6 Durn. 318.]

This was a special case, upon an ejectment of lands in Medley in Oxfordshire.

(N.B. In Hilary term last, this Court had stayed the proceedings, till the lessor of the plaintiff, who lived in Ireland, should give security for the costs; although it was an ejectment brought under the direction of the Court of Chancery, where the bill was retained till after trial of the ejectment: and security had already been given there; but that security was only for 40l.)

At the trial, the plaintiff offered in evidence, (for the purpose only of reading several depositions taken in a cause in Chancery,) a paper-writing purporting to be a true copy of a bill in Chancery brought by the plaintiff's lessor, against Theophilus Leigh and others: (and it was proved to have been examined with the record;) which copy so offered in evidence, was written close, on two sheets of paper containing forty office copy sheets in quantity; and each of the two sheets of paper was stamped with a triple six-penny stamp only.

And he further offered in evidence another paper-writing purporting to be a true copy of an amended bill brought by the plaintiff's lessor against the said defendants and others, (proved likewise to have been examined with the record;) written also close, on three sheets of paper containing forty-four office copy sheets in quantity; and each of the three sheets stamped with a triple six-penny stamp only.

[1178] It was objected "that such copies or either of them ought not to be read; because not properly stamped, according to the statutes." But a verdict was given for the plaintiff, subject to the opinion of the Court "whether such copies are properly stamped, so as to entitle the plaintiff to have read them in evidence." If they are, then the plaintiff to enter his judgment; if not, then the verdict to be void.

It was first argued on Tuesday, 28th of April 1761.

Mr. Stowe, for the plaintiff—This question depends upon the several Stamp-Acts. The 5, 6 W. & M. c. 21, (now made perpetual) lays \* a duty of one penny upon every skin, or piece of vellum, or parchment, or sheet of paper upon which any † copy of any proceedings whatsoever in any Court of Equity shall be engrossed or written.

The 9, 10 W. 3, c. 25, § 61, enacts (to the end the King may not be defrauded,) "that all records, writs, pleadings, or other proceedings in Courts of Law and Equity, and all deeds, instruments and writings whatsoever, thereby charged, shall be ingrossed or written in such manner as they have been usually accustomed to be written and are now written." And this is the principal statute on which this question turns.

The word "copy" is not in the 64th section. The present case is of an examined copy, and not an office-copy. The rule of office-copies is different in different Courts: viz. in Chancery, ninety words in a sheet; in the Exchequer seventy-eight; in this Court, seventy-two; but close copies were only stamped with one double penny stamp: now indeed a triple penny.

And copies of deeds are generally produced and proved without any stamp at all: whereas this was stamped with a stamp of six times the value.

The only intent of these Stamp Acts is to raise the duty to the Crown: and this stamp does that, and much more.

Mr. Aston, contra, for the defendant, agreed that the question depends entirely upon the Stamp Acts.

The 5 & 6 W. & M. c. 21, laid the penny duty.

The 9, 10 W. 3, c. 25, § 40, lays one penny upon every sheet of paper upon which any copy of any bill in equity shall be ingrossed or written. This is an additional penny.

\* V. sect. 44.

† See also 32 G. 2, c. 35, § 10, which lays a like duty, but seems confined to Courts of Law only.

[1179] Section 49 directs every such sheet to be stamped before the writing: and with two distinct stamps.

Section 59 directs that no such instrument or writing not so stamped, &c. shall be given in evidence, till as well the former duty as the latter shall be paid. So that these two stamps were to be separated and distinct.

The 30 G. 2, c. 19, § 18, makes it lawful to stamp with one general new stamp, equivalent to all the other separate old ones.

The 32 G. 2, c. 35, has no such clause as that of § 64, in 9, 10 W. 3, c. 25. But its 13th section (fo. 515,) directs all paper, &c. thereby charged to be brought to the Stamp-Office and stamped, &c. and enacts that it shall not be available in law or equity, or be given in evidence or admitted in any Court, unless so stamped.

Therefore every copy of any bill in Chancery must be stamped with either the old or the new stamp. And this is not so stamp. Neither is it stamp *ad valorem*; but, on the contrary 13s. 6d. short, if it be computed by the sheet, at ninety words per sheet: a sheet is a known quantity containing so many lines, and so many words in each line.

Lord Mansfield—But how does it appear that it is necessary that a copy of a proceeding in Chancery, given in evidence, must be an office copy? I should be glad to hear this point argued. For if that be not necessary, the duty is paid; if it be necessary, then it is not paid.<sup>(a)</sup>

Mr. Aston—The practice is so. And the Acts of Parliament say “every copy of any bill.”

Lord Mansfield—An office-copy is, in the same Court and in the same cause, equivalent to the record: but in another Court or in another cause in the same Court, the copy must be proved.

Before the first Act which gave the single penny duty, a copy of a proceeding in one Court might be given in evidence in another, written as close as the writer pleased. And the \* clause which is professedly intended to prevent collusion as to the proceedings of the Court, does not say a word about copies. Each party in a cause in Chancery must take an office-copy of the adverse pleadings: but he may read the draught of his own. Reading the office-copy is equivalent to reading the record itself.

[1180] It is not to be conceived that the Legislature intended to put the parties to the expence of 40l. or 50l. in taking out office-copies; only for the sake of raising 18d. or (upon the first Act) only a penny to the Crown.

Mr. Aston observed that such a construction would greatly lessen the revenue. At this rate, one threepenny stamp would do for a whole bill.

Mr. Just. Wilmot—So you would have forty 3d. stamps for this one copy of the original bill.

Mr. Aston—Yes: this is what I insist on.

Lord Mansfield—The Act of Parliament did not mean to alter the rule, as to the giving copies in evidence: if it had, it would have been a heavy charge upon the suitor. The practice of a party's giving the office-copies in evidence, very often is to be accounted for, by their having those office-copies in their possession already: so that it is, in such case, even cheaper to them to use these than any others.

Mr. Norton, who was retained for the defendant, urged the loss that the stamp duty would suffer, if this question should be determined against them.

It was therefore ordered to be set down for further argument on the first day of this term; with a particular clause in the rule (by consent) to prevent the plaintiff's being delayed in bringing a new ejectment, in case the Court's opinion should be against him.

Which day being now come, and the cause called,

(a) The most material section is section 64, in 9 & 10 W. 3, c. 25, and which by the subsequent Acts is probably extended to the additional duties: that section runs thus, “To the end that His Majesty and his successors may not be defrauded of any of the duties, be it enacted that all records, writs, pleadings, or other proceedings in Courts of Law and Equity, and all deeds, instruments, and writings whatsoever, hereby charged, shall be ingrossed and written in such manner as they have been usually accustomed to be written, and are now written.” But this clause does not say a word about copies, as observed by Lord Mansfield *supra*.

\* Sect. 64 of 9, 10 W. 3, c. 25.



Mr. Norton said he should have hoped to have been able to support the objection, if it had come out, upon inquiry, that the usage of the Stamp-Office had been uniform and consistent, ever since the making of the Act, in requiring close copies to be stamp in this manner.

But he acknowledged, that upon examination into the facts, it appeared that there had been no such uniform usage; but, on the contrary, different usages, and even different opinions amongst the commissioners themselves. Therefore unless the Court would couple some of the sections with each other, he was afraid he could not pretend to support the objection.

[1181] Lord Mansfield—Certainly, the Act of Parliament took up the matter on the foot upon which it then stood. And at the time of making these Acts, there were two sorts of copies of proceedings: one sort was a close copy, which might be given in evidence, in another Court; the other sort was an office-copy; and this was equivalent to the record itself, when made use of in the same Court and in the same cause. This office-copy was then fixed at a certain determinate number of words in a sheet, in order to ascertain the fees of the officers of the respective Courts: but copies to be given in evidence might, at that time, be written as close as the writer pleased. Thus the Stamp Acts found it. And they did not mean to alter the manner of making copies to be given in evidence, or to fix them to so many words in a sheet: they only meant to prevent any fraud upon the stamp-duties with regard to the office-copies, by the parties compounding with the officers for their fees, and then writing more than the usual number of words in a sheet of them.

Per Cur. Let the postea be delivered to the plaintiff.

FENN, EX DIMISS. TYRRELL ET AL'. *versus* DENN. 1761. Tenant in possession, personated at the time of service, by another, who accepted the service in her name, deemed good service upon the tenant herself.

Mr. Gould, of counsel for the lessor of the plaintiff in this ejectment, had obtained a rule upon Mrs. Magdalen Campbell, the tenant in possession of the premises in question, for her to shew cause (a) why the service of the ejectment in this cause, which † had been theretofore made upon a woman who had said her name was Magdalen Campbell, at the time when it was served upon her at the said Magdalen Campbell's house, should not be deemed good service upon the said Magdalen Campbell herself; and why the lessors of the plaintiff should not have leave to sign their judgment against the casual ejector, on Wednesday next, in default of her appearance: in which rule it is further ordered that the leaving a copy of this rule at the house of the said Magdalen Campbell, with some person there; or, if no one can be met with, affixing a true copy of it on the door thereof; shall be deemed good service thereof on the said Magdalen Campbell.

The said rule was now made absolute, upon producing an affidavit "that Magdalen Campbell was either not at home, or (if at home) was denied; and that her ser-[1182]-vant-maid was at home, but could not be served: whereupon a copy of the rule was fixed on the door of the house;" and moreover, "that at a subsequent day," (upon a doubt whether what had been already done was sufficient,) "the maid being at home and opening the window, but refusing to open the door, and denying that her mistress was at home, another copy was affixed on the door, and the maid was told the effect of it; and another copy was thrown in at the window; and the original rule was shewn to the maid."

Per Cur. Rule made absolute.

(a) A like rule "to shew cause why a preceding service of an ejectment upon a servant in the house of one Hawkins, tenant in possession, should not be deemed a good service of it," was made on the second day of this term, in a cause of *Goodright, on the demise of Methold v. Noright*; on its appearing that Hawkins and his wife both kept out of the way, to prevent their being personally served.

† N.B. If the rule were not thus made with a retrospect, the plaintiff must lose the assizes.

REX *versus* DARBISHIRE. Wednes. 27th May 1761. Constable of a manor, including a parish, but more extensive, is not exempt from serving this office by having a certificate of exemption under 10 & 11 W. 3, c. 23.

This was a case from Warwickshire Assizes.

The defendant was originally indicted at the Quarter Sessions holden at Warwick on the 4th of April 1758, for refusing to take upon himself the office of constable of and for the manor of Birmingham, having been duly nominated and elected thereto. The indictment set forth, that at a court leet holden on the 18th of October 31 G. 2, in and for the manor of Birmingham, the defendant, according to the custom of the same manor, was duly nominated and elected by the jury, one of the constables of the said manor of Birmingham for the year then next ensuing; he then being an inhabitant and resident of and within the said manor, and being a fit person so to be nominated and elected, and a person liable to be nominated and elected to the said office. That the defendant had notice, &c. That the steward certified his appointment to a justice of peace; by whom he was summoned to appear on, &c. at, &c. to take the oath of office as constable, nominated and elected of and for the said manor of Birmingham as aforesaid. That although he personally appeared according to the summons, and was then and there required by the said justice to take the said oath of office of constable, of and for the said manor of Birmingham, according to the nomination and election aforesaid, he unlawfully, wilfully and contumaciously did neglect and refuse to take it, and to be duly sworn into the said office, and to take it upon him. There was a second count in the indictment, alledging that he was personally present in court at the leet; and being required by the steward to be sworn and take the office upon him, neglected and refused, &c.

This indictment being removed hither by certiorari, the defendant pleaded "not guilty." and the cause was tried at Warwick Summer-Assizes in August 1759, before Ld. Ch. B. Parker.

[1183] It appeared upon the evidence, that the facts laid in the indictment were true; and that the defendant was a fit person to be nominated and elected as aforesaid; and liable to serve the said office of constable, unless discharged or exempt therefrom by reason of the certificate and assignment thereof hereinafter mentioned: also, that the usage at Birmingham has been, "annually at the court leet there, to elect two constables for the manor of Birmingham generally, and one constable for the hamlet of Deritend (a distinct vill within the said manor) particularly."

That the manor of Birmingham extends itself into and comprehends the whole town and parish of Birmingham, and also the said hamlet of Deritend.

That the constables so elected for the said manor of Birmingham generally, have jurisdiction and authority, as constables, not only throughout the said town and parish of Birmingham, but also within and throughout the said hamlet of Deritend.

That the constable of Deritend is elected out of the inhabitants of Deritend only: and the constable so elected for Deritend particularly, and the said constables so elected for the said manor of Birmingham have severally equal and concurrent jurisdiction within the said hamlet of Deritend.

That the defendant had a certificate according to the statute of 10, 11 W. 3, c. 23, discharging one Plowden Jennett from all parish offices within the parish of Birmingham; and an assignment thereof, signed and executed on the several and respective days of the dates thereof respectively: and the same was duly enrolled according to the statute; and had not been before assigned.

Upon this case the question reserved for the opinion of His Majesty's Court of King's Bench, is

"Whether the said John Darbyshire, upon the circumstances of this case, is, notwithstanding the certificate, guilty of the indictment, or not guilty."

Mr. Serj. Hewitt, for the King, argued that he is not exempted from serving this office herein described.

The discharge is (by the Act) from all "parish and ward offices," within the parish or ward wherein the felony was committed. But the limits of this man's office extend beyond the parish of Birmingham: there [1184] fore this is not a parish office. And there is no such division in this place, as a ward: therefore no ward officer.

But a constable is not a parish-officer to all. It was a common-law office, before parishes existed. Constables were, by common law, conservators of the peace. "The

office is as ancient as turns or leets;" 4 Inst. 265. Therefore more ancient than parishes.

A parish is not a common-law division; but an ecclesiastical one; and so it was asserted, in Freeman's Rep. 228, in the case of *Adeson v. Sir John Otway*, by Mr. Justice Atkins. And in Mich. 10 W. 3 an appointment of a constable was \* quashed, because it was not alledged in the order, "that he was an inhabitant of the liberty," but only "of the parish." Cases temp. W. 3 256, *Anonymous*.

Here, this man is appointed constable in and for the manor of Birmingham.

The office of constable is always annexed to a vill, not to a parish. But the felony, in this case, was committed in the parish of Birmingham, not in the vill of Deritend.

Mr. Caldecott, for the defendant.—He is at least a parish-officer, (whatever more he may be;) because his office extends throughout the whole parish of Birmingham: and he is an inhabitant of the parish of Birmingham. Therefore, though he be also constable of the manor which includes the parish: yet he is certainly a parish officer, notwithstanding that greater extent of his jurisdiction or power.

This Act is to be construed favourably. And it has been determined on † 3, 4 W. & M. c. 11, "that serving the office of constable for a city at large, (though he was appointed by the corporation, and exercised it throughout the whole city,) gained a settlement in the parish where he inhabited." 2 Strange, 1014, between *The Parishes of St. Maurice and St. Mary Calendar in Winchester*.

He cited P. 29 G. 2, B. R. *Rex v. Davis, Collector of the Rates and Duties of the Highways of the Parish of St. Leonard Shoreditch*, who was appointed by the trustees under the Act of Parliament, and not chosen by the parish: yet it was holden to be a parish office: and "that this Act ought to receive the most liberal construction."

[1185] In the liberty of Westminster, the constables are chosen by the burgesses for the liberty of Westminster, and act throughout the whole liberty: yet they always enjoy the benefit of these certificates.

This case is executing an office in the parish where the man lives; and is certainly within the intention of the Legislature: for the Act of Parliament directs the Judge to certify in what parish or place the felony was committed.

Mr. Serj. Hewitt, in reply—The reward is only a discharge from parish and ward offices: and from no others.

As to 2 Strange, 1014.—It depends upon the words of the Act of Parliament of 9, 10 W. 3, c. 11. Which only requires executing a public annual office, within the parish: it does not at all speak of parish offices: nor is confined to them, as this is.

As to the case of *Rex v. Davis*—the man was chosen, by trustees under an Act of Parliament for repairing the highways of that parish, collector of such highway rate within the parish: so that that was strictly and properly a parish office.

In Westminster, I believe the constables are appointed for a particular parish, not for the liberty in general.

The present case, most manifestly, is not confined to the parish where the felony was committed: which by the Act, it ought to be; for it is clear that the Act does not mean to extend it further than that limit.

Lord Mansfield—The only question upon this case is, "whether the constable of the manor of Birmingham is a parish officer of the parish of Birmingham."

This term "parish officer," does not include every office exercised in the parish: if it did, it might even take in the office of high-sheriff of the county.

A parish officer is relative to the parish, and confined to the parish only. A constable of a parish may be called a parish officer: but this man has a much larger jurisdiction than the parish only; for he has a jurisdiction over the whole manor, which extends much beyond the parish; and the parish is only a part of that district over which it is to be exercised. And the Act does not intend the [1186] certificate to be a discharge from an office, whereof the functions are to be exercised out of the limits of the parish.

This man cannot be esteemed a parish-officer, either from the origin of his office, or the nature, or the exercise of it.

Mr. Just. Denison—If it had been stated "that the manor of Birmingham and parish of Birmingham were co-extensive," this certificate might have been a sufficient

\* Absente Holt.

† It was on 9, 10 W. 3, c. 11. (See Serjeant Hewitt's reply.)



discharge. But this is stated quite otherwise, namely, "that the jurisdiction of the constables elected for the manor generally, extends not only throughout the town and parish, but also within and throughout the hamlet of Deritend."

The Act only meant to excuse the proprietor of the certificate, from serving parish or ward offices within the parish or ward where the felony was committed; and not from offices to be exercised out of the parish or ward. If so, this is not an office within the words or meaning of the Act of Parliament, upon this state of the case now before us: for this is not an office of constable in and for the parish; but in and for the manor, which is more extensive than the parish is: and a different species of division too, one being ecclesiastical, the other civil.

Mr. Just. Wilmot—The Act of Parliament means these certificates to be exemptions from such offices only, the functions of which are confined within that sort of division which is now called a parish; which is not a civil, but an \* ecclesiastical division. No such species of division was known at \* common law: the temporal or civil division was into villis, not into parishes.

And this office now under our consideration, as the case is stated, could be only a partial exercise of the functions of this office, within the parish of Birmingham: for he could only exercise within the parish of Birmingham, the functions of such part of the jurisdiction as the limits of the parish extended to; but not those of the rest of his jurisdiction which lay beyond the limits of it. Consequently, the exemption he could pretend to claim under this certificate could be, as this case is stated, only partial: but it would be absurd to construe the Act to exempt him from serving the same identical office within the parish, and yet leave him liable to serve it in the vill.

Mr. Caldecott's case cited from 2 Strange is very strong for the present opinion of the Court. That case was upon the Certificate Act of 9, 10 W. 3, c. 11. The question was "whether executing the office of constable for the city [1187] at large gave a certificate-man a settlement in the parish wherein he inhabited and exercised it:" and it was holden "that he did acquire a settlement thereby." But it was not treated as a parochial office; it was enough, that it was an annual office exercised within the parish; which was sufficient to bring it within that Act of Parliament, though it was not a parochial office.

And as to the case of *Davis the Collector of the Highway-Rates of St. Leonard's*—it turned singly upon an Act of Parliament peculiar to that parish.

That of *St. Maurice in Winchester* was indeed about an office in the city in general; and this is an office in the manor in general: but the question did not there turn upon its being a parochial office, or not: it being sufficient that it was an annual one

Per Cur. unanimously,

Let the postea be delivered to the prosecutor;

And let judgment be entered for the King.

CAMPBELL, ESQ. *versus* CUMMING AND ANOTHER. 1761. A *capias ad satisfaciendum* made returnable at a day which falls out of term, would not be void, though liable to be set aside by motion. [See 4 East, 311.]

A *scire facias* being brought against bail, the defendants pleaded thereto, "that the principal died before the return of the *capias ad satisfaciendum*." The return of the *ca. sa.* being thereupon set forth in the replication, it appeared to be returnable "on Thursday next after eight days from the day of the Purification of the Virgin Mary." The defendant demurred, generally, to the replication.

Mr. Serj. Nares, on behalf of the defendant, insisted that the proceedings were irregular: for the word "from" is exclusive: and consequently the writ is not returnable till in vacation-time, (even a week in the vacation).

And as this was a proceeding by bill, the *scire facias* must bear teste on the day of the return of the *ca. sa.*: which therefore will be in vacation-time too.

It ought, he said, to have been made returnable "on Thursday next after the octave, &c." And he cited a case of *Girdler v. White*, M. 3 G. 2, B. R.

[1188] Mr. Yates, *contra*, for the plaintiff, insisted that it was right and regular, in true and even † strict computation: and, were it otherwise, yet as it was an execu-

\* V. Freeman's Reports, 228, per Atkins, accord.

† It was so, for the Purification fell on Monday; so that, either way, the Thursday

tion and not upon mesne process, the writ of *ca. sa.* would not be void, but only liable to be set aside upon motion, for irregularity. And he cited the case of *Shirley v. Wright*, 1 Salk. 273, where it was holden "that the sheriff who had let his prisoner escape, should not take advantage of a want of a *scire facias* to ground the *ca. sa.* upon which had issued *post diem et annum*."

The whole Court were very clearly and unanimously with Mr. Yates, in both points; and accordingly gave

Judgment for the plaintiff.

SARAH NICHOLSON *versus* STEPHEN CROFT. 1761. In a declaration on a policy of insurance, containing seven counts, the Court ordered three of them to be struck out without any costs.

This was a question, (upon the Master's report,) "whether there were, or were not, more counts inserted in the declaration, than were necessary."

It was a declaration upon a policy of insurance, consisting of seven counts; 1st, for a total loss, on a policy subscribed by the defendant himself; 2d, for an average loss, (averred to amount to 63l. 4s. 6d.) on a policy subscribed by the defendant himself; 3d, for 6l. per cent. to be returned, (it being averred "that the ship departed with convoy,") on a policy subscribed by the defendant himself; 4th, 5th and 6th, exactly the same with 1st, 2d and 3d (respectively,) with this difference only, that these three last counts alledged the policy to have been subscribed by one Manoel Francis Silva, the defendant's then agent, factor or servant in that behalf by him duly authorized, appointed, and deputed, for that purpose; 7th, for money had and received to the plaintiff's use. The Master (Mr. Owen) thought that four counts were sufficient; viz. either the three first with the last; or else the 4th, 5th and 6th, together with the last.

The Court agreed with him in opinion.

Lord Mansfield—On a declaration for a total loss, you may recover an average loss: yet I would not tie the plaintiff down to declare only for a total loss; but leave the plaintiff at liberty to declare both ways. And the latter method is often of service to a defendant, by pointing out the particular average that the plaintiff goes for.

But it is unnecessary to declare double, with respect to signing of the policy; that is to say, once as upon the poli-[1189]-cy signed by the defendant himself; and again, as upon a policy signed by his agent for him. One alone of these two methods of declaring is sufficient: and the better way is to declare according to the truth; that is, upon a policy signed by Silva, as agent for the defendant duly authorized by him in that behalf.

The rule at last settled by the Court, was for striking out the three first counts (which alledged the policy to be signed by the defendant himself:) but without any payment of costs, as this manner of declaring was said to be usual.

REX *versus* JOHN MORRIS. Saturday, 30th May, 1761. [S. C. Bull. 239, 275.]

Perjury upon an answer in Chancery, no need to prove the identity of the person, or the actual swearing.

The defendant having been convicted of wilful and corrupt perjury, in an answer in Chancery, Lord Mansfield (who tried him) made his report on Tuesday the 14th of April: in doing which, he stated an objection to the evidence, which had been made by the defendant's counsel at the trial, viz. "that there was no proof of the identity of the person who swore the answer, nor even proof that any person at all swore it." This objection, he said, he had over-ruled at the trial; thinking it sufficient that the hand of the defendant and the Master were proved. But he desired to have the opinion of his brethren upon this point; that the defendant might have the benefit of the objection, if it should seem to them to have any force in it, (though he declared himself to be still clear in his former opinion).

† Mr. Just. Denison and Mr. Just. Wilmot entirely concurred with his Lordship;

next after eight days from it, or the Thursday next after the octave of it, was the 12th of February.

† Mr. Justice Foster was then absent, (at Bath).

and they were all three clearly and unanimously of opinion, that as the name subscribed to the answer was proved to be his hand-writing, and Master Bennet had proved that the jurat' was subscribed by him (the Master,) as being sworn before him; this was sufficient proof "that he was the same person," and also "that he actually swore it." For the very reason why the Court of Chancery (some time since) made a general order "that all defendants should sign their answers," was with the very view to the more easy proof of perjuries in answers. And as to the actual swearing,—it is, in the nature and course of business, quite necessary to take the jurat', attested by the proper person before whom the oath ought to be taken, as sufficient proof of its being actually sworn by the person, so far (at least) as to put it upon him to shew or to raise a reasonable suspicion "that he was personated;" as it would otherwise be almost impossible to convict any one of perjury committed in an answer in Chancery.

[1190] JOHN ENYS, ESQ. Executor of Samuel Enys, Esq. *versus* ISAAC DONNITHORNE, Executor of Nicholas Donnithorne. Friday, 5th June, 1761. Covenant by two joint lessees, if it be joint and several, shall bind the executors of the deceased lessee. [See 5 Durn. 524.]

This was an action of covenant brought by the executor of the lessor, against the executor of a deceased joint-lessee.

The declaration sets forth an indenture made on the 10th of October 1735, between the said Samuel Enys (the plaintiff's testator) of the one part, and the said Nicholas Donnithorne deceased, and one Joseph Donnithorne on the other part, (the counterpart of which indenture, sealed, &c. he brings into Court,) whereby the said Samuel Enys, for and in consideration of the sum of twenty guineas paid to him by the said Nicholas Donnithorne and Joseph D. or one of them, and also for and in consideration of the yearly rent and other reservations, covenants and agreements therein after mentioned and comprised, on the parts and behalf of the said Nicholas D. and Joseph D. and either of them, their or either of their executors, administrators, and assigns, to be paid, observed and performed, did demise unto the said Nicholas Donnithorne and Joseph D. their executors, administrators, and assigns, all that, &c. then in the tenure and occupation of the said Nicholas D. and Joseph D. or one of them, their or one of their agents or servants; habendum to the said Nicholas D. and Joseph D. their executors, administrators, and assigns, from the first day of March last past, for 50 years then next ensuing, if the said Samuel Enys and Richard Plint or either of them should happen so long to live, and the then present term and estate of the said Samuel Enys therein should so long continue; the said term to commence and begin from and immediately after the surrender, forfeiture, or other determination of the said lease or demise of the said premises made and granted by him the said Samuel Enys to them the said Nicholas D. and Joseph D. and bearing date the 27th day of February 1728; they the said N. D. and J. D. their executors, administrators, and assigns, yielding and paying therefore yearly and every year during the said term hereby granted, after the commencement thereof, unto the said Samuel Enys his executors, administrators, and assigns, the yearly rent, &c. at, &c. The first payment thereof to be made at or upon such of the said days as should first and next happen after the commencement of the said term. And the said Nicholas Donnithorne and Joseph D. did in and by the said indenture, for themselves and either of them, their or either of their executors and administrators, covenant, promise, and agree, unto and with the said Samuel Enys his executors, administrators, and assigns, that they the said Nicholas D. and Joseph Donnithorne or one of them, their [1191] or one of their executors, administrators, or assigns, should or would from time to time and at all times during the said term, after the commencement thereof, well and truly pay or cause to be paid unto the said Samuel Enys his executors, administrators, or assigns, the abovementioned yearly rent, &c. and also should and would from time to time and at all times during the said term, after the commencement thereof, well and truly yield, pay, clear and discharge all and all manner of other charges, &c. And the said Nicholas Donnithorne and Joseph D. did in and by the said indenture, for themselves and either of them, their and either of their executors and administrators, jointly and severally covenant,



promise and agree unto and with the said Samuel Enys his executors, administrators, and assigns, that they the said Nicholas D. and Joseph D. or one of them, their or one of their executors, administrators, or assigns, should and would from time to time and at all times during the said term, after the commencement thereof well and sufficiently repair, &c. &c. Then it is averred that the said Samuel Enys, at the time of the making of the said indenture, was lawfully possessed of the reversion of the said demised premises, expectant on the said demise made and granted by the said Samuel to the said Nicholas D. and Joseph D. by the said indenture bearing date the said 27th day of February 1728, for the residue of a certain term of 99 years commencing on the 15th day of January in the year 1711, then to come and unexpired, and determinable on the several deaths of the said Samuel Enys and Richard Plint, by virtue of a certain demise of the said premises with the appurtenances made on the said 15th day of January 1711, by Hugh then Lord Viscount Falmouth to the said Samuel: and it is further averred, that the said Richard Plint is still living, and that the estate and term so demised to the said Samuel doth still subsist. The plaintiff then avers that the lease or demise mentioned in the indenture now brought into Court to have been made by the said Samuel Enys to the said Nicholas D. and Joseph D. did end and expire and determine on the first day of March 1738. Then the said John Enys (the plaintiff) further shews that the said Nicholas Donnithorne, being so as aforesaid possessed of and intitled to the premises by virtue of the said respective demises made by the said Samuel as aforesaid, died on the 10th of December 1737; having first duly made his last will and testament, and constituted one James Donnithorne and the said Isaac Donnithorne (the now defendant) executors thereof. That the said James and Isaac afterwards duly proved the same, and took upon them the execution thereof. That the said Joseph Donnithorne (the co-lessee) after the decease of the said Nicholas, and after the expiration of the said lease or demise by the said indenture bearing date the 27th of February 1728, to wit, on the 2d of March 1738, entered on the said premises, by virtue of the said demise by the indenture now brought into Court; and was [1192] thereof possessed for the said term so as aforesaid demised by the said indenture now brought into Court, in form aforesaid, determinable, aforesaid; the reversion thereof with the appurtenances for the residue of the aforesaid term of ninety-nine years, belonging to the said Samuel Enys, and his assigns. That, being so possessed, the said Samuel Enys, afterwards, to wit, on the first day of November, 1755, made his last will and testament in writing, and thereby appointed the said John Enys (the plaintiff) executor thereof; and afterwards, to wit, on the same day and year, died so possessed of and in his said reversion with the appurtenances in form aforesaid: and the said John Enys (the plaintiff) duly proved the said will of the said Samuel, and took upon himself the execution of it, and thereby became and was possessed of and in the said reversion with the appurtenances, for the rest and residue of the said term of ninety-nine years then to come and unexpired, determinable as aforesaid; and still is thereof possessed. That the said James Donnithorne, after the death of the said Nicholas, to wit, on the 1st December, 1755, died; and the said Isaac Donnithorne (the defendant) thereby became and is the sole surviving executor of the said last will and testament of the said Nicholas. Then the plaintiff, John Enys, says that he being so possessed of the said reversion, with the appurtenances as aforesaid, afterwards, to wit, on 12th December, 1759, (being 1st December 1759 O. S.) 240l. of the said yearly rent of 80l. for three years of the said term of fifty years elapsed and run out, since the death of the said Samuel Enys, and ended at and upon that day in the year last mentioned, at that day in the year last mentioned became due, owing and in arrear to the said John Enys, the executor, and now plaintiff, as executor, in form aforesaid: and that the said Nicholas and Joseph, in the life-time of the said Nicholas, or the said Joseph, since the death of the said Nicholas, or the said James in his life-time, or the said Isaac, so being the executor of the last will and testament of the said Nicholas, as aforesaid, have not, nor hath any or either of them or any other person or persons paid the aforesaid 240l. or any part thereof to the said John Enys, according to the form and effect of the aforesaid covenant of the said Nicholas by him made in form aforesaid; but the payment thereof they and each and every of them have hitherto wholly neglected and refused, and the said 240l. and every part thereof still remain and are in arrear, due, owing, and unpaid to the said John Enys, contrary to the form and effect of the said indenture, and of the aforesaid covenant of the said Nicholas on this

behalf as aforesaid. The declaration then sets forth that in the said demise of the premises made on the 11th January 1711, by Hugh Lord Falmouth, to the said Samuel, and under which the said Samuel was possessed and entitled at the time of the making of the indenture now brought into Court, there is a reservation of the yearly rent of 5l. payable yearly during the said term of [1193] ninety-nine years, determinable as aforesaid, unto the said Hugh, Lord Viscount Falmouth his heirs and assigns, at, &c. ; and that on the 10th October 1759 N. S. (being Michaelmas Day, O. S.) 15l. of the said yearly rent of 5l. for three years of the said term of ninety-nine years, became due and owing unto Hugh now Lord Viscount Falmouth, to whom the reversion of the said demised premises, subject to the said term of ninety-nine years, since the making of that demise has duly come ; whereof the said Isaac, since the death of the said Nicholas and James, had notice : yet the said Isaac hath not yet, nor have or hath any other person or persons yet paid the same or any part thereof to the said Hugh, now Lord Viscount Falmouth ; but the said Isaac hath therein wholly failed ; and the same and every part thereof still remains, and are wholly due and owing and unpaid to the said Hugh now Lord Viscount Falmouth, contrary to the form and effect of the said indenture now brought into Court, and of the said covenant of the said Nicholas, so made in that behalf as aforesaid. Then the plaintiff alleges further, that on the said 12th of December 1759, and for a long time, to wit, for the space of seven years then last elapsed, all and singular the said demised premises, and every part and parcel thereof, &c. were ruinous and in great decay, for want of needful and necessary repairing and amending, &c. all which said premises so being ruinous and out of repair, the said James and Isaac, in the life-time of the said James, after the death of the said Nicholas, and the said Isaac, executor as aforesaid, since the death of the said James, suffered and permitted to be and continue so ruinous and out of repair, for and during all that time, and from thence hitherto ; and neither they or either of them, or the said Joseph, or any other person or persons have or hath as yet repaired the same or any part thereof ; but have, and each of them hath therein wholly failed and made default, contrary to the form and effect of the said indenture, and of the aforesaid covenant of the said Nicholas so by him made in this behalf as aforesaid. And so the said John says that the said Nicholas in his life-time, and the said Isaac since his death, although often requested, &c. have not nor hath either of them kept with the said John the aforesaid covenant of the said Nicholas so by him made as aforesaid, but have broken the same, and to keep the same with the said John have and each of them hath hitherto wholly refused, and the said Isaac, executor as aforesaid, still refuses, to the said John's damage, 500l. And he brings into Court the letters testamentary of the said Samuel Enys, &c.

The defendant demurs generally to this declaration : and the plaintiff joins in demurrer.

This case was first argued on Friday 24th April 1761, by Mr. Gould for the plaintiff, and Mr. Walker for the defendant.

[1194] Mr. Walker—The plaintiff, as executor, sues the defendant, as executor, and assigns the breaches in 1759.

At the time of the plaintiff's testator's making the lease of 10th of October 1735, a former lease of 27th February 1728, made by him to the same lessees, was still subsisting.

Two years after the date of the second lease, Nicholas Donnithorne, one of the joint lessees, died : and the defendant is his surviving executor.

On this second lease, (of 10th October 1735,) he took four exceptions.

1st. It is void for the uncertainty in the commencement of its term.

2d. By the death of Nicholas Donnithorne (one of the two joint-lessees) on 10th December 1737, the whole benefit of the term, and the term itself, and the whole charge, survived to the surviving joint-lessee, Joseph Donnithorne.

3d. It is improper for the plaintiff to sue as executor : he ought to have sued directly in his own name absolutely, and not as executor.

4th. He is also improper in suing the defendant as executor : he ought to have sued him as assignee.

First objection. The term is uncertain as to its commencement : it is by one part of the habendum, to commence "from the first of March preceding the date of this second lease," (which was the first of March 1734;) and by another part of it, to



commence "from the surrender, forfeiture or other determination of the former lease made in 1728," (which determination of the former happened on 1st March 1738).

Second objection. But supposing it to have any legal operation, the term and the benefit of it survived to the surviving lessee; and so also did the whole charge of it: for Nicholas Donnithorne died before the term commenced. And the covenants will not bind the executors of the deceased lessee. 5 Co. 18, *Slingsby's case*, is applicable to the present case: for here, the estate was jointly demised; and the covenants can not operate severally.

Third objection. It is improper for the plaintiff to sue as executor. 1st. As to the charge of the breaches, which are laid in 1759: and the plaintiff's testator died in 1755. [1195] 2dly. As to the person charged; because of the difficulty of the defendant's making a defence. And 3dly. Upon account of costs: for he ought not to be exempt from costs; because the matter arose within his own time.

Fourth objection. He is also improper in suing the defendant as executor: it ought to be as assignee. For the defendant's testator died before any entry; and consequently before any rent was due.

Mr. Gould, contra for the plaintiff.—This action is an action of covenant; and brought upon a covenant which is joint and several: and the indenture is made "in consideration of the rent and covenants on the part of the lessees and their executors, &c. to be observed and performed."

To the first objection I answer.—The lease is not uncertain in its commencement; because it may be rendered certain. In point of computation, it commences from 1st March preceding the date: but in point of occupation, it is to take effect only from the expiration or other determination of the first lease made in 1728. It is a known distinction which lies between a lease commencing in computation, and commencing in possession. 1 Ro. Abr. 849, pl. 11, title Estate, letter Z. is precisely in point. *Ibid.* pl. 12, to the same purport.

To 2d objection. This action is founded upon the covenant, which is joint and several, by the two lessees; and they are securities each for the other. This is not a charge resulting from the benefit of enjoying the land; but from a \*<sup>1</sup> covenant which was one of the considerations of making the lease. 1 Strange, 553, *Lilly v. Hedges*, Tr. 9 G. 1, B. R. "one man may covenant for the act of another."

To 3d objection. It is impossible that Mr. John Enys can be intitled to the original term, otherwise than as executor or administrator of Samuel Enys: and it is only a description of his title to the term. And if he had really named himself executor unnecessarily, this shall †<sup>1</sup> not exempt him from paying costs. For which he cited a case of *Jordan v. Powell*, M. 10 G. 2, B. R. where the plaintiff sued as administrator; and yet it was held to be only surplusage.

To 4th objection. It was impossible to have sued the defendant otherwise than as being executor. His testator was bound by the covenant. And Mr Enys had nothing to do with any agreement between his lessees. They could not, by any act between themselves discharge themselves from an express covenant. No acceptance from an assignee will discharge an express covenant.

[1196] Mr. Walker in reply—(1st.) This lease was so uncertain in the time it was to commence, that it could not be reduced to a certainty: neither does it distinguish when the computation shall commence, and when the interest or possession shall take effect.

2dly. Upon a joint lease, the covenants shall operate only jointly, not severally. *Yelv.* 177, \*<sup>2</sup> *Rolls, Administrator of Rolls, v. Yate*. Therefore this action could only be brought against the survivor. The case of *Lilly v. Hedges*, 1 Strange, 553, does †<sup>2</sup> not impugn what I say. But 1 Saunders, 155, *Eccleston et Ux. Executor of Castle v. Clipsham*, is to the purpose, and shews that the covenant shall go along with the interest.

3dly. The plaintiff's demand appears to be for injuries in his own time. Therefore he can not sue for them, as executor.

4thly. The law operates upon him as assignee.

However, he chiefly relied on the first and second objections.

\*<sup>1</sup> V. 2 Ro. Abr. 148, tit. Obligation, letter G. pl. 3, 4, 5, 6, 7.

†<sup>1</sup> V. 1 Strange, 682, *Portman v. Camu*, S. P. accord. See likewise *Harris, Executor, v. Jones*, B. R. Thursday, 26th January, 1764, post, p. 1451.

\*<sup>2</sup> This case does not at all prove his position.

†<sup>2</sup> It does, very strongly.



Lord Mansfield and Mr. Just. Foster were both absent at this time.

Mr. Just. Denison thought the second objection (which goes on to the point of the action,) deserved further consideration; viz. "Whether, where there is a joint lease, and where the interest must in its nature survive, the covenants, though joint and several, must not be construed to run with the land." It looks very odd, that when one of the lessees dies, and the interest survives to the longer liver of them; yet the other's representatives should be bound by the covenants, though no benefit remains to them. And especially it is right to consider fully of the objection, in a case where the plaintiff would otherwise † lose his action.

I would look into || *Slingsby's case*.

Mr. Just. Wilmot also was willing to hear it argued again; as he thought that there might perhaps be some weight in the second objection: though little or none in the rest.

Yet there seems to be a doubt, whether (as Mr. Gould says,) one lessee may not very reasonably covenant for another, as well as a stranger might covenant for both.

On the other hand, perhaps the subject-matter of the covenant may make it reasonable that it should rather be construed as a joint covenant only, since the interest and benefit survive.

Whereupon, Mr. Gould, with respect to this construe-[1197]-tion of the covenant, and in proof of its being joint and several, mentioned the case of *Robinson v. Walker*, 1 Salk. 393, and likewise *Burden v. Ferrers*, 1 Siderf. 189.

Upon its now standing in the paper for a second argument,

Mr. Serjeant Poole, for the defendant, did not insist on the third and fourth objections: and though he did not give up the first, yet he only insisted on the second. However, he could add nothing to what had been urged before.

And the Court (being now full) determined against him, without hearing Mr. Norton for the plaintiff.

Lord Mansfield—On the first point—It is either a surrender of the former lease; or if it is not, yet the new one is, in point of \* interest, to take its commencement from the determination of the former one only.

2d point—And the action is brought upon a joint and several covenant. The difficulty only arose upon a misrepresentation of *Slingsby's case*; which is nothing like this.

Mr. Denison spoke to the same effect.

Mr. Just. Foster and Mr. Just. Wilmot were of the same opinion.

Per Cur. unanimously,

Judgment for the plaintiff.

REX versus WALTER ERLE, Gent. Saturday, 6th June, 1761. Mandamus to a treasurer of a county, requiring him to reimburse constables on the stat. 17 G. 2. c. 5, relating to rogues and vagabonds and disorderly persons, refused. V. 12 G. 2, c. 29, s. 6, and 17 G. 2, c. 5, s. 1, 4, 16, 17.

Mr. Gould shewed cause against granting a mandamus to the defendant, Treasurer of the county of Dorset, requiring him as treasurer of the said county, to reimburse and pay to Richard Buckland and Edward Andrews, late constables of the borough of Shafton, otherwise Shaftesbury, in the said county of Dorset, the several sums of money (mentioned in the paper-writing annexed to the affidavit of the said Richard Buckland and another) expended by them in conveying and maintaining several rogues, vagabonds and other idle and disorderly persons, according to an order made at the General Quarter-Sessions of the Peace, holden at Shaftesbury on the 10th day of July 1744, in pursuance of an Act of Parliament made 17 G. 2, intitled "An Act to Amend and make more Effectual the Laws Relating to Rogues, Vagabonds and other [1198] Idle and Disorderly Persons, and to Houses of Correction."

He insisted that the sessions have a jurisdiction to examine into the accounts of the constables: whereas these are only allowed by a single justice.

Mr. Norton, contra, for the mandamus, denied that the sessions have any jurisdiction to over-hale the constable's accounts.

This is the only remedy we have. They may return what they think proper, if they think their point maintainable.

† Note—In this case, the survivor happened to be insolvent.

[ 5 Co. 18 b.

\* V. 1 Ro. Abr. title Estate, letter Z. pl. 11 & 12.

Here is no chief constable in this borough : therefore we are obliged to apply to the treasurer.

Lord Mansfield—They are obliged by the Act to apply to the Quarter-Sessions : and the surplus only is to be paid over : which shews that the sessions have a jurisdiction to make deductions.

There is waste enough, upon these occasions, already.

Discharge the rule.

The rule was accordingly discharged.

HAMILTON *versus* MENDES. Monday, 8th June, 1761. [S. C. 1 Black, 276.] Insured who abandons can only recover for the actual loss at the time of his abandonment. [2 Durn. 409.] [5 East, 392.]

[Applied, *Godsall v. Boldero*, 1807, 9 East, 82. Dictum adopted, *Rankin v. Potter*, 1873, L. R. 6 H. L. 127; *Shepherd v. Henderson*, 1881, 7 App. Cas. 71. Considered, *Ruys v. Royal Exchange Assurance Corporation* [1897], 2 Q. B. 138.]

This was a special case reserved at Guildhall, at the sittings there before Lord Mansfield after Michaelmas term 1760, in an action brought against the defendant as one of the insurers, upon a policy of insurance from Virginia or Maryland to London, of a ship called the "Selby" and of goods and merchandize therein, until she shall have moored at anchor twenty-four hours in good safety.

The case stated for the opinion of the Court was as follows—

That the ship "Selby," mentioned in the policy, being valued at 1200l. and the plaintiff having interest therein, caused the policy in question to be made; and the same was accordingly made, in the name of John Mackintosh, on behalf and for the use and benefit of the plaintiff, and which was subscribed by the defendant, as stated, for the sum of 100l.

[1199] That the ship, being of the burthen of two hundred tons, was on the 28th of March 1760, in good safety at Virginia; where she took on board 192 hogsheads of tobacco, to be delivered at London.

That on the said 28th day of March, she departed and set sail from Virginia for London; and on the 6th day of May following, as she was sailing and proceeding in her said voyage, was taken by a French privateer called the "Aurora" of Bayonne, Captain Jean Piena Lesea commander; who, with his company, were subjects of the French King, then being at war with our lord King George the Second.

That at the time of the capture, the "Selby" had nine men on board; and the captain of the said privateer took out six, besides the captain, Dorsdill; leaving only the mate and one man on board.

That the French put a prize-master and several men on board the said ship "Selby," to carry her to France.

That as the French were carrying the said ship "Selby" towards France, on the 23d day of the said May, she was retaken off Bayonne, by the "Southampton," an English man-of-war commanded by Capt. Antrobous; who sent her into Plymouth, where she arrived the sixth day of June following.

That the plaintiff living at Hull, as soon as he was informed what had befallen his said ship the "Selby," wrote a letter on the 23d day of June, to his agent John Mackintosh living in London, to acquaint the defendant, "that the plaintiff did from thenceforth abandon to him his interest in the said ship, as to the said one hundred pounds by the defendant insured."

That the said John Mackintosh, on the 26th day of the said June, acquainted the defendant with an offer to abandon the ship: to which the defendant said "he did not think himself bound to take to the ship; but was ready to pay the salvage and all other losses and charges that the plaintiff sustained by the capture."

That upon the 19th day of August, the said ship "Selby" was brought into the port of London, by the order of the owners of the cargo and the re-captors.

That the said ship "Selby" sustained no damage from the capture.

[1200] That the whole cargo of the said ship "Selby" was delivered to the freighters, at the port of London; who paid the freight to Benjamin Vaughan, without prejudice.

The question therefore submitted to the opinion of the Court in this case, is,—

"whether the plaintiff, on the said 26th day of June, had a right to abandon, and hath a right to recover as for a total loss." If he is intitled to recover for a total loss; then the jury find a verdict for the plaintiff, damages 98l. costs 40s. But if the Court shall be of opinion, that he had no right to abandon on the said 26th day of June, or he ought only to recover an average loss; then the jury find a verdict for the plaintiff, damages 10l. costs 40s.

Flet. Norton, for plaintiff.

H. Gould, for defendant.

This case was first argued on Friday 10th April last, by Mr. Morton for the plaintiff, and Mr. Aston for the defendant.

Mr. Morton—The question is, whether, by law, the insurers are subject to a total, or only to an average loss.

The capture of the ship by an enemy does amount to a total loss of it. Roccusius, pa. 282. Respons, 34. And upon a total loss, the ship being in this country, the insured may always abandon. On 13th December 1759, in the case of *Gardiner v. Brosnall* before Lord Mansfield at Guildhall, it was so settled, "that on a total loss, the insured may always abandon, if in our own country:" (though there indeed the ship was in a foreign port).

This is a valued policy: and the insurer having received a sufficient premium, the insured ought, in point of justice and equity, to have a right of election whether to keep or to abandon the thing insured. And when the insured has once had his election to demand the money insured, no subsequent event can take it from him. For the peril insured against having actually happened, the condition of the contract is broken, on the insurer's part; and when a condition is once broken, no subsequent event can hinder the other party from insisting upon it. Nor can an abandonment be partial.

In the case of *Fitzgerald v. Pole*, in the House of Lords, many cases are \*<sup>1</sup> cited in the margin, where the plaintiffs had judgment as for a total loss, though the ships remained in being.

Lord Mansfield—But they were absolutely denied by the other side.

[1201] Mr. Morton—Yet even general verdicts against insurers are an authority. But the circumstances here found do plainly constitute a total loss, so as to make the insurers liable—Roccusius, 227, note, 66, and \*<sup>2</sup> *Goss v. Withers*, in this Court.

Grotius holds a detention of twenty-four hours only to be sufficient. Lib. 3, c. 6, pa. 814. "Sed recentiori jure gentium, &c." And even Bynkershoek admits it to be so after all reasonable hopes of recovery are gone. Lib. 1, c. 4. And here all hope of recovery was gone: the ship was detained in the hands of the enemy from the 6th of May to the 23d of May. The hands too were taken out. Consequently, the insured might be hurt; and therefore, on a valued policy, he might abandon.

Mr. Aston, contra, for the defendant.—This mere capture, followed by a re-capture before it was taken infra præsidia hostium, is not a total loss, nor can intitle the insurer to abandon.

Abandoning is a term that imports something left to be abandoned: which can not be said, if the loss be absolutely and strictly speaking total.

The right to abandon must arise upon the end being so far defeated, that it is not worth the while of the insured to pursue it: such a loss as is equally inconvenient to him, as if it had been a total loss. Ordinances of France, 181, art. 45, Sea-Laws. Magen's Book,†<sup>1</sup> (where they are translated, and the word abandoning is first used).

The hope of recovery being quite gone, depends upon its being in loco securo, brought into a place of safety. Consolato del Mare, c. 287. Bynkershoek, 9. Juris Publici, cap. 5, lib. 1. And Roccusius is agreeable to both these two. Therefore a bare taking at sea is not enough to make it a total loss. It was never in loco securo; but only carrying towards France.

In 1665, it was not the notion, "that a ship was totally lost which might come to light again." And agreeable to this is Roccusius's Notabilia, 50, pa. 204,†<sup>2</sup> "Non autem

\*<sup>1</sup> See cases in Dom' Proc' Wednesday 13th Feb. 1754.

\*<sup>2</sup> M. 1758, 32 G. 2, B. R. ante, p. 683 to 698.

†<sup>1</sup> Essay on Insurances, vol. 2, p. 174, 175, art. 42, et sequen'.

†<sup>2</sup> See the whole passage, post.



deperditæ, si postea reperiantur." All the <sup>†1</sup> books that speak of the assured's right to abandon, are to be understood of subsisting perils.

Now this ship was restored undamaged, and in as good plight as before: and if it had not been in quite so good [1202] plight, yet it would only be a loss in proportion to the damages. Roccus ut supra. A ship cannot be abandoned, so long as it will swim.

The case of *Goss v. Withers* turned upon particular circumstances; but the general doctrine of that case is with us. There, the loss was total at the time of abandoning: here, it was not. There, the ship was disabled to pursue her destined voyage: the goods were perishable, and the Lent-season for the sale of the fish was over: but here, the ship was perfectly safe, and able to pursue her voyage, at the time of abandoning; she was completely redeemed from her peril, undamaged; and came home so, to her destined port.

The case of *Gardiner v. Brosnall*, turned upon other questions.

There is no difference between a valued, and an open policy, where the loss is only partial, and not total: for the value must be proved, in the case of a partial loss; and the interest must be proved, if it was a total loss.

In order to give the insured a right to abandon, the peril must subsist at the time of abandoning.

Therefore here, the insured are only intitled to an average loss.

Mr. Morton, in reply—This is an insurance against the taking of a ship: which ship has been taken. The facts stated amount to a breach of the insurer's contract: and subsequent events cannot alter the case. The voyage was delayed and defeated, for a month; the ship was without sailors; and it was brought into a port we were strangers to.

The case of *Goss v. Withers* was particularly circumstanced; yet the <sup>\*1</sup> general doctrine was laid down, "that if an insured ship be taken, the assured may demand as for a total loss, and may abandon to the insurer." Here, as well as there, the views of the insured were defeated.

The insurer might possibly have been a gainer by the ship being abandoned to him under his right of salvage.

Note—It was admitted on both sides, that there was no case where there had been an (a) adjustment of a partial loss upon a valued policy; nor any determination that its [1203] being a valued policy turned it into a wager, and so differed it from the case of an open policy, (which is a contract of indemnity).

This cause came on again (in the paper) to be argued a second time, on Tuesday the 26th of May last (1761).

Mr. Norton argued on behalf of the plaintiff—The question is now narrowed almost to a point, by a late <sup>\*2</sup> determination; for I cannot now argue that a valued policy is to be considered upon the same foot with a wagering policy; since it has been <sup>†2</sup> determined "that there is no difference between a valued policy and an open one, except fixing the quantum of the value of the goods as to their prime cost."

And the damage, upon an average loss, must be <sup>‡</sup> computed (as it is now settled) according to the price of sound goods at the port of delivery, at the time of arrival there. But

In all valued policies, where the valuation is exorbitantly high, and the interest on board is very trifling, that is a mere evasion: it is a fraud upon the statute of 19 G. 2, c. 37, and shall be treated as a mere cover to a wager. Therefore the doctrine of wagering policies is not applicable to the present case, since these points have been <sup>§</sup> settled.

<sup>†1</sup> Edict. Lewis, 14, art. 46. Ordin. Bilboa, 1738, artic. 32. Ordinance of Middleburg in Zealand, 1689, art. 26. Ordin. Rotterdam, 1721, artic. 62, 64.

<sup>\*1</sup> V. ante, 696, 697.

(a) It must be observed that at this time, the case of *Lewis v. Rucker* (reported ante, 1167,) had not received its determinations; nor had been even mentioned in Court: the very first motion in that case was made upon the next day after this first argument of the present case; and it was not determined till 2d May 1761.

<sup>\*2</sup> V. *Lewis v. Rucker*, ante, 1171, 1172, 1173. (See the preceding note.)

<sup>†2</sup> V. ante, 1171, 1172.

<sup>‡</sup> V. ibidem.

<sup>§</sup> V. as above.

It must also now be taken, that an insurance of a ship or goods is to be looked upon as only an indemnity for their safe arrival at their destined port.

Nevertheless I must contend for two propositions which still remain to me, and are these—

1st. There was a time once existing when the insured had a right to abandon, and to recover from the insurer as for a total loss.

2d. Nothing has here happened, to take this right away from them.

But I will first clear the case from objection.

It has been objected, "that an abandonment is inconsistent with a total loss."

Answer—An abandonment is a relinquishing of whatever may be saved, for the benefit of the insurer: and a total loss is where nothing is saved, worth the while of the owner [1204] to pursue. There can scarce be any instance of a total loss, in this sense of the term, where there is not something saved.

In the case of a capture, the thing itself is as far from being really destroyed or annihilated, as it was when in the hand of the owner: but yet it is totally lost to the owner: his dominion over it is totally gone. There may be an abandonment even upon an embargo, if the cargo be perishable.

This objection being cleared, I come to the two propositions before stated.

First—Here did once exist a total loss; and consequently there existed, at that time, a right of abandoning.

Since the case of \* *Goss v. Withers*, it stands settled "that where the hope of recovery is gone, a capture makes a total loss, as between insurers and the insured." If carried *infra præsidia hostium*, that even the right of † property is altered: so also, if all hope of recovery is gone.

Now here were no hopes of recovery left; this ship was seventeen days in the hand of the enemy, and only one man and one boy left on board. The insured might then have called upon the insurer for a total loss; and he could have had no excuse. It will perhaps be said, that it was not a continuing loss upon the 26th June, because the ship was before that time retaken and safe. But the answer to that is "that it was total so long as it continued."

I will therefore now consider the second question.

Second question—Whether the subsequent events have taken away the insured's right to abandon; as the insurance is only an indemnity for the ship's safe arrival at its destined port; and as the ship arrived at that port, without having sustained any damage from the capture: and the insurer is content to pay the salvage and all costs.

Notwithstanding all this, I say that where there was once a total loss, or a loss of such a kind as is in its nature total, the insured have a right to abandon, although there be a subsequent re-capture: for, when once the insured had a right to abandon vested in him, such right continued in him and could not be taken away from him.

And † so I understood it to be laid down, in the case of *Goss v. Withers*.

A right of action once vested cannot be devested.

[1205] This may be compared to a condition once broken; which case is just like the present. And a right to abandon follows of course.

Here is no fraud found: and none can be presumed or intended. There is no injury done to the insurer, by the abandonment; for the value is agreed to be 1200l. and not pretended to be over-valued. He has received a premium upon that, as the value; and if no damage has been sustained, he will be reimbursed by that value; (except the salvage, which he must answer for, in either case,) and this must be taken for a fair valuation: no other being found or pretended; if it had been excessive, it might have been shewn by the insurer, and he might have got rid of the policy, as fraudulent. And upon all the circumstances of the case, there was very sufficient reason for abandoning.

It has been said "that the laws and ordinances of foreign countries will not admit a ship to be abandoned, so long as it can swim."

I answer—Those laws and ordinances are not applicable to captures. They are political, in order to oblige the master and men to give their utmost diligence to save the ship, if possible, from sinking. And all the foreign writers put a capture and a shipwreck upon the very same foot; which proves our right to abandon here.

\* V. ante, 696, 697.

† V. ante, 693.

‡ V. ante, ut supra.

Ordinance 46th. \*1 And so also they put it upon the same foot with a detention by princes. Therefore they affirm our right to abandon in the present case.

It has been objected "that the ship was in safety, on the 26th June," (the time when the offer to abandon was made).

But I deny that she was in safety, quoad the insurer: he had no more dominion or power over the ship on 26th of June, than he had when she was in the hands of the enemy. The re-captor had a right to an eighth part of the ship for salvage: and he had a right to sell it, and did actually sell it. And the insured could not hinder this; he had only a right to seven-eighths of the price it should fetch.

It has been likewise objected, "that if the insured may always be at liberty to abandon, in case of a capture and re-capture, it would oblige all insurers to act as merchants, and meddle in things which they do not or may not at all understand."

But that argument proves too much: for, it holds equally strong in all cases of abandonment; and would therefore equally tend to prove "that there can be no abandonment in any case."

[1206] It has been said "that it would introduce fraud."

But fraud is not to be presumed.

I hope therefore that this Court will concur with foreign writers, that there is no instance where, in case of a capture and recapture, and the loss total in its nature, there may not be an abandonment. And so it was determined in the case of *Goss v. Withers*.

Here, the total loss vested a right to abandon; which right could not be divested by the recapture: and no injury is done to the insurer: nor can any inconvenience arise.

Therefore the plaintiff ought to recover the 98l. as for a total loss. This is a firm stable ground to go upon, in cases of capture: and unless this fixed rule be established, there must be infinite uncertainty and dispute in every case of capture and recapture.

Mr. Gould, contra, for the defendant.—Every thing was said last term, in the argument for the defendant, that possibly could be urged upon the subject.

Mr. Aston did not insist that a total loss must be an absolute annihilation of the thing insured.

The determination of the case of *Goss v. Withers*, was founded upon the particular circumstances of that case, and the doctrine was not laid down so generally as Mr. Norton cites it.

As to its having been once a total loss, and continuing so till 26th June, and the spes recuperandi being utterly gone by the capture; the point was settled in that case of *Goss v. Withers*.<sup>\*2</sup>

Mr. Norton admits, that both in the case of a valued and of an open policy, the insurance is to be considered only as an indemnity: whereas his argument would prove the insurer to be liable to have the ship abandoned to him, though retaken within an hour.

The substantial inquiry is, "whether any of the perils insured against, have happened to the detriment of the ship so far as to intitle the insured to abandon, within the true intent of the policy."

Roccus, 204, (cited by Mr. Aston) proves that restoration before payment is sufficient, and the insurer is clear: "Acetiam quia contractus assecurationis est conditionalis, &c. reperiantur. Non autem deperditæ dicuntur, si postea reperiantur." The book goes on and says, [1207] "If the insured had called upon the insurer, before the recapture, &c. that might have made a great difference."

It would be too rigorous, to allow an abandonment by the owner (who understands the best method of managing the thing insured) to an insurer who does not understand it; unless the thing be rendered really useless to the owner himself. There is no instance of an attempt to abandon a ship at a time when it is in safety.

There can be no solid ground to distinguish between the case of a ransom, and the case of salvage to be paid upon a recapture, at the rate of one-eighth of the value, under a positive Act of Parliament.

The case of *Dean v. Dicker*, 2 Strange, 1250, was upon a policy "interest or no interest:" and therefore the recapture was held not to avail the insurer. But the

\*1 V. Magens, vol. 2, pa. 175.

\*2 V. ante, 693 to 698.



Ch. Justice said, at the conclusion of the case, "it might be otherwise on a valued policy."

As to the inconvenience—it is obvious that abandonment must be exceedingly so to the under-writer; who may not understand the thing, and may reside at a great distance from the place of the ship's arrival.

And as to fraud—though particular facts of fraud are not to be presumed, yet the Court will prevent fraud, as far as lies in their power: whereas enlarging the right to abandon will certainly encourage it.

This peril was over and at an end before the offer to abandon was made; and the ship had received no damage by the capture: and therefore the plaintiff ought only to recover as for an average loss, and to be content with the 10l. damages, given him by the jury.

Mr. Norton, in reply—A specific restitution of the ship may happen not to be a satisfaction to the insured.

The recaptor has a right to sell the ship; and by that, to secure his one-eighth for salvage.

There is a substantial difference between ransom and salvage. One is an act of the owner (or his agents;) the other, the act of a stranger: and a ransom is an election to take an average-loss, instead of demanding as for a total one.

[1208] Roccinus, 204, is a general assertion; which may depend upon circumstances, and is not applicable to the present case. The general position is not law.

My argument ab inconvenienti has weight, if this be a total loss; as it certainly is, and was determined to be so, in the case of *Goss v. Withers*.

The case of *Dean v. Dicker* is not applicable to this case.

Cur. advis'.

Lord Mansfield now delivered the resolution of the Court; having first stated the case, as settled at Nisi Prius.

The plaintiff has averred in his declaration, as the basis of his demand for a total loss, "that by the capture the ship became wholly lost to him."

The general question is, whether the plaintiff, who at the time of his action brought, at the time of his offer to abandon, and at the time he was first apprized of any accident having happened, had only, in truth, sustained an average-loss, ought to recover for a total one.

In support of the affirmative, the counsel for the plaintiff insisted upon the four following points:

1st. That by this capture, the property was changed, and therefore the loss total for ever.

2dly. If the property was not changed, yet the capture was a total loss.

3dly. That when the ship was brought into Plymouth, particularly on the 26th of June, the recovery was not such as, in truth, changed the totality of the loss into an average.

4thly. Supposing it did, yet, the loss having once been total, a right vested in the insured to recover the whole upon abandoning; which right could never afterwards be divested or taken from him by any subsequent event.

As to the first point—if the change of property was at all material as between the insurer and insured, it would not [1209] be applicable to the present case; because, by the marine law received and practised in England, there is no change of property, in case of a capture before †condemnation: and now, by the Act of Parliament, in case of a re-capture, the just postliminii continues for ever.†

I know, many writers argue, between the insurer and insured, from the distinction "whether the property was or was not changed by the capture, so as to transfer a complete right from the enemy to a recaptor or neutral vendee, against the former owner." But arbitrary notions concerning the change of property by a capture, as between the former owner and a re-captor or vendee, ought never to be the rule of decision, as between the insurer and insured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counsel for the plaintiff, upon their second point, "that by this capture, while it continued, the ship was

† V. ante, 693, 694.

† V. 29 G. 2, c. 34, s. 24, "and at any time afterwards retaken."

totally lost," though it be admitted "that the property, in case of a re-capture, never was changed, but returned to the former owner."

The third point depends, as every question of this kind must, upon the particular circumstances. It does not necessarily follow, that, because there is a re-capture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; if further expence is necessary; if the insurer will not engage, in all events, to bear that expence, though it should exceed the value or fail of success: under these and many other like circumstances, the insured may disentangle himself and abandon, notwithstanding there has been a re-capture.\*<sup>1</sup>

The Guidon † among other descriptions of a total loss where the insured may abandon, instances, "if the damage exceeds half the value of the thing; or if the voyage be lost; or so disturbed, that the pursuit of it is not worth the freight." But in the present case, the voyage was so far from being lost, that it had only met with a short temporary obstruction; the ship and cargo were both entirely safe; the expence incurred did not amount to near half the value; and upon the 26th of June, when the ship was at Plymouth, and the offer made to abandon, the insurer undertook to pay all charges and expences the plaintiff should be put to by the capture.

The only argument to shew that the loss had not then ceased to be total, was built upon a mistaken supposition, "that the recaptor had a right to demand a sale, and to put a stop to any further prosecution of the voyage." But that is not so. The property returned to the plaintiff, pledged to the re-captors for one-eighth of the value, as salvage for retaking and bringing the ship into an English port. Upon paying this, the owner was intitled to restitution: the re-captor had no right to sell the ship. If they [1210] differed about the value, the Court of Admiralty would have ordered a commission of appraisement. In this case, it was the interest of the owner of the ship, the owners of the cargo, and the re-captor, that she should forthwith proceed upon her voyage from Plymouth to London. But, had the re-captor opposed it, or affected delay, the Court of Admiralty would have made an order for bringing her immediately to London, her port of delivery, upon reasonable terms.

Therefore it is most clear, that upon the 26th of June, the ship had sustained no other loss by reason of the capture, than a short temporary obstruction, and a charge which the defendant had offered to pay and satisfy.

This brings the whole to the fourth and last point.

The plaintiff's demand is for an indemnity. His action, then, must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification, in truth, is an average, or perhaps no loss at all.

Whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been sustained. This reasoning is so much founded in sense and the nature of the thing, that the common law of England adopts it; (though inclined to strictness). The tenant is obliged to indemnify his landlord from waste: but if the tenant do, or suffer waste to be done, in houses; yet, if he repair before any action brought, there lies no action of waste against him: \*<sup>2</sup> but he can not plead "non fecit vastum;" but the special matter. The special matter shews, that the injury being repaired before the action brought, the plaintiff had no cause of action: and whatever takes away the cause, takes away the action.

Suppose a surety, sued to judgment; and afterwards, before an action brought, the principal pays the debt and costs, and procures satisfaction to be acknowledged upon record: the surety can have no action for indemnity; because he is indemnified before any action brought. If the demand or cause of action does not subsist at the time the action is brought, the having existed at any former time can be of no avail.

[1211] But, in the present case, the notion of a "vested right in the plaintiff, to sue as for a total loss before the recaptor," is fictitious only, and not founded in truth. For the insured is not obliged to abandon, in any case: he has an election. No right can vest as for a total loss, till he has made that election. He can not elect before advice is received, of the loss: and if that advice shews the peril to be over, and the

\*<sup>1</sup> V. ante, 697, accord.

|| V. 29 G. 2, c. 34.

† Cap. 7, s. 1.

\*<sup>2</sup> Co. Lit. 53 a.

thing in safety, he cannot elect at all; because he has no right to abandon, when the thing is safe.

Writers upon the marine law are apt to embarrass general principles, with the positive regulations of their own country: but they seem all to agree, "that if the thing is recovered before the money paid, the insured can only be intitled according to the final event."

Roccus, who collects the opinions of all the authors before his time, and draws conclusions or maxims (solutions of questions) from them, which he calls notabilia, in the place cited at the Bar, (fo. 204, not. 50) puts this question—"Assecurator, qui jam solvit æstimationem mercium deperditarum, si postea dictæ merces appareant, et recuperatæ sint, an possit cogere dominum ad accipiendas illas, & ad reddendam sibi æstimationem, quam dedit?" The answer is—"Distingue. Aut merces, vel aliqua pars ipsarum appareant, & restitui possint, ante solutionem æstimationis; & tunc tenetur dominus mercium illas recipere, & pro illâ parte mercium apparentium liberabitur assecurator: nam qui tenetur ad certam quantitatem respectu certæ speciei, dando illam, liberatur, ut ibi probatur. Et etiam, (another reason, perhaps a better,) quia contractus assecurationis est conditionalis; scilicet, si merces deperdantur: non autem dicuntur deperditæ, si postea reperiantur. Verum si merces non appareant in illa pristina bonitate, aliter fit æstimatio; non in totum, sed prout hinc valent." Aut vero post solutam æstimationem ab assecuratore, "compareant merces: & hinc est in electione mercium assecurati, vel recipere merces, vel retinere pretium."

In the case of \**Spencer v. Franco*, though upon a wager policy, the loss was held not to be total, after the return of the ship "Prince Frederick" in safety; though she had been seised and long kept by the King of Spain, in a time of actual war.

In the case of †<sup>1</sup>*Pole v. Fitzgerald*, though upon a wager policy, the majority of the Judges and the House of Lords held there was no total loss, the ship having been restored before the end of the four months.

[1212] The present attempt is the first that ever was made, to charge the insurer as for a total loss, upon an interest-policy, after the thing was recovered. And it is said, the judgment in the case of *Goss v. Withers* gave rise to it.

It is admitted, that case was no way similar. Before that action was brought, the whole ship and cargo were literally lost; at the time of the offer to abandon, a fourth of the cargo had been thrown over-board; the voyage was entirely lost; the remainder of the cargo was fish perishing, and of no value at Milford Haven, where the ship was brought in; the ship so shattered, as to want great and expensive repairs; the salvage was one half, and the insurer did not engage to be at any expence; it did not appear that it was worth while to try to save any thing; and the recaptor, (though intitled to one half, as well as the owner of the ship and cargo,) left the whole to perish, rather than be at any further trouble or expence.

But it is said, "though the case was entirely different, some part of the reasoning warranted the proposition now inferred by the plaintiff from it."

The great principle relied upon, was, "that as between insurer and insured, the contract being an indemnity, the truth of the fact ought to be regarded; and therefore there might be a total loss by a capture, which could not operate a change of property; and a re-capture should not relate by fiction (like the Roman *jus postliminii*) as if the capture had never happened, unless the loss was in truth recovered."

This reasoning proved, *è converso*, that if the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss.

The words quoted at the Bar were certainly used, "that there is no book, ancient or modern, which does not say that in case of the ship being taken, the insured may demand as for a total loss, and abandon." But the proposition was applied to the subject matter; and is certainly true, provided the capture, or the total loss occasioned thereby, continue to the time of abandoning and bringing the action.

The case then before the Court did not make it necessary to specify all the restrictions. But I will read to you, verbatim, from my notes of the judgment then delivered, [1213] what was said: to prevent any inference being drawn, beyond the case then determined. I said—"†<sup>2</sup> In questions upon policies, the nature of the contract, as an indemnity and nothing else, is always liberally considered. There may

\* Before Ld. Hardwicke, at Guildhall, in 1735.

†<sup>1</sup> V. ante, 1200, in margin.

†<sup>2</sup> V. ante, 697.



be circumstances, under which a capture would be but a small temporary hindrance to the voyage, perhaps none at all: as if a ship was taken, and in a few days escaped entirely, and pursued her voyage. There are circumstances, under which it would be deemed an average-loss: as if a ship should be taken and afterwards ransomed." And in ‡ another part, I said—"I know in later times, the privilege of abandoning has been restrained. But there is no danger in the present case; the loss was total at the time it happened; it continued total, as to the destruction of the voyage; a moiety must be paid for salvage, besides other great costs and expences; what could be saved of the goods might not be worth the freight, for so much of the voyage as they had gone when they were taken; the cargo, from its perishable nature, must have been sold or thrown away where it was brought in; the ship, in so shattered a condition as might make it only worth the materials to be sold"—And more to the same effect.

From this way of reasoning, it did by no means follow that if the ship and cargo had, by the re-capture, been brought safe to the port of delivery, without having sustained any damage at all, that the insured might abandon.

But, without dwelling longer upon principles or authorities, the consequences of the present question are decisive. It is impossible that any man should desire to abandon in a case circumstanced like the present, but for one of two reasons; viz. Either because he has overvalued; or because the market has fallen below the original price. The only reasons which can make it the interest of the party to desire, are conclusively against allowing it.

It is unjust to turn the fall of the market upon the insurer: who has no concern in it, and who could never gain by the rise. And an over-valuation is contrary to the general policy of the marine law: contrary to the spirit of the Act of 19 G. 2; a temptation to fraud; and a source of great abuse: therefore no man should be allowed to avail himself of having over-valued.

If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer if he is permitted to abandon: and he can only desire it, because he has over-valued. This was avowed upon the first argument: and that very reason is conclusive against its being allowed.

[1214] The insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss: and the insured ought never to gain more. Therefore if there was occasion to resort to that argument, the consequence of the determination would alone be sufficient upon the present occasion.

But, upon principles, this action could not be maintained as for a total loss, if the question was to be judged by the strictest rules of common law: much less can it be supported for a total loss, as the question ought to be decided, by the large principles of the marine law, according to the substantial intent of the contract and the real truth of the fact.

The daily negociations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.

If the question is to depend upon the fact, every man can judge of the nature of the loss, before the money is paid: but if it is to depend upon speculative refinements, from the law of nations or the Roman *jus postliminii* concerning the change or re-vesting of property; no wonder merchants are in the dark, when doctors have differed upon the subject, from the beginning, and are not yet agreed.

To obviate too large an inference being drawn from this determination; I desire it may be understood, that the point here determined is, "that the plaintiff, upon a policy, can only recover an indemnity according to the nature of his case at the time of the action brought, or (at most) at the time of his offer to abandon."

We give no opinion, how it would be, in case the ship or goods be restored in safety, between the offer to abandon, and the action brought; or between the commencement of the action, and the verdict. And particularly I desire, that no inference may be drawn, "that in case the ship or goods should be restored after the money paid as for a total loss, the insurer could compel the insured to refund the

money and take the ship or goods :” that case is totally different from the present, and depends, throughout, upon different reasons and principles.

Here, the event had fixed the loss to be an average only, before the action brought ; before the offer to abandon ; and before the plaintiff had notice of any accident ; consequently before he could make an election.

[1215] Therefore, under these circumstances, we are of opinion “that he can not recover for a total, but for an average loss only :” the quantity of which is estimated and ascertained by the jury.

The judgment must be entered up as for the average-loss stated in the case.

REX *versus* PERROT. (Tuesday, 10th Feb. 1761.) Bankrupt committed by commissioners remanded by the Court of Chancery, now again remanded by this Court.

This man having,\* since the last motion, submitted to be re-examined by the commissioners, upon the former question ; and having been remanded by them, petitioned the Lord Keeper to be discharged ; annexing a copy of his deposition, giving an account of the manner in which he had disposed of 15,030*l.* in sixteen general articles, one of which, was—“Expences attending the connection I had with the fair sex 5500*l.*” But the Lord Keeper rejected his petition.

He afterwards submitted to a further examination by the commissioners, who thereupon met on 21st March 1761 ; and being still dissatisfied with his answer, remanded him to Newgate : from whence he was, at his own instance, now brought up again by habeas corpus. It appeared, that at this last meeting the same question had been again proposed to him. In answer to which, he particularized a woman upon whom he had spent 5000*l.* (from December 1758 to December in the year 1759 ; ) and also particularized the times of sending and giving it to her ; and that no other person was privy to this ; and that the woman (whose case was Sarah Powell, otherwise Taylor,) is dead, as he has heard. That she knew him to be a bankrupt, and never returned the money or any part of it to him ; and that he gave it to her for her maintenance and expences, and not for a fund for her future support, or wherefrom he could draw any advantage. That he knew, in the year 1759, when he gave and remitted these sums to her, “that he was not worth any thing, and that he was remitting to her the money of his creditors.” That he was acquainted with her five or six years ; but he cannot recollect what he gave her or spent upon her, during the 2d, 3d or 4th years of their acquaintance ; nor did he keep any particular account or memorandum thereof, either in those years or in the year 1759 ; but speaks from memory only. That he did not take any of this money from his banker : but always took it from Mr. Thompson, (since deceased) who used to sell goods for him. That all letters between him (the bankrupt) and this woman, (except one or two,) are burnt or destroyed.

[1216] Mr. Gould, Mr. Serj. Davy, Mr. Coxe, and Mr. Stowe argued that he ought now to be discharged, as having given a full and complete answer to the questions propounded to him : and it is not material, in the present respect, whether it be true or false, or whether his conduct was prudent or imprudent. If he be not now discharged, he must be imprisoned for life.

Mr. Serj. Hewitt, and Mr. Norton, contra, insisted that this answer was still incomplete and unsatisfactory ; and that the defendant can not be indicted for perjury upon it. He was bound down by what was already proved upon him and traced to him, to account for a very great sum of money which appeared to have come to his hands in this particular year : and this is by no means a satisfactory account of the disposition of it, nor at all probable in itself. He lets the commissioners into no sort of light whereby to trace this money, or to discover what is become of it : it is not to be imagined or conceived that four, five, six or seven hundred pounds in a month could be paid her for her maintenance and expences only ; especially as it appears (as it does by what he himself has represented in one part of his examination) that she had only a man-servant and two maids, whilst she was at Bath. It might have been repaid to him or to some one in trust for him ; or laid out in stocks, and those stocks transferred in trust for him.

\* V. ante, 1124, 1125 [See 5 Durn. 656. 6 Durn. 119. 8 Ves. 331.]

The Court held his answer to be incomplete and unsatisfactory ; and ordered him to be remanded.\*

EDIE AND ANOTHER *versus* EAST-INDIA COMPANY.(a) 1761. [S. C. 1 Black. 295. Bull. 328. Sayer's L. of C. 158.] A bill payable to A. or order, and indorsed personally to B. may be afterwards indorsed by B. to another.

[See *Crouch v. Crédit Foncier*, 1873, L. R. 8 Q. B. 386 ; *Goodwin v. Roberts*, 1875-76, L. R. 10 Ex. 357 ; 1 App. Cas. 476 ; *Bechuanaaland Exploration Company v. London Trading Bank* [1898], 2 Q. B. 674.]

This was an action, brought by the indorsees, upon two foreign bills of exchange drawn by Colonel Clive, then in the East-Indies, upon the East-India Company, and accepted by them, payable to Mr. Campbell or order, then also in India, and indorsed by Mr. Campbell to Mr. Robert Ogilby. One of these bills was by such indorsement directed to be paid to Robert Ogilby or order, in the usual way of indorsing ; and no dispute or question arose upon it.

The other bill was also indorsed by Mr. Campbell to Robert Ogilby : but the words "or order" were originally omitted in this indorsement ; and afterwards put in by another hand, before the trial.

These bills thus indorsed by Mr. Campbell to Mr. Ogilby (without adding the words "or order," in the indorsement of the latter,) were by him indorsed to the plaintiff Edie and Lard or order.

[1217] Ogilby became insolvent : and the question then was—who was to bear the loss ; whether Mr. Campbell (b) or the plaintiffs : (for the East-India Company were no more than stake-holders).

The dispute arose only upon this latter bill : for the first bill was given up at the trial, by the counsel for the defendants ; and a verdict was taken for the plaintiff, upon that count. But,

[1218] On the second, an objection was taken to the want of the words "or order," which the defendant's counsel insisted were necessary to be originally inserted by the indorser ; and that the omission of them was equivalent to the most restrictive words that he could have made use of in order to limit the payment. And accordingly, on this second count, a verdict was found for the defendants.

Mr. Morton, of counsel for the plaintiffs, having moved for a new trial, Mr. Norton, and Mr. Wedderburn now shewed cause, on behalf of the defendants, why a new trial should not be granted.

In support of the motion, Mr. Morton and Mr. Yates had cited the three following

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\* This man was afterwards convicted and executed for concealing his effects.

(a) This long case is nothing more than what had been twice before adjudged, as appears from Comyns, 311, and Str. 557, both cited post, 1217, except the point as to costs ; for which, see Buller, 328.

(b) Unless he was a mere servant or agent to Campbell, this, and which is in the lower part of 1221 and in 1222, must be a mistake, for if Campbell received a consideration from Ogilby, when he made the indorsements to him, as of course he would do if Ogilby was not his servant or agent, then Campbell could not be a loser, for he must have received the value of Ogilby ; and as the acceptors were undoubtedly responsible, the person intitled to the bill would receive of the Company, the acceptors ; and whether Ogilby or the plaintiffs were intitled to the bill, would make no difference to Campbell, who being an indorsee, could be at no risk, as the acceptors were responsible ; but as Ogilby was insolvent, if he had no power to indorse the bill to the plaintiffs, then they would be losers ; because they could in that supposition have no remedy against any person but their indorser Ogilby ; but if Ogilby was a mere agent, a person who had only an authority to receive the money for Campbell, and had no interest, then indeed the question would be as put by the reporter : for then, if Ogilby had no power to indorse over the bill, the consequence would be, that Campbell and all had the property of that bill ; but if Ogilby had a right to indorse the bill, then the property of it would be out of Campbell, and in the plaintiffs, and Campbell could have no remedy but an action against Ogilby for money had and received to his use, and as Ogilby was insolvent, must lose the money.



cases; viz. \*1 *More v. Manning*, Comyns, 311, in point: where it was holden "that a promissory note to pay to one, or order, is assignable toties quoties by the indorsee or indorsees, though the words or order be omitted in the indorsement."

† *Acheson v. Fountain*, 1 Strange, 557, in point also; it being there holden "that an indorsable note indorsed to A. B. without saying or order, is an indorsement to the indorsee or order: for the law interprets the assignments to be in the same manner as the note is drawn."

And *Evans v. Cramlington*, in Carthew, 5, and 2 Ventris, 309, 310, which was said to be applicable to the present case.

They alledged that every indorsement imports that the value has been received by the indorser: and

A promissory note or bill of exchange, originally made payable to one or order, is in its own nature assignable; and the assignee has the whole interest in it, and may assign it as he pleases; and any restriction or confinement of his assignment of it is contrary to the nature of the thing, and therefore void.

An indorsement is an assignment; and, for the reasons aforesaid, is not restrainable by the omission of words, or even by negative words: and if it be given in blank, it may be filled up by the indorsee or by any one else, even in the face of the Court, at the trial.\*2

Having thus established this principle, "that the bill of exchange being originally made assignable and negotiable, and being in its own nature assignable must continue always so; and that the law will interpret the assignment to be made in the same manner in which the bill is drawn, although the words or order be omitted;"

They grounded their motion for a new trial upon these two foundations;

1st. That the jury have found directly contrary to this settled law, and have founded their verdict upon the custom of merchants, which they suppose to be quite to the contrary; and of which custom of merchants, evidence was permitted to be given at the trial; which evidence should not have been allowed. For the custom of merchants is part of the law of England: and the law of England being already fully settled on this point, no evidence in contradiction to it ought to have been admitted; nor can any finding of a jury alter it.

2dly. That if the counsel for the plaintiff had apprehended that such sort of evidence would have been gone into at the trial, they could and would have produced better and fuller evidence than they did, to prove that the custom of merchants was really and in truth and fact agreeable to the law as settled: and they alledged that no fact of usage was proved at the trial, to support a notion "that the acceptor was not liable upon such an indorsement as this."

Mr. Norton and Mr. Wedderburn, contra for the defendants, insisted, that the present verdict was right, and ought to stand.

It has been urged, 1st. "That this bill is in its nature negotiable;" and 2dly. "That being so, it can not be restrained by this or any other indorsement."

As to the first—They agreed a bill of exchange to be negotiable in its nature. But it does not follow, they said, that because it was once so, it must therefore always continue so. For the payee has the absolute property in it; he is the purchaser of it: and why should not he limit the payment of it as he pleases? no man can be injured by this; no man can be deceived by it; it cannot be attended with the least inconvenience.

[1219] No case can be cited to be contrary. The cases that have been cited do not apply to it; as will appear presently.

An imperfect indorsement, an indorsement in blank, indeed may be supplied: but the owner may, if he thinks proper, indorse it negatively and upon terms; and then the indorsee takes it upon those terms, and under that restriction, which the indorser has expressly imposed upon it.

This is no more than a naked authority to receive the money.

It is not true, "that every indorsement imports value received by the indorser." For an indorsement may be so worded as to shew that the interest remains in the indorser: as for instance, "pay this bill to my steward, and to no other person;" or "pay to such a one for my use, and to no other person whatsoever."

\*1 In C. B. Hil. 6 G. 1.

† In B. R. Trin. 1723.

\*2 See Comyns, 312, accord.

And whether he has or has not so limited it, is a question of fact, not of law : and it depends upon the custom of merchants.

The case of *Moore v. Manning* does not contradict our principle. It does not appear that that was not an indorsement in blank : which (it is agreed) does not destroy its negotiability. The assignment was there treated as an absolute assignment to Witherhead : it must have been an indorsement in blank ; and the case goes upon that supposition. However, that came before the Court upon demurrer.

The case of *Acheson v. Fountain* was only a question "whether the plaintiff's evidence supported her declaration : " but her demand was full and clear, without those words. The case could not require the reasons there given : therefore they are at least extra-judicial, or \* perhaps added by the reporter.

As to *Evans v. Crumlington*—it is nothing like this † case : nor is any inference to be drawn from it.

Besides, all these cases are only upon promissory notes ; which depend upon our municipal laws : and promissory notes are, by the stat. of 3, 4 Ann. c. 9, put upon the same foot with inland bills of exchange.

But foreign bills of exchange stand upon quite another foot ;| namely, upon the general law and custom of merchants ; and the verdict supposes and proves the custom of merchants to be with the defendants : and the evidence of several eminent merchants and experienced persons at [1220] the trial, was agreeable to the finding. And if they could have encountered it ; why did they not ? Their omitting to do so, is surely no ground for a new trial.

Mr. Morton and Mr. Yates, in reply—

They admit the question to be, "what is the true construction of such a restrained indorsement as this is." And certainly this sort of indorsement makes or rather continues a bill of exchange generally negotiable. Messieurs Edie and Land are in the case of every common indorsee.

The cases that we have cited are plain and clear, on our side : on the other side, they suppose imaginary circumstances, which did not really exist in them.

The determinations upon promissory notes prove "that the law was likewise so, upon foreign bills of exchange."

The fact of usage that would have been cogent and binding, if proved, should have been a refusal to negotiate a bill with such a limited and restrained indorsement.

If this bill was to go back to India, protested by Messieurs Edie and Lard for non-payment by the Company and the indorsers, undoubtedly the drawer would be liable to Mr. Edie and Mr. Lard, for the payment of it.

Lord Mansfield—I thought, at the trial, that the defendants might be at liberty to go into the usage of merchants upon this occasion.

And Mr. Race, cashier of the Bank of England, gave evidence "that the bank, if they ever discounted the bills not indorsed to order, did it only upon the credit of the indorser ; but that otherwise they would not take them, not considering them as being negotiable."

Mr. Simon, a very eminent and experienced merchant, deposed that he considered the omission of these words as restrictive of the indorsement to the particular individual person specified in the indorsement : and he added, that it was, in his opinion, merely in the nature of a personal authority "to receive the money ;" and was not negotiable.

So Mr. Grant, another witness on the part of the defendants, declared his opinion also to be.

[1221] So also Mr. Regnier, their fourth and last witness.

These were the four witnesses for the defendants.

The plaintiffs, on their part, called Mr. Richard Cope (partner with Mr. Honywood the banker :) but they were mistaken in him ; for he agreed with the other four witnesses, exactly.

Another witness called by the plaintiffs was Mr. Udney : who thought it sufficient without the words "or order : " and attested that he had himself discounted one, and

\* The Court expressed themselves to the effect there reported. My own note of that case agrees with Sir John Strange's.

† I cannot see that it is.

|| V. Wood's Inst. 283.

said he had paid, he believed, fifty bills where the words "or order" were omitted in the indorsement.

Mr. Macbean, a notary public, also in his opinion held the indorsement of a bill of exchange to be negotiable, notwithstanding the omission of these words; and that no objection of this sort was ever made. Indeed if the bill should be indorsed "pay the contents to A. B. only," it was looked upon, he said, to be a restriction of the payment to A. B. personally.

Mr. Uny and Mr. Anderson deposed to the same effect, "that the omission of the words or order did not prevent the negotiability."

But the plaintiffs did not, however, come prepared with particular witnesses to the usage in such cases; not expecting that the evidence in support of such a usage would have been admitted.

I told the jury, that by the general law, (laying the usage out of the case,) the indorsement would follow the nature of the original bill, and be an absolute assignment to the indorsee or his order.

And after having told them that this was the general law, then I left to them upon the particular evidence of the usage that had been laid before them: and recommended it to them to consider well of this evidence; and told them, that if they found an usage so established and settled amongst merchants and traders as to be clear and plain and beyond doubt, they might find a verdict for the defendants upon that second bill: but I directed them, that if they were doubtful of the usage, or if the usage appeared to them not to be fully and clearly established, or to be the other way, then they ought to find for the plaintiffs.

I told them, that the question arose upon the insolvency of Ogilby, the first indorsee; and that it ought to [1222] be considered by them, who it was that gave the trust to Ogilby: for he that gives the trust, ought to run the risque of his credit.

I observed that this indorsement was made by Mr. Campbell, the payee, to this Ogilby; and if he meant to trust Ogilby, it was but reasonable that he should be the person to suffer by Ogilby. And it was clear that he meant to trust Ogilby with the money; for it is acknowledged on all hands, that Ogilby himself had a right to receive it of the Company: whether he had a right to indorse the bill to another person, or not.

The jury staid out a considerable time; and then brought in a verdict for the plaintiffs, upon the bill indorsed to Ogilby or order (which was not disputed;) but they gave their verdict for the defendants, upon that count which declared upon the second bill (for 2000l.) which was indorsed to him without adding the words "or order."

In the whole course of the evidence, no one fact was proved, where the indorsee to whom a bill was indorsed, without adding the words "or order," ever actually lost the money; so as to put him upon disputing the point.

Since the trial, I have looked into the cases, and have considered the thing with a great deal of care and attention, and thought much about it: and I am very clearly of opinion, that I ought not to have admitted any evidence of the particular usage of merchants in such a case. Of this, I say, I am now satisfied: for the law is already settled.

I lay the case of *Evans v. Cramlington* out of the way; as I do not see that it is much applicable to the case now before us.

But I go upon the two cases of *Moore v. Manning*, and *Acheson v. Fountain*. The former was an assumpsit upon a promissory note given by Manning to Statham or order; Statham assigned it to Witherhead, and Witherhead to the plaintiff. Upon a demurrer to the declaration, exception was taken, "because the assignment was made to Witherhead without saying to him and order: and then he cannot assign it over." But it was resolved by the whole Court, that it was good: for, if the original bill was assignable, then, to whomsoever it is assigned, he has all the interest in the bill, and may assign it as he pleases. And very right that was: for the main foundation is, "what the bill is in its origin." And accordingly, as that note was originally made payable to Statham and order, they held the assignment of it to Witherhead to be an absolute assignment to him, [1223] which comprehended his assigns. It could not be an indorsement in blank; because it is stated "that the assignment was made to Witherhead, without saying to him or order." The point



resolved was "that the assignment to Witherhead was absolute." The words added at the end of the report are inaccurate, and might, at first view, occasion a little confusion: but, to be sure, the Court went into an additional argument; which the reporter has omitted to particularize. But the declaration sets out the assignment; which is "an assignment by Statham to Witherhead, omitting to add the words and order."

Then as to the other case of *Acheson v. Fountain*—the plaintiff had declared upon an indorsement made by William Abercrombie, whereby he appointed the payment to be "to Louisa Acheson or order;" upon producing the bill in evidence, which appeared to be originally made payable to Abercrombie or order, yet Abercrombie's indorsement was only this—"Pray pay the contents to Louisa Acheson." It was objected, "that the indorsement did not agree with the declaration." The Court, notwithstanding this, gave judgment, upon the ground of a general proposition in law, "that a bill is negotiable, without adding these words to the indorsement." And though the plaintiff might perhaps have had leave to amend his declaration in the point objected to, yet the declaration came before the Court unamended: so that the objection came with its full strength: and the Court gave their opinion upon the point, as a matter of clear settled law: for the whole Court were of opinion, "that it was well enough, that being the legal import of the indorsement: and that the plaintiff might, upon this, have indorsed it over to another, who would be the proper order of the first indorser." And accordingly, judgment was given for the plaintiff.

A draught drawn upon one person, directing him "to pay money to another or order," is, in its original creation, not an authority, but a bill of exchange, and is negotiable. It belongs to the payee, to do what he thinks proper with it, and to use it as best suits his convenience. It is his property; and he may assign it as such, and to whom he pleases: and his direction "to pay it to such a one," is a direction "to pay it to him or his order;" for he assigns his whole property in it, and has had a valuable consideration for so doing.

Another thing observable is the absurdity of the opinion of the merchants, (which they avowed to be their opinion,) "that a bill thus indorsed was not to go to executors or administrators, in case of the indorsee's death:" whereas there can be no doubt, that such an interest is transmissible to executors or administrators.

[1224] The words "or order" are not necessary to be inserted in the indorsement, any more than the words "executors or administrators" are necessary to be added to it.

The point now in question has been already solemnly settled both in the Court of King's Bench and Common Pleas, by the two adjudications that have been mentioned: and therefore witnesses ought not to have been examined to the usage, after such solemn determinations of what was the law.

Therefore there ought to be a new trial.

As to the costs—I think there should be none, in this case. For the verdict must be set aside generally, not in part only. Yet this verdict is agreed to be right upon the first count; and that is found for the plaintiffs. Therefore there ought to be no costs upon granting a new trial in the present case: since the merits were always clear for the plaintiffs, on the first count; and it now appears that nothing remained to be tried, on the second.

Mr. Just. Denison concurred, in toto.

This verdict upon the second count is not well founded. The point in question is not matter of fact; but matter of law.

I never before heard of this notion of a restrictive assignment of a negotiable bill.

Where a bill is originally made payable to A. or order, it is of course and in its very essence negotiable from hand to hand. An inland bill of exchange is assignable in its nature, toties quoties: and promissory notes are now put upon the same foot with them. Foreign bills of exchange are equally so, by the law of merchants, and by the settled determinations of Courts of Law in England.

This is a matter of law: and the law is clearly and fully fixed. There is no instance of a restrictive limitation, where a bill is originally made payable to a man or order.

I never heard of an indorsement to A. only. In general, the indorsement follows the nature of the thing indorsed; and is equally negotiable.

But at least, here is no such restraint as that: here is nothing from whence to

collect an intent to limit and re-[1225]-strain it. The law has determined that the bill is negotiable in itself : and there is no law to the contrary, nor any pretence for it in the present case. And it would be infinitely inconvenient, if it should be otherwise : for, as no circumstances at all appear, it would destroy or disturb that certainty which transactions of this nature require.

An executor or administrator may indorse a bill or promissory note, within the custom of merchants. In the case of *Rawlinson v. Stone*, M. 20 G. 2, B. R. upon a writ of error from C. B. an inland \* bill of exchange was made payable to A. or order : A. died, and the administrator of A. assigned the note to the plaintiff in the Common Pleas ; for whom that Court gave judgment upon demurrer. The Court, upon argument of the writ of error here, held, "that the executor or administrator might assign it over : " and they affirmed the judgment of the Court of Common Pleas. The executor or administrator is only assignee in law, not in fact : yet they held that he might assign it by the name of executor or administrator ; and that it was the common method to do so. The indorsement virtually included it.

Now the present case includes that, and more : for here, the first indorsee was an assignee in fact. And it ought to be so, for the sake of certainty, and for the benefit and convenience of trade. No intention appears here to restrain it : and in general, the law says "it is assignable."

And it is not material, when or how filled up : for it is every day's practice, to fill up the indorsement long after it is made ; nay, even in Court, at the trial.

I will not give any opinion, whether the indorser might have limited his assignment by some clear plain negative words, if in fact it had been his intention to limit and restrain it.

Here, no such intention appears : the indorsement is general ; and the law is settled, "that the assignment follows the nature of the thing assigned." And the law being already so settled, the jury ought not to have given their verdict upon an opinion contrary to it.

A new trial ought therefore to be granted : but no costs should be paid ; for the reasons already mentioned.

Mr. Just. Foster concurred that there should be a new trial ; because it is a verdict against a known and settled rule of law ; as appears by the two adjudged cases reported in Comyns and Strange. Therefore it ought not to have been left to a jury at all.

Much has been said about the custom of merchants. But the custom of merchants, or law of merchants, is the law of the kingdom ; and is part of the common law.

[1226] People do not sufficiently distinguish between customs of different sorts. The true distinction is between general customs, (which are part of the common law,) and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law ; and therefore ought not to have been left to the jury, after it has been already settled by judicial determinations.

But there should be no costs paid upon this occasion ; because the verdict is both against law and against the opinion and direction of my Ld. Ch. Justice, upon the second count ; and is with the plaintiffs, on the first.

Mr. Just. Wilmot was of the same opinion.

The law, with regard to this point, is settled and fully established, by the two cases which have been cited ; and upon right and proper principles.(c)

This original contract is, "to pay to such person or persons as the payee or his assignees or their assignees shall direct : " and there is as much privity between the last indorser and the last assignee, as between the drawer and the first payee. When the payee assigns it over, he does it by the law of merchants ; being a chose in action, not assignable by the general law. And the indorsement is part of the original contract, and is incidental and appurtenant to it in the nature of it ; and must

\* I find by my own notes, that it was a promissory note, and there is a very short account of it (which agrees with mine) in 2 Strange, 1260, by the name of *Robinson v. Stone*. However, it is immaterial whether it was on note or bill. [See also 3 Wils. 1.]

(c) If it be the general law of the land it ought not in any case to be left to the jury. In Dr. and Stud. 34, it is said whether there be any particular custom, or not, shall be tried by twelve men, and not by the Judges, except the same particular custom be of record in the same Court.



be understood and interpreted to be made in the same manner as the bill was drawn : and the indorsee holds it in the same manner, and with the same privileges, qualities and advantages, as the original payee held it ; that is, as an assignable negotiable note, which he may indorse over to another, and that other to a third, and so on, at pleasure.

There is a great deal of difference between giving a naked authority "to receive it," and transferring it over by indorsement. And I doubt whether he can limit his indorsement of it by way of assignment or transfer to another, so as to preclude his assignee from assigning it over as a thing negotiable. For the assignee purchases it for a valuable consideration ; and therefore purchases it with all its privileges, qualities and advantages ; one of which, is its negotiability.

[1227] To be sure, he may give a mere naked authority to a person "to receive it for him:" he may write upon it—"Pray pay the money to my servant for my use;" or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him and for his own use. In such case, it would be clear that no valuable consideration had been paid him. But, at least, that intention must appear upon the face of the indorsement. Whereas here, no such thing nor any thing tending to it, appears upon the face of the indorsement : it is a general assignment without any restriction at all.

The principle I rely upon, is the paying a valuable consideration for the assignment.

In the case of *Moore v. Manning*, (which is in point,) those \* words added at the end, "that at a trial, when a bill is given in evidence, the party may fill up the blank as he pleases"—are redundancy. And that indorsement could not be an indorsement in blank : it appears otherwise from the case itself. It was made to Witherhead, but without saying "to him and order."

So the other case reported in 1 Strange, 557, is likewise in point. And there is no difference, whether the determinations be on promissory notes, or on bills of exchange : it is just the same thing ; because it is to be governed by the same rule.

(He cited a manuscript report of that same case of *Acheson v. Fountain*, which is reported by Sir John Strange : which agreed with Sir John's report of it, and with mine exactly.)

There is another case in Carthew, 403, *Fisher v. Pomfrett*, that shews this to be a right determination ; (though the state of that case was indeed just the reverse of the present case). It was a bill of exchange payable to T. S. who indorsed it "Pay the contents of this bill unto the order of Mr. Fisher." Fisher brought his action as indorsee. The defendant demurred to the declaration, because the indorsement was not to Fisher himself, but to his order. But the Court held that Fisher might well bring the action : "for amongst tradesmen, that form was commonly used, though intended to be made payable to the person whose order is mentioned." And Fisher had judgment.

Therefore a note indorsed over to A. would enable him to indorse it over to B. and so on. For the convenience and course of trade is to be attended to : the intention is to be regarded, not the form.

The custom of merchants is part of the law of England ; and Courts of Law must take notice of it, as such.

[1228] There may indeed be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon ; yet that is only where the law remains doubtful. And even there, the custom must be proved by facts, not by opinion only ; and it must also be subject to the control of law : and so was the case of *Hawkins v. Cardy*, reported in Carthew, 466, and in 1 Salk. 65. There the defendant had given a note under his hand, "to pay unto E. G. or order a certain sum of money :—" "E. G. by indorsement on this note, ordered part of the money to be paid to the plaintiff. Upon which, this action was brought : and a special custom amongst merchants was laid in the declaration, according to the plaintiff's case." Upon a demurrer to this declaration, it was adjudged "that this is a void custom ; because by means of such division, the defendant would be subject to as many actions, as the person to whom the note was given should think fit ; and this upon a single contract which subjected him to one action only." This warrants what I said, "that the original contract must be looked

\* V. Comyns, 312.



into." Here, the original contract is a negotiable bill; and the indorsee is in the place of the original payee.

The two cases of *Moore v. Manning*, and *Acheson v. Fountain*, serve to prove "that there is no such custom of merchants, as the defendants pretend:" for they could not have been so determined as they were, if there had been such a custom of merchants.

Therefore these judicial determinations of the point are the *lex mercatoria*, as to this question: for they settle what is the custom of merchants; which custom is the *lex mercatoria*, which is part of the law of the land. But this finding of the jury in the present case, is directly contrary to the *lex mercatoria* so fully settled and established by legal adjudications.

Therefore the verdict ought to be set aside; but it should be without costs, for the reasons already specified.

Per Cur. unanimously,

The verdict was set aside, and a new trial ordered; (but without costs).

[1229] BASKERVILLE *versus* BROWN; et c. contra. Wednes. 15th June, 1761. [S. C. 1 Black. 293, and see Bull. 180.] Verdict against the plaintiff in a prior action, may be set off against his present demand.

Brown brought an action against Baskerville upon two promissory notes amounting (both together) to the sum of 30l. The cause was entered and tried before Ld. Mansfield at the sittings: and the plaintiff took a verdict for the whole of his demand.

Baskerville had also brought an action against Brown, for 11l. 18s. for taylor's work done by him for Brown; and this cause was likewise entered and tried at the very same sittings; but it happened that the former cause (wherein Brown was plaintiff) was first entered and first tried.

In the latter cause, (wherein Baskerville was plaintiff,) the therein defendant (Brown) had given notice of a set-off of so much of the before mentioned two promissory notes, as would suffice to answer Baskerville's demand against him; and he was ready, at the trial, to have done so, notwithstanding his having taken a verdict for the whole 30l. in the cause wherein he was plaintiff; but Baskerville's counsel opposed this; and insisted that Brown had estopped himself from making this set-off, by having taken a verdict for the whole of his demand; whereas he ought (as they insisted,) to have left out so much, in taking his verdict, as was equal to Baskerville's demand upon him.

Lord Mansfield, at the trial, inclined against allowing the set-off: but he thought it a matter that deserved consideration.

It was accordingly brought before the Court, for their consideration, in the form of a motion made on the part of the defendant Brown, for a rule upon Baskerville the plaintiff, to shew cause why the verdict (which had been found for Baskerville) should not be set aside; and why the defendant Brown should not have the costs of a non-suit.

Mr. Norton and Mr. Yates, on behalf of the plaintiff Baskerville, now shewed cause against this rule. And, besides urging what they had insisted upon at the trial, they added further, that the \* statute only says "that the defendant may set off the debt due to him from the plaintiff;" but does not compel him to do so: and here, the defendant Brown had actually made his election "not to do it," by taking a verdict for his whole demand in the cause wherein he was plaintiff. And they insisted that the nature of the debt is changed, and the former debt [1230] extinguished by the verdict; so that it can not be set off, in an action tried after that verdict had been given.

To this, it was answered by Mr. Morton and Mr. Stowe, (in support of the rule)—that the debt remains unchanged in its nature, and unextinguished, notwithstanding the verdict. And it might have been still set off, they said, in the present action, without any inconvenience: for if Brown should attempt to take out execution for the whole, in the other action wherein he was plaintiff, after a set-off in this action either the Court would set the matter right, (even with costs,) or Baskerville might

\* V. 2 G. 2, c. 22, s. 13.

have redress by an *audita querela*. But Brown was obliged, they said, to take his verdict for the whole of his demand : for he could not be sure that Baskerville would try his cause at all ; and then Brown would have entirely lost this sum of 11l. 18s. Brown did all he could to come at a fair balance : he could do no more than plead it, or give notice to set it off, as it stood at the time of the plea pleaded. The fault was in Baskerville. He ought to have set off his demand upon Brown of 11l. 18s. against Brown's demand upon him of 30l. And then complete justice had been done easily and at once. He ought not to have brought his action against Brown, at all.

Cur. advis'.

Lord Mansfield now delivered the resolution of the Court.

The meaning of the \* Act of Parliament, he said, was, that in all cases of mutual debts, the less sum should be deducted out of the greater, if the defendant desires it.

But Brown could not compel Baskerville to set off his less demand upon Brown, against Brown's greater demand upon him : nor could Brown have safely taken his verdict for less than his whole demand. Yet Baskerville himself might have done this without prejudice, and with perfect safety : and he ought to have done it. But he declined doing it ; and at the same time brings his action against Brown, for what he might, without prejudice, have set off against Brown's demand upon him.

Therefore it was litigious and vexatious in him not to do it, when he might safely and easily have done it ; but chose, instead of it, to commence an action against Brown.

Both actions stood together for trial : but it happened that the cause of *Brown v. Baskerville* stood first. Brown took his verdict for the whole demand upon the two notes ; there being no plea nor notice of any set-off in this cause wherein Brown was plaintiff.

[1231] Then came on Baskerville's cause, in which he was plaintiff, and Brown the defendant : in which cause, Brown had given notice to set off so much as was equal to Baskerville's demand upon him. This he would have done : but it was opposed ; and the objection seemed specious.

But we are all clearly of opinion, upon full consideration, "that the debts might be set off, one against the other in this latter cause, notwithstanding Brown's having taken a verdict in the former for his whole demand." For if at the time of the action brought, the defendant may set-off one debt against the other, or plead (if a larger sum be due from the plaintiff to him, than from him to the plaintiff,) in bar of the plaintiff's action : Brown had a right in the cause wherein he was defendant, to give this notice of a set-off, at the time when he gave it. And Baskerville might, in the cause wherein he was defendant, have set off such part of the larger sum due from him to the plaintiff Brown, as was equal to the debt due to him from the plaintiff, if he had thought proper. And Brown's notice to set off against Baskerville's demand told him, that Brown was ready to strike a balance between the mutual debts, and to be content with the difference between them, and it specified the nature of Brown's demand upon him, as the Act requires.

Thus it stood before the verdict : the debt due to Brown was a mutual debt ; and notice was given of it, and upon what account it became due, and that it was intended to be insisted on. And after the verdict, it still remained a mutual debt, as it did before. The verdict did not annihilate or extinguish the debt : nor change the nature of it, or the rule of law : it only amounted to conclusive evidence of it. So that Brown had the same right to set it off, after the verdict, as he had before the verdict.

We are of opinion, this right to make a set-off still remained in Brown, both within the words, and reason, and intent of the Act of Parliament : and that the debt was neither extinguished, nor its nature changed.

Baskerville was the only person in fault : and he ought not to have brought his action.

Brown was right all along : he could not have taken his verdict for less than he did, with safety. He may now remit so much of the sum he has recovered, as will bring the mutual debts to a just balance : and this he ought to do.

[1232] But it would be strange, if the mere accident of the priority of trial should, by his cause's happening to stand first in the paper, preclude him from taking the

\* See the stat. of 2 G. 2, c. 22, s. 13, for setting of mutual debts, one against the other.

benefit of the Act, according to his notice rightly and truly given at the time when it was given.

Per Cur. unanimously,

Verdict set aside; and the defendant to have costs of a non-suit: and Brown to remit so much of his damages recovered in the other action, as exceed the balance of the mutual debts.

SIR JOHN ASTLEY, BART. *versus* YOUNG. 1762. [S. C. Sayer's L. of C. 178.] Where declaration consists of two counts, and a joinder in demurrer on a plea to one, and a plea to the other, and has judgment for defendant on the former, but a verdict against him on the latter, the plaintiff is entitled to costs on his verdict, the defendant to none on his demurrer. [See 1 Durn. 458. Doug. 652. 3 Durn. 655. 6 Durn. 601. 5 East, 263. 2 Bosanq. 58.]

The plaintiff's declaration consisted of two counts. V. ante, pa. 807, 808. The defendant pleaded the general issue to the whole declaration, and a justification to the last count. The plaintiff demurred to the justification: and judgment was thereupon given for the defendant.

The general issue was tried: verdict for the plaintiff.

The question was "whether the defendant should have his costs of his judgment on the demurrer."

Mr. Norton, for the plaintiff: Mr. Thurlow, for the defendant.

Note—These were single pleas, at common law. (As to double pleas pleaded by leave of the Court under the 4, 5 Ann. c. 16, § 4, see a former case of *Cooke v. Sayer*, Friday 9th February 1759, ante, pa. 753.)

The Court agreed "that the defendant could have no costs."

But where there is double pleading and each plea goes to the whole declaration: and there is a demurrer to any one plea which goes to the whole; and judgment for the defendant thereupon: there the defendant should have costs: for, the plaintiff should not try his issue, after the defendant has had judgment upon a demurrer which goes to the whole.

REX *versus* HIGGINSON. 1762. Indictment for a nuisance in keeping a disorderly house.

On Monday 13th of April last, Mr. Morton moved in arrest of judgment; the indictment upon which the defendant had been convicted, being (as he alledged) too general: and he obtained a rule to shew cause why it should not be quashed. It was in these words—Middle-[1233]-sex—The jurors for our lord the King upon their oath present, that Thomas Higginson of James Street in the parish of St. Martin in the Fields in the country of Middlesex yeoman, on the sixth day of November in the first year of the reign of our Sovereign Lord George the Third now King of Great Britain, &c. and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, did keep and maintain and yet doth keep and maintain a certain common ill-governed and disorderly-house; and in the said house, for his own lucre and profit, certain evil and ill-disposed persons, of ill name and fame and of dishonest conversation, do frequent and come together, then and the said other days and times, there unlawfully and wilfully did cause and procure; and the said persons in the said house, then and the said other days and times, there to be and remain, fighting of cocks, boxing, playing at cudgels and misbehaving themselves, unlawfully and wilfully did permit and yet doth permit: to the great damage and common nuisance of all the subjects of our said lord the King inhabiting near the said house; and against the peace of our said lord the King, his Crown and dignity.

Cause being now shewn against Mr. Morton's rule "to shew cause why the judgment should not be arrested,"—

The Court (exclusive of Mr. Justice Foster, who was gone,) said it appeared to them to be a good indictment, and (without argument) discharged the rule.

The end of Trinity term 1761, 1 G. 3.



REPORTS of CASES ARGUED and ADJUDGED in the COURT of KING'S BENCH, during the Time LORD MANSFIELD Presided in that Court; from Michaelmas Term, 30 GEO. II. 1756, to Easter Term, 12 GEO. III. 1772. In Five Volumes. By SIR JAMES BURROW, Knight, late MASTER of the CROWN-OFFICE, and One of the BENCHERS of the HONOURABLE SOCIETY of the INNER TEMPLE. The Fourth Edition, with the Addition of Critical Notes and Observations, and References to other Reports and Authorities. Vol. III. From Michaelmas Term, 2 GEO. III. 1761, to Trinity Term, 6 GEO. III. 1766, inclusive. 1812.

[1235] MICHAELMAS TERM, 2 GEO. III. B. R. 1761.

SULSTON *versus* NORTON. Monday, 16th Nov. 1761. [S. C. 1 Black. 317.] Action for bribery will lie, though the party do not vote.

This was an action on the statute of 2 G. 2, c. 24, § 7, "for the more effectual preventing bribery and corruption in the election of members to serve in Parliament."

The declaration contained five counts: first, that the defendant corrupted one Moore to vote for Lord Villiers and Sir Robert Burdett, by giving him five pounds five shillings; secondly, a corrupt agreement to give Moore five pounds five shillings; thirdly, a corrupt agreement to lend him five pounds five shillings upon a promissory note; fourthly, a corrupt agreement to deliver the note to Moore on voting; fifthly, for giving the note and counter-note hereafter mentioned. A verdict was found for the plaintiff, and entered on the first count.

Mr. Serjeant Hewitt, on behalf of the plaintiff, shewed cause against setting aside the verdict; which had been moved for, on the part of the defendant.

Mr. Caldecott, on behalf of the defendant, had objected, when he made that motion,

First, that the man did not in fact vote for the persons he promised to vote for; but, on the contrary, voted for their opponents: and therefore the defendant, as he did not by any corrupt agreement procure Moore to vote for them, cannot be said to have corrupted him to do so.

Secondly, that the verdict ought not to have been taken on the first count, which was for giving him the money.

[1236] To the first objection, the case of *Bush v. Rawlins* in B. R. P. and Tr. 29 G. 2, was said, by the serjeant, to be a full answer, being in point.

And in answer to the second objection, he alledged that the evidence given very sufficiently supported the taking the verdict on the first count; and for the truth of his allegation, appealed to Mr. Justice Foster, who tried the cause.

Mr. Justice Foster reported the evidence to have been, "that the defendant gave Moore five guineas, to vote for Lord Villiers and Sir Robert Burdett; that Moore gave him a note for it; and the defendant gave him a counter-note, obliging himself to give up the former note when the condition should be performed."

Mr. Caldecott and Mr. Thurlow, for the defendant thereupon observed, that the Act of Parliament says, "if any person, &c. shall take any money, &c. by way of gift, loan, or other devise:" and though the plaintiff has laid this several ways, he has taken a verdict as upon a gift; whereas it appears in fact, not to have been a gift, but a loan or other devise.

In order to intitle them to take a verdict on the first count, they must have proved it to be a gift: which, it appears by the Judge's report, they could not prove.

The statute expressly distinguishes between gifts and loans or other devises. And so indeed does their own declaration: for, the first count is founded upon the former; the four others, on the latter.

This action being upon a penal statute, it therefore ought to be taken strictly.

This case, as it is laid, differs from that of *Bush v. Rawlins*: the resolution there does \* not interfere with this. For here, "corrupting Moore to give his vote," must mean actually "procuring him to give his vote:" whereas the man did not vote so; and consequently, the other candidate (Mr. Luttrell) was not hurt, at all, by what the defendant did.

[1237] Lord Mansfield—The first objection is in the nature of a motion for a new trial on account of a mis-direction by the Judge.

But the case of *Bush v. Rawlins* is in point. And I wonder how it could ever be a doubt: for, the offence was completely committed by the corrupter; whether the other party shall afterwards perform his promise, or break it.

Secondly, as to the verdict's being taken on a wrong count—the evidence does support the first count. For this is a gift: the note and all the rest is mere evasion, colour, disguise, and device to evade the law.

But if it were not so, the verdict was given generally for the plaintiff. If, by mistake, it has been entered upon a count not proved, instead of the count which was proved, that is no reason for a new trial: the blunder has not injured the defendant. The Court ought rather to rectify the mistake, by ordering the verdict to be entered upon the right count, agreeable to the evidence and consequently the true ground upon which the jury found for the plaintiff.

However, the gift is the true and proper count to take it upon: if it was really a loan,<sup>(a)</sup> it would be no corruption.

Mr. Justice Wilmot held accordingly. This is the right and true count to take the verdict upon.

Per Cur'.—Rule discharged.

STEVENSON *versus* SNOW. Tuesday, 17th Nov. 1761. [S. C. 1 Black. 315, 318.]

If risk not run, the insurer to retain only a part of the premium. [See 1 Bosanq. 171.]

This was a special case reserved at a trial at Nisi Prius before Lord Mansfield in London, upon an action for money had and received to the plaintiff's use, brought by the plaintiff, the insured, against the defendant, the insurer, for a return of part of the premium.

Case—It was an insurance upon a ship, at five guineas per cent. lost or not lost,

\* That resolution was, "that the giving a bribe to forbear voting at the election of a member to Parliament was an offence within the same Act and clause, although the man did not forbear to vote, but actually voted for the opponent's candidate;" and "that there was no need for the plaintiff to allege in his declaration, that the man did actually give, or forbear his vote, according to his promise." [See also 4 Burr. 2499.]

(a) The word loan is used in the description of the offence in the person taking, but not in that of the person giving the bribe, 2 Geo. 2, c. 24, § 7.

at and from London to Hallifax in Nova Scotia, warranted to depart with convoy from Portsmouth, for the voyage, that is to say, the Hallifax or Louisbrough convoy.

[1238] Before the ship arrived at Portsmouth, the convoy was gone. Notice of this was immediately given by the insured to the underwriter: and at the same time, he was also desired either to make the long insurance, or to return part of the premium.

The jury find that the usual settled premium from London to Portsmouth is one and one-half per cent.

They find also that it is usual for the under-writer, in such like cases, to return part of the premium; but the quantum is uncertain: (and the quantum must in its nature be uncertain; because it depends upon uncertain circumstances).

It is stated that the plaintiff made to the defendant an offer of allowing him to retain one and one-half per cent. for the risque he had run on such part of the voyage as was performed under the policy, viz. from London to Portsmouth.

Mr. Yates was counsel for the plaintiff; and argued that as the defendant had not, by reason of this accident, run the whole intended risque, he ought not to keep all the premium; but ought to return so much as is proportionable to the latter part of the voyage insured, namely, from Portsmouth to Hallifax: on which part of the voyage he has run no risque at all. The plaintiff has offered to let him retain so much as belongs to the former part of the voyage, viz. from London to Portsmouth; in which, he did run a risque: and the premium for that part of the voyage is at a settled known price.

Mr. Wedderburn, contra, for the defendant, endeavoured to maintain that the defendant was intitled to keep the whole premium.

The consideration was a valuable consideration, a stipulated price agreed upon by the parties for the whole voyage: and the voyage, was accordingly entered upon; and part of the risque was actually run by the defendant.

This contract was entire, and cannot be apportioned by any Court whatsoever. The premium must have been originally settled, upon computing the different risques of different parts of the voyage, all blended together. One part of the voyage is often much more dangerous than another: it might be the case of this voyage.

[1239] But even taking it more largely, as a contract *jure gentium*; and not confined to the strict common-law notion of entirety of contract;—the premium is a matter *stricti juris*: the insurer was honestly and truly intitled to the premium, as soon as ever the risque was begun.

The object of the insurance, viz. the voyage, is also a matter *stricti juris*. The insured can not substitute another voyage in its place; though it should be a shorter and easier one. If the ship had been lost between London and Portsmouth, the insurer would have been liable to pay the whole. If the ship had made a deviation, or returned after she had left Portsmouth and was under convoy to Hallifax, the insurer would certainly and without dispute have been intitled to the whole premium, notwithstanding that part of the risque was not run at all. And so it is now, as the voyage was entered upon, and his risque once begun.

Mr. Yates, in reply. The entirety of contract is no reason in the present case. For this voyage is, in its nature, divisible: the voyage from London to Portsmouth is a distinct voyage from the voyage from Portsmouth to Hallifax.

The departing with convoy is the condition of the insurance.

If the ship had been lost between London and Portsmouth, the insurer must indeed have paid the loss; but the thirty shillings per cent. for that part of the whole voyage insured, would have been the consideration of it, and a full consideration for it.

Here, a part of the consideration fails, without the default of the party insuring. If the risque be not run, the insurer, in common justice, is not intitled to the premium for insuring it.

There are two ordinances, (one, of Konigsbergh, and the other, of Stockholm) which direct a return of the premium to be made, in cases where the policy does not operate, retaining only a small proportion of it (half per cent.) for the trouble of having made the insurance. They are in Magens on Insurances; vol. 2, pa. 190, No. 785, of Konigsbergh; vol. 1, pa. 266, No. 1070, 1071, of the City of Stockholm.

And this is a right and reasonable rule. We only desire a return of the premium for that part of the voyage where no risque at all has been run.



[1240] Lord Mansfield, having first stated the case, said—I had not at the trial, nor have now, the least doubt about this question, myself.

These contracts are to be taken with great latitude: the strict letter of the contract is not to be so much regarded, as the object and intention of it.

Equity implies a condition “that the insurer shall not receive the price of running a risque, if he runs none.”

This is a contract without any consideration, as to the voyage from Portsmouth to Hallifax; for he intended to insure that part of the voyage as well as the former part of it; and has not. Consequently, the insured received no consideration for this proportion of his premium. And then this case is within the general principle of actions for monies had and received to the plaintiff’s use.

I do not go upon the usage; for the usage found is only “that in like cases, it is usual to return a part of the premium; without ascertaining what part.”

If the risque is not run, though it is by the neglect or even the fault of the party insuring, yet the insurer shall not retain the premium.

It has been objected, “that the voyage being begun, and part of the risque being already run, the premium can not be apportioned.” But I can see no force in this objection. This is not a contract so entire that there can be no apportionment. For there are two parts in this contract: (a) and the premium may be divided into two distinct parts, relative, as it were, to two voyages.

The practice shews, “that it has been usual, in such like cases, to return a part of the premium;” though the quantum be not ascertained. And indeed the quantum must vary, as circumstances vary: so that it never can have been fixed with any precise exactness.

But though the quantum has not been ascertained; yet the principle is agreeable to the general sense of mankind.

Mr. Justice Denison was of the same opinion.

[1241] It is most equitable, that the defendant should only retain the premium for such part of the voyage as he has run the risque of. The insured has a right to have the other part restored to him. And this is agreeable to the general principle of actions for money had and received to the plaintiff’s use: where the defendant had no right to retain it, he must refund it.

Mr. Justice Foster declared himself to be of the same opinion. There is no consideration for the remainder of the premium; for the voyage from Portsmouth to Hallifax, wherein no risque was run by the insurer, who only insured the voyage with convoy: therefore he has no right to retain the premium for this.

Mr. Justice Wilmut declared his concurrence most clearly and strongly. He said these kinds of contracts are by the writers on this head, called *contractus innominati*: and the rule which they lay down concerning them is, “that they are to be determined *secundum bonum et æquum*.”

The jury have here found usage “to return part of the premium, in such cases:” which is a strong proof of the equity of the thing. And nothing can be more just and reasonable.

If the risque was once begun, the insured shall not deviate or return back, and then say “I will go no farther under this contract, but will have my premium returned.”

But upon this policy, there are two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made; the other, not at all entered upon. It was a conditional contract: and the second voyage was not begun. Therefore the premium must be returned: for upon this second part of the voyage, the risque never took place at all.

This is agreeable to what the writers on this subject lay down; and is the right and justice of the case.

Per Cur. unanimously—

Let the *postea* be delivered to the plaintiff.

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(a) This is the only distinction between this case and that of *Tyne v. Fletcher*, Mic. 1777, and without attending to it the two cases seem inconsistent.

MORRIS *versus* PUGH AND HARWOOD. Thurs. 19th Nov. 1761. [S. C. Black. 312, 320. Buller, 138.] Proof may be admitted to shew where a writ was actually sued out. [See 3 Durn. 361. 7 Durn. 619.]

Mr. Morton shewed cause on behalf of the plaintiff, against a new trial; for which Mr. Norton, who was for the defendants, [1242] had, a few days ago, moved, because (as Mr. Norton said) the evidence of the writ ought not to have been admitted.

It was an action of trover, for a mare. No actual conversion was proved: but the evidence of conversion was a demand and refusal, on the second of May.

It was objected at the trial, "that this demand and refusal appeared to be subsequent to the bringing of the action:" for it appeared on the Nisi Prius roll, that the bill was filed of Easter term; and consequently, as there was no special memorandum, it must refer to the first day of that term, which was in the beginning of April, (long before the time of the demand and refusal upon the second of May). And there was no other evidence but this, to support the declaration.

In answer to this objection, the counsel for the plaintiff produced the writ; which appeared to be sued out after the second of May.

The counsel for the defendants objecting to this evidence, as not admissible, Lord Mansfield reserved the point, for the opinion of the Court: and if the Court should be of opinion "that it was admissible," then the verdict (which was found for the plaintiff) was to stand; otherwise the plaintiff to be nonsuited.

Mr. Morton on behalf of the plaintiff, said they had a right to produce the writ, in answer to this objection: and the evidence arising from it was sufficient to intitle the plaintiff to a verdict.

The relation to the first day of the term is only a fiction; the fact was in this case quite otherwise.

When they grounded their objections upon this fiction, we shewed that in fact, the writ was sued out subsequent to the demand.

Therefore this evidence of the real fact answers the fictitious relation of the declaration to the first day of the term; though there be no special memorandum: for, the bill could not, in the course of practice, be filed before the writ was sued out; and the suing out of the writ is a matter in pais.

Mr. Norton contra.—They are concluded by what appears upon the record. The bill is the first process upon the title: and the writ can not be shewn in contradiction to it: for, this would be a contradiction to the record.

[1243] Lord Mansfield—Refusal upon demand is not an actual conversion, but evidence of it. If the refusal on the second of May had really been after the action brought, I ought to have left it to the jury, as evidence of a conversion before the bringing of the action. But I had no doubt of admitting the writ, to shew "that the refusal was before the commencement of this suit."

It is true, if there be no special memorandum, the bill, by fiction of law, relates to the first day of the term. But fictions of law hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may shew the truth.

The bill is not the commencement of the suit; the writ is: and being after the time to which the bill relates, shews that there should have been a special memorandum.(a)

Judges ought to lean against every attempt to nonsuit a plaintiff upon objections which have no relation to the real merits: much more, when the plaintiff is clearly intitled to recover upon the merits, and must recover in another action.

It is unconscionable in a defendant, to take advantage of the apices litigandi, to

(a) Where the proceedings are by original writ, such writ is palpably the commencement of the suit; but where the proceedings are by latitat, the bill is generally considered as the commencement of the suit, the latitat not being a writ of which any entry is made, but only a writ to bring the party into Court; and therefore it is clear that if the cause of suit arises in Michaelmas term, the plaintiff may in the vacation preceding take out a latitat as of the preceding term, but must not arrest on it. Yet a latitat will save the bar of the Statute of Limitations, though that was long doubted of.

turn a plaintiff round, and make him pay costs where his demand is just. Against such objections every possible presumption ought to be made, which ingenuity can suggest. How disgraceful then would it be to the administration of justice, to allow chicane to obstruct right, by the help of a legal fiction contrary to the truth of the fact!

I am clearly of opinion "that the writ was rightly admitted to be given in evidence."

It has been determined, in actions upon penal statutes, which must be brought within a limited time, "that the plaintiff may shew the true commencement of the prosecution, contrary to the fiction;" and this being done in support of a penal action, is much stronger than the present case; where truth is admitted, to prevent manifest injury and wrong.

[1244] Therefore the rule ought to be discharged.

Mr. Justice Denison concurred; and mentioned a\* case in Lord Hardwicke's time, where his Lordship would not nonsuit the plaintiff upon the general memorandum upon the record; because it was amendable.

This indeed, in the present case, was upon evidence; that, in Lord Hardwicke's time, was upon record: but there is no difference in reason.

Mr. Justice Wilmot concurred: and he said he did not, nor ever could understand what was meant by "the bill's being the first process:" for there must have been some other process prior to the filing the bill.

The writ is that first process, and may be shewn; and the practice is so, and it is right and reasonable that it should be so.

Lord Mansfield—This too was amendable, in the present case.

Mr. Justice Wilmot—There was a rule made about amending it; but I am very glad they have not proceeded upon that rule; because it has afforded an opportunity of settling the point.

The rule to shew cause "why the verdict should not be set aside, and a new trial had," was discharged.

WRIGHT, EX DIMISS. WILLIAM CLYMER *versus* LITTLER, ET AL'. Friday, 20th Nov. 1761. [S. C. 1 Bl. 345.] A void deed unsealed shall not operate as a will, nor as a revocation of a former will.

[Overruled, *Stobart v. Dryden*, 1836, 1 Mee. & W. 624.]

This was an ejectment for certain copyhold lands within the manor of Barnes in the county of Surry; in which manor, there is a custom of borough-English.

The lessor of the plaintiff, William Clymer, made out his title, under a regular and undisputed will of his grandfather John Clymer, dated 17th Feb. 1743, and executed in the presence of three witnesses, disposing of his freehold, as well as of this copyhold estate to the lessor of the plaintiff in fee; the testator John Clymer having previously surrendered the copyhold to the use of his will.

The title of the defendants (who were purchasers under another William Clymer, second and youngest son of John, and uncle to William the lessor of the plaintiff,) depended upon another subsequent will (or instrument which they called a will) made by the said John, as they alledged, on the 20th of September 1745: which, they contended was at least a revocation of his former will in 1743. And if it be only a revoca-[1245]-tion of the former will, then William the youngest son of John, must inherit as heir in borough-English.

This will or instrument of 1745, (which was not under seal) was all written by one William Medlicott, who was son-in-law to the said John Clymer, (having married his only daughter Amy).

It was also indorsed on the back, in the same handwriting of the said William Medlicott, in these words—"The covenant and agreement of John Clymer:" and it was witnessed by the same William Medlicott, and one Elizabeth Mitchell.

The body of it was in these words, "Know all men by these presents, that I John Clymer of Barnes in the county of Surrey, gent. have this day covenanted and agreed in the manner and form following, that is to say; for natural love and affection which I have and bear to my son and daughter and grandson hereinafter named, I do make,

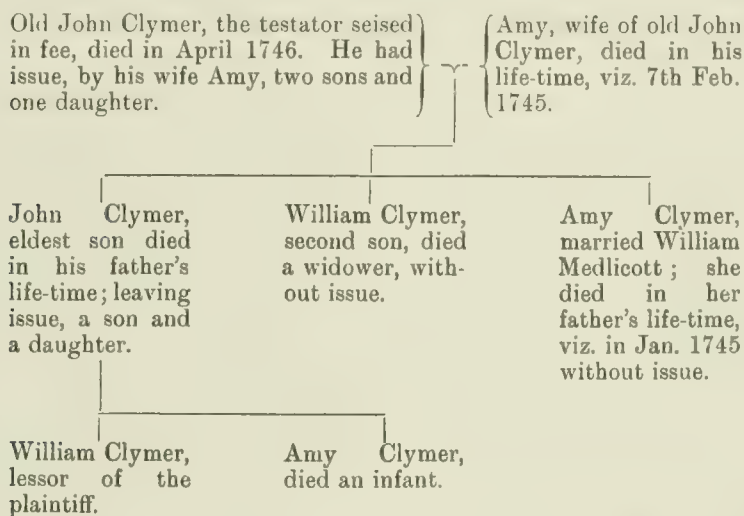
\* There were two, one for words, the other for an assault and battery.



constitute and appoint the several estates and sums of money following, after the decease of myself and Amey my wife, to come to and be given to them. But first of all, my estate called Barnes and Hopton, to my wife for her life; and after her decease, all that eighteen pounds a year, to my son William Clymer for his life; and after his decease, to William Clymer my grandson. And as to all those copyhold messuages, lands and tenements at Barnes in the county of Surrey," (which is the estate in question) "to my daughter Amey the wife of William Medicott, her heirs and assigns for ever; to take and hold the same after the immediate death of myself and said wife, and not before. Dated 20th September 1745. John Clymer. Witness, Elizabeth Mitchell—William Medicott."

It happened, in fact, that this Amy Medicott, daughter of John Clymer, and wife of this William Medicott, died before her father.

[1246] In order to be better understood, I will give a short pedigree of the family; and specify the particular times of their respective deaths.



Upon the death of old John Clymer, in 1746, his second son William Clymer was admitted to this copyhold estate, (the premises in question,) as heir in borough-English; the above-mentioned will of old John Clymer in 1743, being then unknown to every body except the above-named William Medicott, who had it in his possession, but secreted it.

This William, youngest son of John, enjoyed the estate until 1751; and afterwards aliened it to one Mitchell: who was admitted in 1751; and afterwards sold it to one Penley. Penley was admitted; and afterwards sold part of it to Littler, one of the present defendants; who was admitted to that part; the other part descended to Penley's heir; who was admitted thereto, and then sold it to Pelham, another of the present defendants: who was also admitted in due manner.

During the time of all these transactions, the lessor of the plaintiff was at first a minor, (a) then at sea, (b) always poor, (c) and remained ignorant of the will in 1743: till (d) the death of William Medicott, who produced it when dying, and directed it to be delivered to the lessor of the plaintiff.

William Medicott died in May 1747. He had the custody of both wills, till a few weeks before his death. The latter will was found amongst his papers. The former was delivered by the said William Medicott to one Edwards, about three

(a) For above two years.

(b) How long does not appear.

(c) This was no good excuse; but why did he not give notice to the steward, disseisors, or tenants, or to the purchasers?

(d) Which was but about a year after the death of the testator, and fourteen years before the ejectment.

weeks before his death: and it was, about three months after, delivered to William Clymer the lessor of the plaintiff; who was then about two years under age, but proved it in 1751.

[1247] After this discovery, the lessor of the plaintiff did not bring this ejectment, till after an acquiescence of fourteen or fifteen years from his uncle's first admission to it upon old John's death: or at least without the nephew's setting up any claim within that time; during which, his uncle William, or the purchasers under him, had been in quiet possession.

At the trial, the lessor of the plaintiff produced and proved the will of 1743: under which, he was devisee of this estate, in fee.

To encounter this evidence, the defendants produced this will or instrument of 1745: and both the witnesses to it (Elizabeth Mitchell and William Medlicott) being dead, they proved their hand-writings, and also the hand-writing of old John Clymer, in the common and ordinary form.

Whereupon the plaintiff's counsel insisted, that this will or instrument was, in the first place, an absolute forgery; and in the next place, that in point of law it could not operate as a revocation of the will in 1743.

And they called Mary Victor, sister to the said William Medlicott, who was one of the subscribing witnesses to the will or instrument of 1745: which Mary Victor swore, "that whilst she was attending her said brother William Medlicott in his last illness, and about three weeks before his death, he pulled out of his bosom the will of 1743, and said 'it was the true will of John Clymer;' and then delivered it to her, with directions to deliver it over to William Clymer the lessor of the plaintiff, or to Mr. Faulkner." And she added, "that one Edwards was present at the time."

This Edwards (who had been already called on the part of the defendants, to prove the hand-writing of Elizabeth Mitchell, one of the witnesses to the will or instrument of 1745,) on being cross-examined on the part of the plaintiff, confirmed Mary Victor's evidence "that Medlicott did pull the will of 1743 out of his bosom, and gave it to her with such directions as she had deposed."

Upon Mary Victor's cross-examination by the counsel for the defendants, she not only persisted in what she had before deposed, but also added that at the same time that William Medlicott produced the will of 1743, as the true will of old John Clymer, he acknowledged and de-[1248]clared to her "that the said will or instrument of 1745 was forged by himself."

No objection was made to this evidence, by the counsel for the defendants, at the trial.

The Judge and jury (a special one) perused and examined the two instruments of 1743 and 1745, and their different signatures;—and took notice of the circumstances of the latter, being all of the hand-writing of this William Medlicott himself; and disposing of a fee to Medlicott's own wife: and, upon the whole, they were all of opinion "that it was a forgery." And the Judge directed the jury to find for the plaintiff: which they did.

On Tuesday, 10th November 1761, Mr. Norton moved, on behalf of the defendants, for a new trial; upon the foot of a misdirection by the Judge who tried the cause, upon a point of evidence: and a rule was made to shew cause why the verdict should not be set aside, and a new trial granted.

This cause coming on to be argued yesterday (19th November 1761,) Mr. Justice Wilmot reported the \* evidence from Lord Chief Justice Willes; who tried the cause, and who was satisfied with the evidence, and reported that no objection was made at the trial, to the evidence given by this witness, Mary Victor.

Mr. Justice Wilmot having made his report, and several additional circumstances, not mentioned in the report, having been agreed by the counsel on both sides;—

Mr. Norton proceeded. He objected to the admission of this evidence, as being only hear-say evidence. What Medlicott said, ought not to be admitted or regarded: for it was not said upon oath, nor was there any opportunity of cross-examining him.

Indeed, this evidence would have been of little or no weight, even if he had given such a testimony himself; after having himself solemnly attested this will, as a witness to it.

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\* I have already endeavoured to throw the whole together, as clearly as I was able.

This pretended declaration was made near fifteen years ago (for he died in 1747 :) and yet the ejectment was not brought till 1761.—This sort of evidence shall not overturn a title confirmed by so many years possession.

Besides, we are a purchaser for a valuable consideration, [1249] under the heir at law ; to whose title no objection was ever made.

Mr. Eliab Harvey, for the plaintiff, admitted the possession to have gone in the course of descent in borough English ; but observed that the granting new trials is not so necessary in ejectment as it may be in other cases ; because it is easy to bring another ejectment.

As to the length of time they have been in possession—William the grandson (the lessor of the plaintiff) was poor, a minor at sea, and ignorant of the will in 1743.

Our title stood upon an unexceptionable will. Their's is rather a deed of covenants : but they insisted upon it as a testamentary act and a revocation.

Their own witness, Edwards, proved in the course of giving his evidence, "that Medicott did produce out of his bosom, the will of 1743, and delivered it to Mary Victor, to be given to the lessor of the plaintiff or to Mr. Faulkner."

We called this Mary Victor, not to give evidence of the forgery, but to impeach the credit of their evidence William Medicott.

If Medicott had been living, he must have been called to prove the will. And if he had owned "that he forged it," it could not have been established : or if he had proved the execution of it, we should have been at liberty to discredit his personal evidence, by shewing "that he had himself owned it to be a forgery." And surely, we may give the same evidence after he is dead, in contradiction to the proof made by other persons, of his handwriting.

In this second instrument of 1745, there is a disposition "to Medicott's wife, in fee:" she died before the testator. But it was no will, no testamentary act, nor even a deed.

This is the verdict of a special jury. And Lord Chief Justice Willes compared the papers, and declared "that it bore the appearance of a forgery." The jury thought so too. And their verdict ought to stand.

[1250] Lord Mansfield ordered both the wills or instruments to be produced here, to day : to which time it was adjourned.

And they being now, accordingly, produced—

Mr. Norton for the defendants, proceeded, to the following effect. We could have proved this will, even without calling Medicott, if both the witnesses had been living : or if Medicott himself had been alive and been called, he might have explained the occasion of his saying such words to such a person and at such a time.

The consequence of admitting such evidence as this is, would be fatal : and no purchaser under a will could be safe.(a)

Here were many notorious changes of the property ; and an absolute acquiescence all the time by the lessor of the plaintiff.

The wills are now both of them before the Court. That of 1745 enures either as a will of copyhold land, or as a good writing to appoint the uses of a surrender of copyhold land ; or, at least, as a revocation of the will made in 1743.

First, it is a good will of copyhold lands. Copyhold lands are not within the Statute of Frauds, and no witnesses at all are necessary to such a will. It is a good will under the Statute of Hen. 8. \* That statute only requires "that it be a will in writing."

I agree that here is no disposition of the personal estate, or any appointment of an executor. But still it is a good will of copyhold land : for neither of those are necessary in a will of copyhold land. It gives an estate for life to his wife, with remainder to William Clymer, under whom we claim. And the Ecclesiastical Court have received it, and suffered it to be proved as a will.

Secondly, it is a good instrument to appoint the uses of a surrender.

Any writing is sufficient for this purpose : it needed not any attestation.

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(a) The purchases were under W. C. the second son, who was the customary heir, the land being borough English ; and note that the plaintiff's title, and not the defendant's, were under a will ; and that the defendant attempted to set up a supposed will or deed in 1745, as a revocation of the will under which the plaintiffs claimed.

\* 32 H. 8, c. 1.



Thirdly, at least, it will operate as a revocation.

[1251] Revocations are favoured, both in law and equity. There are many methods of revocation: a will may be revoked by mere operation of law, without the intention of the party. A feoffment without livery, a bargain and sale without enrolment, a grant without attornment, are sufficient to do it.

But by his own act, a man may by writing revoke one will, without making another.

Before the Statute of Frauds, he might have revoked it verbally, by mere parol only.

Any act inconsistent with the will, though ineffectual to the purpose it was intended for, yet being done by the maker of the will, is a revocation, because it shews his intention to revoke the disposition he had before made of his estate.

This writing fully shews the animus revocandi: which alone is sufficient. It is indeed a very inaccurate instrument: but it is in writing; and he says \*1 "I have agreed that my estate shall go so and so." And this will or writing shews his intention of a total revocation of the former: for, by this, he disposes of his land to a very different purpose from the former disposition of it by the will of 1743.

Both wills were read in Court.

Mr. Harvey and Mr. Lee argued for the lessor of the plaintiff, William Clymer, the grandson.

They observed that Mr. Norton's objection was confined to the evidence of Mary Victor, sister to William Medlicott, one of the witnesses to the will of 1745; and they observed too that her evidence was corroborated by the evidence of Mr. Edwards, one of their own witnesses.

But it was to be further observed, they said, that the verdict was not founded on this evidence only. For the special jury actually saw and deliberately perused the will or instrument of 1745; and upon such view, inspection, and examination, and upon all the circumstances of the disposition, they judged it to be a forgery.—Besides, no objection was taken to the evidence at the trial. They might have objected to it then, or demurred to it.

[1252] As to acquiescence—the lessor of the plaintiff was but seventeen years of age, when his grandfather died; was always poor; and was at sea, the most part of his time.

But as to the evidence itself—it was strictly and legally admissible. It was not given in order to prove the forgery, but to discredit their evidence, arising from the proof of Medlicott's hand. Medlicott must have been called, if living, and would have overturned the will or writing of 1745, by giving this evidence of what Mary Victor swears he owned to her. The present proof is only "that he was a subscribing witness." And this evidence might be and was proper to be given to take off the force of such his attestation.

As to the legal operation of this will or instrument of 1745—

First, it is no good will of land of any kind: there is no animus testandi; no publication; no mark of a will.

Secondly, neither can it be a sufficient appointment of the uses of a surrender made to the use of a will; when it is not a will at all, nor even a testamentary appointment.

Thirdly, nor can it operate as a revocation of the former will. Here are no words of revocation; no declaration of an inclination to it: no such intention appears. Revocations are not favoured now: the Statute of \*2 Frauds, settles the point in what manner they shall be made. Feoffments to uses, bargains and sales inrolled, and grants operate by relation to the lifetime of the testator: and a feoffment without livery, a bargain and sale without enrolment, or a grant without attornment, are only incomplete. But a mere covenant "to make a feoffment in fee," without more, is no revocation of a will: as was determined in the case of *Montagu v. Jeffereys*, in Moore, 429, and 1 Ro. Abr. 615, pl. 3.

Little or nothing is to be found about revocations of wills of copyhold lands. But it has never been determined "that a will of copyhold is not within the revoking clause of the Statute of Frauds."

A will of copyhold lands can not now be revoked by parol: it must be by some

\*1 V. ante, p. 1245.

\*2 29 C. c. 3.

other will declaring the same. In the case of *Eggleston et Al' v. Speke*, 3 Mod. 258, the second will did not operate as a revocation of the former; [1253] because it was not a good will in all particulars, and there was no such declared intention. Carthew, 79, S. C.

But a mere covenant and agreement will not revoke a will, 1 Ro. Abr. 615, pl. 3, title Devise, letter P. And yet that was a covenant in pursuance of a marriage: which makes it a very strong case.

The words "constitute and appoint" are not testamentary words: nor is there any publication of this writing. It is not under seal: which it ought to be, in order to revoke what is under seal. Therefore as an appointment, it cannot revoke the former will. It ought also to have been done in the presence of three witnesses by the Statute of Frauds. The twenty-second section takes care of the revocation even of wills of personal estates; though it does not meddle with the making them. And this is a ground for a presumption "that the Legislature considered copyhold wills to be within the provision of the statute, as to the revocation of them, too."

The revocation in the present instance, must be extended to the will of the freehold as well as of the copyhold, if it operates at all: it can not operate as a revocation of part of the former will, and not as a revocation of another part. It must be an intention to revoke the whole: it must intend to give to another, as well as to take from the former. In the case of *Onions v. Tyrer*, 1 Williams, 345, Lord Cowper argues upon this principle, "that if the second devisee took nothing, the first devisee could lose nothing." But in this case now before the Court, nothing is given to any other person. This covenant is no revocation of a will. 2 Peere Williams, 623, *Cotter v. Layer*. And it can not take effect as a testamentary revocation.

The defendants can not be purchasers for a valuable consideration, under a public notoriety; and without notice of our claim. All the purchasers were under notice of a will: and the defendants consulted counsel upon the validity of it.

This evidence is admissible; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath: for such declarations of dying men have been admitted as evidence even in cases of murder. So that it ought not to be called "mere hearsay evidence."

But their objection comes too late; as it was not taken upon the trial: they even cross-examined the witness. So is Lucas's Rep. 202, 203, H. 12 Ann. B. R. *Queen v. Corporation of Helston*—"If counsel do not, at the trial, in-[1254]-sist upon an objection, there ought to be no new trial." H. 2 G. 2, Fitz-Gibb. 40, *Anonymous*. Mr. Lee moved for a new trial, because his client had made a mistake in point of evidence: and it was denied; because "vigilantibus non dormientibus jura subserviunt."

This express evidence of the direct forgery came out upon Mr. Knowler's cross-examination of our witness (this Mary Victor;) not upon our examination of her.

Mr. Norton, in reply.—This will of 1745, says "I appoint my lands to come to and be given to, &c." It can not be a covenant to stand seised: there is no seal, no covenantee; and besides, it is copyhold; of which there cannot be a covenant to stand seised. It must operate as a revocation.

Wills of copyholds are not within the Statutes of Frauds; either as to the making or as to the revocation of them. They stand just as they did: the revoking clause can never extend to them, when the enacting clause does not.

As to the case of *Eggleston et Al. v. Speke*, 3 Mod. 258.—The nature of the estate is different from this. This is a revocation of the will in toto, quoad the copyhold land.

A will may be good as to copyhold, though bad as to freehold: therefore so also may a revocation be.

An instrument may operate as a revocation; though it be void as to its professed end and intention: as, for instance, a will devising land to a Papist.

As to the case in 1 Peere Williams, 345.—There was no intention to revoke the will, and let in the heir at law.

But in the present case, the two acts of the testator are inconsistent. This is not a covenant to do the thing; but actually doing it: it does not rest in futuro.

Nothing passes by a feoffment, without livery; or by a bargain and sale, without enrolment; or by a grant without attornment: and therefore in such case, there can be no reference backwards.

Lord Mansfield.—The defendants came to the trial, apprized of the plaintiff's title, and prepared to encounter it.

[1255] There is no doubt as to the will of 1743 ; which is the plaintiff's title. The only answer to it, which the defendants now alledge, is "that the instrument of 1745 has revoked it." And they do not suggest that they can give any new evidence in support of that instrument or the point of revocation. The jury have found for the plaintiff: consequently, "that the will of 1743 was not revoked." Lord Chief Justice Willes is satisfied with the verdict. This motion therefore and the argument in support of it, as there is no pretence that the defendants can mend their case upon a new trial, is in the nature of an appeal from his opinion.

There are three grounds, any one of which, if made out, is sufficient to support this verdict. If the instrument of 1745 was forged ; if it was obtained by fraud and imposition, though not forged ; or, though duly and fairly executed, if it be no revocation.

As to the first ground, the defendants complain, that the Chief Justice misdirected the jury, by leaving to them as evidence the declaration of Medicott "that he forged it."

Answer. It came out upon their own examination ; they made no objection to it at the trial ; and it certainly was a circumstance proper for the jury to consider. The competence of evidence depends upon the circumstances under which it is given. The will of 1743 is set up after fifteen years. It was necessary to shew how it was secreted, and how discovered.(a)<sup>1</sup> The declaration of Medicott in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence. The instrument of 1745 was equally in his custody and secreted. The account he gave of it in his last moments is equally proper. Even though it had been upon an examination by the plaintiff, (especially as it was all written and witnessed by him, and gave the premises in question to his wife,) as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience ; I am of opinion "the evidence was proper to be left to the jury."

But independent of this declaration, forgery or fraud was apparent. Medicott appears to have been a bad man. It is all written by him, and gives the fee to his wife, in prejudice of John Clymer's male issue. It is worded as an [1256] irrevocable settlement ; without cause or consideration. Medicott never dared to produce it ; and chose rather to conceal the will of 1743, that the younger son might be admitted and possess the premises.

But lastly, this paper is no revocation. It is no will : and therefore can not direct the uses of the surrender.

It is no conveyance. It is no agreement with any body. It does not purport having been delivered to or for the use of any body. There is no proof that it was out of the custody of John Clymer, before his death. It ought not to have been out of his custody ; because it is voluntary and without any consideration. He could not have been obliged to perform it. Then it amounts to no more than his bare saying "that he intended to make a will or surrender to the use of his daughter, in fee : " and did neither. An intention to revoke by a future act which a man can not be compelled to perform, is no revocation, till the act is done. All the cases are so : and the reason is evident.

It is to no purpose, to grant a new trial ; because I am satisfied that the verdict is, in every light, agreeable to the true justice of the case.

Was it a measuring cast, or if the defendant had been surprized by the plaintiff's title, I should have thought otherwise.

The defendants are purchasers from the heir of a copyholder duly admitted. There has been a possession above fifteen years. The title set up by the plaintiff is a will concealed.(a)<sup>2</sup>

(a)<sup>1</sup> But above a year and three months after the testator's death, before the lessor had the custody of the will by which he claimed. Vide ante, 1246.

(a)<sup>2</sup> If this had been by the plaintiff's lessor, it would, as it should seem, have been a fraud in the plaintiff's lessor to conceal the will and suffer the estate to be sold by the heir and several others claiming under him, all of whom were admitted ; and therefore, if this had been the fact, a Court of Equity at least would have enjoined the heir from setting up the will, according to the principle in the cases in Eq. Abr. 281. And it seems a jury ought under such circumstances to have found against



But, be these favourable circumstances as they may, the trial had is satisfactory beyond a doubt: and the defendants can not mend their case. Therefore it would be vain and vexatious, to grant a new trial.

The three other Judges declared their entire concurrence; but declined expatiating upon it, or entering into particulars, as Lord Mansfield had so very fully gone through it.

Per Cur'.—The rule must be discharged.

REX *versus* JAMES WHEELER. Monday, 23d Nov. 1761. [1 Black. 311.] Defendant discharged without fine for a contempt in attempting to set aside an award in equity.

The defendant came up, to receive the judgment of the Court; having been reported in contempt.

The contempt was this—The defendant Wheeler, being a [1257] vintner, had bought two pipes of wine of one James Stuart Tulk: which wine the defendant asserted to be adulterated and bad, and therefore refused to pay for it.

Whereupon Tulk brought his action against him for the price. At the trial the matter was, by consent of both parties, (probably, to conceal the secrets of the trade, and the nature and degree of mixing,) referred to the arbitration of one Mr. Charles Corderoy: Wheeler consented to abide by his award, and not to bring any bill in equity. This rule of Nisi Prius was made a rule of this Court. Corderoy awarded "that Wheeler should pay Tulk a certain sum of money, (about 20l.) for this wine." Wheeler refused to pay the money awarded; and moved this Court "to set aside the award."

Upon hearing that motion, the Court thought there was no ground to set aside the award; but that it ought to be performed. Upon which, the defendant performed the award, and paid the money. Afterwards, he was so ill advised as to bring a long bill in the Court of Chancery.

The plaintiff here (defendant in equity) moved this Court for a rule to shew cause why an attachment should not issue against him, for bringing a bill in equity, contrary to the rule of this Court made by consent.

Upon the motion, the Court expressed their resentment, and made a rule to shew cause.

The vacation then coming on, the defendant filed a supplemental bill in Chancery, stating the motion for an attachment, and praying an injunction and relief.

The plaintiff here (defendant in equity) pleaded, in bar, the rule of this Court: which plea was allowed.

Upon shewing cause here, against the attachment, the Court, from abundant indulgence, heard, a second time, every thing which could be said to impeach the award. But they continued of their former opinion, in support of the award: and the rule for the attachment was made absolute of course.

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a will, so concealed by the devisee in fee; but qu. the fact of concealment; for the will was proved in 1751, ante, 1246; which seems to be the strongest part of the plaintiff's case: or rather that and a defence founded on forgery, seem to be the only answers to the arguments from the admission of the customary heir, and the many admissions of the purchasers under him before any suit commenced by the lessor: it is true, that the defendants were not privy to the forgery, which weakens the presumption against them, on that account. On the whole, the facts stated, ante, 1246, seem to have been the grounds of the judgment in this case; they are four, and some observations are made on each of them in the notes. Qu. if any of them warrant the judgment? and qu. if the better ground would not have been the probate of the will in 1751, and the attempt of defeating the plaintiff's claim by forgery? Qu. also, whether John Clymer the testator made any surrender to the use of his will? if he did not, the legal estate at least, would have been in the defendants; and therefore the judgment is wrong if this be so; and as the devise was to a grandchild, it is very doubtful whether a Court of Equity would supply the want of a surrender (see 1 P. Wms. 60, 61); and if equity would do it against an heir at common law, yet qu. whether they would against a customary heir, having no other provision, which seems to have been the present case. See 2 P. Wms. 505.

He was taken up upon the attachment: and interrogatories were filed. He was examined: and the interrogatories and examination were referred to me. I reported him in contempt: for he explicitly owned the fact of bringing an original and supplemental bill in Chancery; though [1258] he pretended that he did not understand that he had ever consented "not to bring a bill in equity," nor ever meant any such consent.

Afterwards, upon his being driven to the brink of commitment, he was forced to submit: and it was referred to me to inquire "whether he had procured the bill brought by him against James Stuart Tulk, Charles Corderoy and James Jefferson, in the Court of Chancery, to be dismissed;" and also to liquidate and ascertain the amount of the costs out of purse of the said James Stuart Tulk, Charles Corderoy, and James Jefferson, occasioned by his having filed a bill and proceeded in Chancery against them, in contempt of the order of this Court. And the Court adjourned the consideration of the judgment for his contempt, until after I should have made my report.

Immediately after the making this rule, the defendant dismissed his bill in Chancery; and readily attended and submitted to the taxation of all the costs which the three persons mentioned in the rule had been put to, out of pocket, as well in the Court of Chancery as in this Court, arising from his contempt: all which costs, (which were amply allowed, pursuant to an intimation from the Court "that they ought to be so," and amounted to 87l. 4s. he immediately paid: and perhaps his own might be as much more, at least.

All which was now laid before the Court: and nothing remained, according to the ordinary course of proceeding, but for the Court to have passed judgment upon him for his contempt.

The Court was unwilling to punish him further, by fine and imprisonment; as he had smarted severely: and yet, as his contempt was so obstinate, they did not care that a slight sentence should stand upon their records.

Therefore they waved giving judgment, by consent.

They said, they would not receive more complaints now, upon this occasion: but that the attorney and counsel were equally guilty of the contempt, and more criminal; and if it ever happened again, they would proceed against them.

Note—This case is a strong proof how far a contentious spirit, with bad advice, may go. The sum awarded was but about 20l. The cause in Chancery went no farther than a plea: if it had proceeded to an examination of witnesses and a hearing, the costs must have been considerably more. And it was without the least chance [1259] of success: for, every ground of relief in equity, against an award, is equally open in this Court; upon a motion, in a summary way, "to set it aside."

No man would accept of being an arbitrator, if he was liable to be harassed with a Chancery-suit for his pains.

The Court (for the reason above given) only made a rule that this recognizance should be discharged.

ROE, EX DIMISS. DUKE OF BOLTON, *versus* GRANTHAM. Tuesday, 24th Nov. 1761.

Power of jointress to make leases not expressed cannot be implied.

[Referred to, *In re Bolton Estates* [1903], 2 Ch. 473.]

This cause stood in the paper, for argument of a special verdict found at the Assizes for the county of Devon, upon an ejectment brought by the present Duke of Bolton for lands in East Portlemouth in that county; part of the estate which had once belonged to Robert Willoughby Lord Broke, and which had been settled by a private Act of Parliament made in 27 H. 8, upon the ancestors of the present Duke of Bolton, with a clause to restrain alienations, except for the jointures of wives for term of life, &c.

The special verdict was long; and there was a long argument upon it, at the Bar: but the question was no more than "whether the Duchess of Bolton could lease the lands settled upon her for life, under the power given by the exception in the said Act: for three lives, or years determinable upon three lives; that being the usual manner of leasing in the county where those lands lay, and the usual manner in which they had been leased."

The Court was clear "that such power not having been given to jointresses by the said Act of Parliament, could not be implied." It would therefore be of no use, to report the case at large.

Per Cur'. Judgment for the plaintiff.

MIDHURST *versus* WAITE. Friday, 27th Nov. 1761. [S. C. 1 Black. 350.]

Deputy high constable may billet soldiers.

Upon a motion for a new trial—

It appeared upon the report of Mr. Justice Wilmot who tried the cause, that this was an action brought by an alehouse-keeper in the hundred of Evinger in Hants, against a deputy high constable, for billeting soldiers [1260] upon him; and that the high constable living at a distance, had appointed the defendant his deputy, by parol only; and to do this business of quartering soldiers for him, during the whole time of his continuance in that office.

The questions were—(first) whether a high constable is a common-law officer: (secondly) whether a high constable is within the word "constable" in the Annual Mutiny Act, so as to empower him to billet soldiers; and (thirdly) whether a high constable can appoint a deputy for this purpose.

Mr. Justice Wilmot reported, that at the trial, he was of opinion in the affirmative, on all the three points.

Mr. Thurlow and Mr. Serjeant Davy, on behalf of the plaintiff, argued to the contrary: and particularly insisted that the deputation ought, at least, to have been in \* writing,\* and also that the deputy could not billet them in his † own name.

The constable of the hundred can not billet soldiers, in places where there are other officers: the Act only gives him this power in the absence of the officers of the place. This appears particularly from § 35, 36, of this Act. So, by 2, 3 Ed. 6, c. 10, about making malt, the power of viewing it is given to the constable of the town where it shall be made or put to sale.

Secondly, but, at least, he could not appoint a deputy for this purpose. This person, the now defendant, was never approved of nor sworn.

In the Act of 1 W. & M. c. 18, § 7, there is a provision about Dissenters chosen constables, "that they may execute the office by a deputy that shall comply with the law." But the person appointed under this Act could not be a deputy, but a constable in his own right.

No judicial officer can appoint a deputy. *Phelps v. Winchcombe*, 3 Bulstr. 77. 1 Ro. Rep. 274. Moore, 845. 2 Danv. 482, pl. 1.

An under sheriff can not exercise a judicial act. Hob. 13, *Sir Daniel Norton v. Simmes*. Noy, 21, *Banda's case*.

[1261] A high constable is, in some respect, a judicial officer: and the billeting of soldiers is a judicial act. This act is the effect of the judgment of the agent: and an appeal is given from his act.

By 9 Ed. 4, fo. 31, a sheriff can not make a deputy to take security upon a supplicavit; though, to take the party, he may.

Mr. Webb contra, for the defendant.

First. A high constable is included in the Mutiny-Act: the words are "constable, tything-man, head-borough, or other officer."

Secondly, he may make a deputy for this purpose.

First—He argued from the Act itself.

Lord Mansfield—Surely, it is impossible, to maintain "that a high constable is not within the Act."

Mr. Webb—Proceeded to the

Second point—He may appoint a deputy upon this particular occasion.

3 Bulstr. 77, *Phelps v. Winchcomb*. 3 Keb. 309. 1 Siderf. 355, are cases of standing deputies: and Lord Hale adopts all the doctrine laid down in the case of *Phelps v. Winchcomb*.

\* 9 Co. 46, *Earl of Shrewsbury's case*. [See also 7 Vin. 537, pl. 7, and qu. if the point be any where in 9 Co.]

† 1 Ro. Rep. 274, *Phelpe v. Winscombe*.



Taking security is a judicial act.

The counsel for the plaintiff, in reply, confined themselves now to the second question.

This is a permanent, constant, general deputy, as to all acts of this kind: not a deputy *pro eâ vice*.

Lambard supposes the case of *Phelps v. Winchcomb* to have proceeded rather upon toleration, than upon law.

In this instance, the duty is judicial; and the appeal proves "that this was the idea of the law."

If a man be bound by tenure, to execute the office of constable, and appoint a substitute, that substitute himself is sworn in: he is not a deputy.

[1262] An under-sheriff can not execute a writ of partition.

Lord Mansfield—All these niceties were never thought of, by those persons who have for many years drawn the Mutiny-Acts. They are not drawn by gentlemen of the profession of the law. And the nature of the thing, as well as the intention of the Legislature, requires that people should not be liable to actions for honestly executing them.

These Acts are intended to guard the civil authority against the military.

The Act now under consideration certainly comprehends a high constable: and he may appoint a deputy to this particular ministerial act. This is a ministerial act: and a constable may appoint a deputy to do ministerial acts.

It is taking the definition too large, to say "that every act where the judgment is at all exercised, is a judicial act:" a judicial act is supposed to be done *pendente lite* (of some sort or other).

This construction is the most convenient, and agreeable to the rule of law in cases of appointing deputies.

Mr. Justice Denison concurred in opinion with his Lordship.

So also did Mr. Justice Foster: and

Mr. Justice Wilmot continued of the same opinion he was at the time of the trial.

He said, he would only now add, that he had looked a good deal into the nature of the office of high constable; and that he found it to be much more ancient than the time of Ed. 4.

Per Cur'. unanimously,—

Rule discharged.

REX *versus* GEORGE SCOTT AND EDWARD HAMS. Saturday, 28th Nov. 1761. [S. C. 1 Black. 291, 350.] If four are indicted for a riot, and two die before trial, judgment against the surviving two shall not be arrested.

[Referred to, *R. v. Plummer* [1902], 2 K. B. 344.]

This was an indictment for a riot; and consisted of two counts only; there being no count added, for an assault.

[1263] The first count charged that George Scott, Lewis Delavoux, Samuel Austin, Edward Hams, Walter Bray, and John Chaplin, with force and arms, at, &c. in the street and common highway there, called the Strand, unlawfully, violently, and routously did assemble and gather themselves together, to disturb the peace of our said lord the King: and so being then and there assembled and gathered together, they the said G. S. L. D. S. A. E. H. W. B. and J. C. then and there unlawfully, riotously and routously did follow and walk after one Felix Sarrant, gentleman, then and there passing along the Strand aforesaid, and then and there being in the peace of God and of our said late lord the King, from and out of the Strand aforesaid, unto the dwelling house of him the said F. S. situate in Blue-Cross-Street in the parish and county aforesaid, insulting, abusing, menacing, and hollowing after him the said F. S. whereby he the said F. S. was then and there put in great peril and danger of losing his life; and other wrongs to the said F. S. then and there unlawfully, riotously and routously did, &c. &c.

The second count charged that George Scott, Lewis Delavoux, and Edward Hams, with force and arms, at, &c. in the said street and highway there, called Blue-Cross-Street, near the dwelling-house of the said F. S. there situate, unlawfully, riotously and routously did assemble, and gather themselves together, to disturb the peace of

our said lord the King, (he the said F. S. then being in the same house and in the peace of God and our said lord the King;) and so being then and there assembled and gathered together, they the said G. S. L. D. and E. H. did then and there unlawfully, riotously and routously make, and cause and procure to be made, a large fire in the street and highway aforesaid: and in the same fire then and there unlawfully, riotously and routously, did burn, and cause to be burnt, him the said Felix Sarrant in effigy: and they the said G. S. L. D. and E. H. then and there unlawfully, riotously, and routously did remain and continue in the street and highway aforesaid, near the fire aforesaid, for a long time (to wit, for the space of two hours and upwards,) hollowing, shouting, firing guns, squibs, and fireworks, and misbehaving themselves; and other wrongs to the said F. S. then and there unlawfully, riotously, and routously, did, &c. &c.

Mr. Morton had (on Saturday the 30th of May last) moved in arrest of judgment: for, that only two of the defendants had been convicted; the \*rest having been acquitted. Whereas three persons, at the least, are necessary to constitute a riot: and as this is an indictment for a riot, and only two are found guilty, there can be no judgment given against them.

[1264] And to prove "that if several persons be indicted for a riot, and two only found guilty, and the others all acquitted, judgment shall be arrested, because a riot cannot be committed by two persons only;" he cited Popham, 202, *Harrison v. Errington*, (the second error assigned;) also *Rex v. Sudbury, Heapes, and Others*, 1 Id. Raym. 484. 2 Salk. 593, and 12 Mod. 262, all S. C. in point. And if another offence be added in the same count, it does not vary the case: so is *Rex v. Colson, et Al'*, 3 Mod. 72.

Mr. Norton and Mr. Stow now shewed cause, on behalf of Sarrant (a quack doctor) the prosecutor, why judgment against the defendants should not be arrested.

It has been objected "that it being an indictment for a riot, and no other count laid, three persons at least ought to have been found guilty; or else, it can be no riot."

But where the indictment is "that the defendants cum multis alijs committed a riot," there two only may be found guilty, and judgment shall be against them. 1 Sir J. S. 196, *Rex v. Kinnersley and Moore*. And so Holt held in the case of *Rex v. Sudbury, et Al'*.—These two, with others, (six in all,) are here charged: and two of the others are dead, without having been either convicted or acquitted.

Mr. Morton, contra, for the defendant. In the case cited from Sir J. S. 196, (*Rex v. Sudbury, Heapes, et Al'*): it is supposed "that the defendants together with other persons unknown, were guilty." But in the present case it does not appear that any others were guilty, besides these two; for here is no finding as to the two dead persons.

Lord Mansfield—Six were indicted: two of them are acquitted; two are dead, untried. The jury have found these two to be guilty of a riot; consequently it must have been together with those two who have never been tried; as it could not otherwise have been a riot.

Per Cur. Rule discharged.

The end of Michaelmas term, 1761, 2 G. 3.

#### [1265] HILARY TERM, 2 GEO. 3, B. R. 1762.

REX versus BARKER, ET AL'. Saturday, 23d Jan. 1762. [S. C. 1 Bl. 300, 352.]  
Mandamus lies to trustees to admit a dissenting teacher.

On Wednesday 10th of June 1761, Mr. Norton moved for a mandamus to be directed to the surviving trustees under a deed of release made by one Charles Vinson to John Enty a dissenting minister at Plymouth, and other trustees, settling a then new-built meeting-house, garden, &c. upon the said trustees in trust (amongst other things) "to suffer the meeting-house to be for the public worship of God by such congregation of Protestant Dissenters commonly called Presbyterians, as should sit under and attend the ministry of the said Mr. John Enty or such other Presbyterian minister or ministers as should in his and their room successively, in all times then

\* The fact was, that two died, two were acquitted, and two convicted.

coming, be, by the members in fellowship of the said or such like congregation or congregations, regularly and fairly chosen and appointed to be the minister, preacher or pastor, to preach in the said meeting;" requiring them to admit Christopher Mends to the use of the pulpit thereof, as pastor, minister, or preacher there; he the said Christopher Mends being duly elected thereto.

He produced an affidavit of the facts, and of Mr. Mend's election: and of demand and refusal of the use of the meeting-house; and he cited the \* case of *Rex v. Bloore*, P. and Tr. 1760, which was a mandamus to restore William Langly to the office of curate of a chapel; and the rule was made absolute upon this principle, that where there is a temporal right, this "Court will assist by mandamus."

Lord Mansfield took this opportunity of declaring, that the Court had thought of that case of the curate of the chapel of Calton, since the determination of it, as well as before; and they were [1266] thoroughly satisfied with the grounds and principles upon which that mandamus was granted.

Where there is a right to execute an office, perform a service, or exercise a franchise; (more especially, if it be in a matter of public concern, or attended with profit;) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy; this Court ought to assist by a mandamus; upon reasons of justice, as the writ expresses—*Nos A. B. debitam et festinam justitiam in hac parte fieri volentes, ut est justum;*" and upon reasons of public policy, to preserve peace, order, and good government.

The interposing this writ where there is no other specific remedy, is greatly for the benefit of the subject and the advancement of justice. The speedy decision of the question, in that case which has been mentioned, by an immediate trial in a feigned issue shews it.

This case is not indeed quite the same as that was; but still it is reasonable to grant a rule to shew cause.

On Monday, 23d November 1761, Mr. Thurlow and Mr. Dunning shewed cause against the mandamus.

They controverted, by affidavit, the election of Mends; and endeavoured to support the election of Mr. Hanmer, whom the trustees had put into possession.

The majority of the congregation seemed to be on the side of Mends: the trustees espoused Hanmer, and meant to maintain him with a high hand.

There was no colour for the election of Hanmer: and that of Mends was liable to objections.

This contest had raised great animosity, spirit, and obstinacy; especially in those who were for Hanmer; and as they thought their strength lay in throwing obstacles in the way of any (more especially a speedy) redress, as Hanmer was upholden and maintained in possession by the trustees; their counsel, with great earnestness and ability, argued against making the rule absolute for a mandamus; and contended that it could not be "to admit," where another was in possession.

A mandamus "to admit" goes no further (they said) than to give a legal possession where otherwise the [1267] party would be without remedy. And to prove the distinction between a mandamus to admit and a mandamus to restore to a former possession—they cited the case of *Rex v. Dean and Chapter of Dublin*, 1 Sir J. S. p. 538, per Pratt. "A mandamus to admit is only to give a legal, not an actual possession; though in a mandamus to restore, the Court will go further."

But here, another person (Mr. Hanmer) is in possession: and Mr. Mends never has been so. Here is no legal right; and this Court can not take notice of trusts, so as to give relief, upon an equitable title only. Nor is this gentleman the cestuy qui trust: at most, his title is only equitable.

Lord Mansfield—A mandamus is a prerogative writ; to the aid of which the subject is intitled, upon a proper case previously shewn, to the satisfaction of the Court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all

\* Vide ante, p. 1043 to 1046. [And qu. if there ought not to have been an affidavit that the prosecutor was qualified, and the meeting house registered according to the Toleration Act 1 W. & M. c. 18. See also 1 Durn. 398, 399. 2 Durn. 180, 259. 3 Durn. 577, 649.]



occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice.

The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied.

Writs of mandamus have been granted, to admit lecturers, clerks, sextons, and scavengers, &c. to restore an alderman to precedence, an attorney to practice in an Inferior Court, &c.

Since the Act of Toleration, it ought to be extended to protect an endowed pastor of Protestant Dissenters; from analogy and the reason of the thing.

The right itself being recent, there can be no direct ancient precedent: but every case of a lecturer, preacher, schoolmaster, curate, chaplain, is in point.

The deed is the foundation or endowment of the pastorship. The form of the instrument is necessarily by way of trust: for, the meeting-house, and the land upon [1268] which it stands, could not be limited to Enty and his successors. Many lectureships and other offices are endowed by trust-deeds. The right to the function is the substance, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit, in this case, follows, by necessary consequence, the right to the function of minister, preacher, or pastor; as much as the insignia do the office of a mayor: or the custody of the books, that of a town-clerk.

Mr. Just. Wilmot—It has been granted in the case of scavengers. It is a prerogative writ, and shall be granted to amplify justice, and to preserve a right; where there is no specific, legal remedy; where no assize will lie.

Mr. Just. Foster—Here is a legal right. Their ministers are tolerated and allowed: their right is established, therefore is a legal right, and as much as any other legal right.

The Court proposed an issue to try “whether Mr. Hanmer \* was or was not duly elected;” as the cheapest and best way to put it in.

It was then adjourned to the first day of this present Hilary term, in order that the parties might give an answer, “whether they would agree to this issue;” or “whether they would agree to proceed to a new election:” and the parties themselves to be consulted, and make their election.

But afterwards, (on Tuesday 24th November 1761,) Lord Mansfield proposed and made an alteration in the rule to be drawn up in this case: which alteration he judged to be necessary, as Mr. Hanmer himself was no party to this litigation about the mandamus.

He therefore directed it to be drawn up to the following effect, (and indeed gave the very words;) viz.

It is ordered, that the first day of next term be given to Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, to shew cause why a writ of mandamus should not issue, directed to them, requiring them to admit Christopher Mends to the use of the pulpit in a certain meeting-house appointed for the religious worship of Protestant Dissenters commonly called Presbyterians, in Plymouth in the county of Devon, as pastor, minister, or preacher there. And it is further ordered, that they [1269] the said Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, do at the same time acquaint this Court “whether they insist upon the validity of the election of John Hanmer;” and if not, “whether they are willing to proceed to a new election of a minister, pastor, or preacher there;” the prosecutor of this rule having declared his consent “to wave his claim, in order to a new election.” And it is further ordered, that notice of this rule be given to the said John Hanmer; to the intent that he may be heard, as he shall be advised; and that he may acquaint this Court “whether he insists upon the validity of his election,” and “whether he is willing to have it tried in a feigned issue.”

Mr. Thurlow and Mr. Dunning now give an answer, by direction of their clients, “that Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, do insist

\* N.B. This Mr. Hanmer was in possession, and claimed to be duly elected to the same ministry or pastorship.

upon the validity of the election of John Hanmer ; and that they are not willing to proceed to a new election, &c. and that the said John Hanmer does insist upon the validity of his election, and is not willing to have it tried in a feigned issue."

After which Mr. Thurlow and Mr. Dunning were heard again, in general ; and argued strenuously against granting a mandamus. They knew, the election of Hanmer could not be supported upon a trial. The election of Mends seemed liable to objection as irregular. But, if the matter was proper for a mandamus, they were aware that in case neither was elected, the Court would issue a mandamus "to proceed to an election : " in which case, the majority of the congregation were inclined to Mends. The trustees therefore obstinately persisted in opposing a mandamus and refusing a trial.

Lord Mansfield—Every reason concurs here, for granting a mandamus. We have considered the matter fully : and we are all clearly for granting it. I have made a collection of cases on this subject, since the last argument : but I have it not here, at present.

Here is a function, with emoluments ; and no specific legal remedy. The right depends upon election : which interests all the voters. The question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the Court deny this remedy, the congregation may be tempted to resist violence by force : a dispute "who shall preach Christian charity," may raise implacable feuds and animosities ; [1270] in breach of the public peace, to the reproach of Government, and the scandal of religion. To deny this writ, would be putting Protestant Dissenters and their religious worship, out of the protection of the law. This case is intitled to that protection ; and can not have it in any other mode, than by granting this writ.

The defendants have refused either to go to a new election, or to try it in a feigned issue.

We were, all of opinion, when a trial was proposed to them, that a mandamus ought to issue, in case of a refusal. Their answer ought to be put into the rule, as preiatory to it : and I do this, with a view that their refusal may be authentically given in evidence to the jury, upon a trial.

Many cases have gone as far as this, or farther.

Mr. Justice Denison, Mr. Justice Foster, and Mr. Justice Wilmot, all declared themselves of the same opinion.

The Court ordered a mandamus to issue.

V. post, pa. 1379, 1380, 28th April 1763.

REN *versus* HEYDON, AND FOUR OTHERS. Monday, 25th Jan. 1762. [1 Black. 351, 356, 404.] A joint information against several on distinct rules, will not be granted.

\* Sir Fletcher Norton shewed cause on behalf of the prosecutor, why the proceedings upon this joint information should not be stayed, with costs to be paid by the prosecutor ; for that five separate rules "for one or more informations against each defendant" are consolidated into this one joint information, without any rule for such a joint information against all of them.

Mr. Serjeant Nares, contra, insisted that by the practice, this can not be done ; nor does the present rule justify it.

Mr. Athorpe (secondary) being asked, concurred with Mr. Serjeant Nares, "that there was no authority by any rule, or by the practice, for filing this one joint information against all the defendants."

Sir Fletcher Norton replied, that if the offence be joint, [1271] there may be a joint information.

Lord Mansfield—But the question is, whether it can be done upon these several and distinct rules, which were taken upon the motion of several different gentlemen, who only applied for one or more informations against each defendant, but without any general motion for a joint information against them all.

Sir Fletcher Norton—It must be allowed, I agree, that one man's guilt is not the guilt of another : but this case is a joint act of bribery, upon which we can convict

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\* Mr. Norton was this day knighted, and made Solicitor General.

all of them; but yet the evidence may not be sufficient to convict the individuals separately.

Mr. Justice Wilmot was not satisfied of that; and seemed to doubt whether the same evidence which would be sufficient to convict all jointly, would not be sufficient to convict each one alone separately.

Lord Mansfield said he was clear that this joint information against all, was wrong, upon these separate and distinct rules for one or more against each; and that the present rule must be made absolute.

Rule made absolute for staying the proceedings upon this joint information.

CHURCHWARDENS OF ST. SAVIOUR'S SOUTHWARK *versus* SMITH. Tuesday, 26th Jan. 1762. [S. C. 1 Black. 351.] Assignee of a lease after a breach of covenant by the lessor, not liable for the breach.

This was an action of covenant against the assignee of a term.

The declaration set forth, that by indenture dated the 23d of January 1702, the then churchwardens demised the premises to one James Richards, for sixty years and three-quarters from the date of the indenture; that James Richards covenanted to repair, and to pay the rent, &c. and also covenanted to pull down the houses that stood on the east front of the premises, and to build new houses thereupon, within seven years; that James Richards entered on the 23d of January 1702, and assigned to the defendant Richard Smith; and that the premises were ruinous.

[1272] The first breach was assigned, in not repairing: the defendant pleads "that the premises were not ruinous, &c." And upon this plea, issue was joined: so that it is, at present, out of the case.

The second breach (upon which the question arises) was assigned, in not pulling down the old houses, and building new ones; viz. "that James Richards, the original lessee, did not do it before the assignment; nor has the defendant, the assignee, since the assignment." The defendant pleads *actio non*, &c. for that "the estate did not come to him by assignment, till after the expiration of the seven years." The plaintiff demurs: and the defendant joins in demurrer.

The only question was, "whether the assignee be answerable for the breach incurred before the assignment."

Mr. Morton, for the plaintiffs, argued "that he was." He said that as the thing was to be done upon the land, the covenant would run with the land and bind the assignee: though, he admitted, it would be otherwise, if the thing covenanted to be done was collateral to the land. And he would have had it supposed that the present case was within both the first and second resolutions in *Spencer's case*, 5 Co. 16, and agreeable to the cases in Cro. Eliz. 457, 552, 553. Moore, 159, and 1 Jones, 223.

And though here is a limited restricted time fixed for the performance of the thing covenanted to be done, yet that makes no difference, he said, as to the assignee: for the restriction is collateral to the covenant; and is rather prejudicial than advantageous to the reversioner, as it is the better for him, the later it is done.

But the Court were very clearly of opinion against him; without hearing Mr. Yates, who was for the defendant.

Lord Mansfield said, the single question was, "whether an assignee is liable for a breach which he never committed." And it is certain "that he is not." This breach was committed before his time: and this covenant does not run with the land.

[1273] Mr. Justice Denison\* and Mr. Justice Wilmot concurred; and observed that it was so settled in the case of † *Grescot v. Green*, P. 12 W. 3, B. R. 1 Salk. 199. "Lessee covenanted for him and his assigns, to rebuild and finish a house within such a time: after that time, he assigned; the house not being built and finished. Per Holt Chief Justice, this covenant shall not bind the assignee; because it was broken before the assignment: aliter, if broken after; as if the lessee had assigned before the time expired."

Judgment for the defendant.

\* Mr. J. Foster was absent.

† V. Holt, 177.



STEPHENSON, Gent. *versus* HILL. 1762. Customary tenant's prescribing in non decimando. [See Fortesc. Rep. 44.]

This was an action brought upon the statute of 2 E. 6, c. 13, for the payment of tithes of corn and grain.<sup>(a)</sup>

The defendant pleaded the general issue, "nil debet": and the cause came on to be tried before Mr. Justice Bathurst at Appleby Assizes, 14th August 1760.

Upon the trial, it appeared that the lands whereon the corn mentioned in the declaration grew, were and immemorially had been customary lands, parcel of the manor of Morland, in the county of Westmoreland, and holden of the lord thereof for the time being.<sup>(b)</sup>

It also appeared that the said manor of Morland, and the appropriate rectory of St. Michael Appleby, were parcel of the possessions of the priory of Wetherall, in the county of Cumberland, which was one of the larger dissolved monasteries and was vested in the Crown by virtue of the stat. 31 H. 8, c. 13. And that the prior of the said priory at the time of the dissolution was and had been time immemorially seised of the said manor with the appurtenances, in his demesne as of fee, in right of his priory; and also of the appropriate rectory of St. Michael Appleby, and the tithes there.

It also appeared that the said manor and appropriate rectory being so vested in the Crown, the same was in due manner granted to the Dean and Chapter of the Holy and Undivided Trinity of Carlisle, in fee; and that they are still seised in fee, in right of their church; and that the present defendant was the customary tenant and occupier of the said lands whereon the said corn grew, [1274] during the time in the declaration mentioned; and held the same of the said dean and chapter, as of their said manor of Morland.

That the plaintiff is farmer of the corn and grain tithes growing and arising within the territories of Bondgate, within the parish of St. Michael Appleby, aforesaid: and the lands whereon the corn grew, lie in the territories and parish aforesaid.

It appeared that no tithes had ever been yielded or paid for or in respect of the said lands.

It also appeared that all the other customary tenants of the said manor paid tithe.

It appeared also, that this was the only customary tenant belonging to the said manor, which was within the said parish of St. Michael.

Whereupon a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench upon the following question—

"Whether the defendant could, in this case, set up any prescription which would, by virtue of the stat. of 31 H. 8, exempt him from the payment of tithe."

Mr. Aspinall (who argued for the plaintiff, on Tuesday 24th November last) made two questions of it, viz.

First, whether the tenant can set up any prescription at all, to exempt him from the payment of tithe:

Secondly, whether the facts here stated are a sufficient foundation for an exemption; even supposing that he might set one up.

The second point, he said, might be taken first.

The fact stated, "that no tithes have ever been paid," is no exemption, of itself: it is no prescription of exemption. It is only evidence: it might have arisen from unity of possession, or other causes.

It will be no foundation for a decree in equity, if it had been actually found by a verdict "that they have never been paid."

[1275] Lord Mansfield—The question is "whether they can, in point of law, prescribe in non decimando;" for, if they can, the non-payment is good evidence of it, upon any foot of discharge.

Mr. Aspinall—By law, he can not. For he must prescribe either in his own name, or in the name of the lord of the manor. But

(a) I.e. for the double value of the tithes.

(b) This seems to be an uncertain and contradictory state of the case; for Aspinall, counsel for the plaintiff, post, 1275, puts a construction on the words parcel, &c. which would reconcile the seeming contradiction in this state of the case; but his construction was not admitted by the Court.

First, as the defendant is a layman, he can not prescribe in non decimando, in his own name.

Secondly, neither can he prescribe in the name of the lord of the manor. He must prescribe now, as if it still was at the time of the dissolution.

A lord can only prescribe as [to] the lands [in his own possession, and such as] have been holden by his farmers and tenants at will.

These are stated to be copyhold † lands parcel of the manor of Morland, holden of the lord of the manor; not saying "at the will of the lord."

Therefore they are customary freeholds.

Now a lord can not prescribe for his customary freeholders; though he may prescribe for his tenants and farmers of copyhold holden at will.

These lands in the north (c) are customary freeholds, and pass by feoffment and livery (d) and are not holden ad voluntatem domini. Therefore they are not like copyholds: as appears by Carthew, 432, *Gale v. Noble*—(Trial at Bar in ejectment for lands parcel of the manor of Corsham in Wilts).

The expression "parcel of the manor" only imports "that they lie within the manor."

The Court will favour the better estate. Therefore, taking it to be a customary freehold, the lord could not prescribe in non decimando, in any manner whatsoever.

He can not prescribe as by the custom of the manor: for the custom of the manor, in general, is stated to be quite contrary.

[1276] The case of *The Bishop of Winchester, Crouch v. Friar*, in many books, but most at large in Cro. Eliz. 784,\*<sup>1</sup> will be urged against me. But supposing that to be law, yet the lord of the manor did not prescribe against himself as appropriate rector. He was founder; and therefore a stipulation might be presumed: whereas here, the dean and chapter have had both the manor and the tithes, in themselves. And that was a prescription for copyholders: and the custom was prior to the parochial right of tithes; which first commenced by the Council of Lateran, in the time of King John.

Nor can he be exempted by unity of possession. Unity of possession is a distinct thing from prescription.

Besides, here he can not rely upon unity of possession; because it has been in other hands from time immemorial.

And copyholders at will cannot be exempted by prescription.

Mr. Clayton, for the defendant—No tithes have been ever paid for these lands, from 31 H. 8. And after this length of time, a legal exemption will be presumed.

This was a great abbey, that came to the Crown by the Stat. of H. 8. And the manor was in the prior, in right of his priory. These lands were therefore discharged from payment of tithes, at that time: and their discharges from tithes are preserved to the Crown and their grantees and assignees, by 31 H. 8, in the same manner and to the same extent as when they were in their hands.

Spiritual persons may prescribe in non decimando; and so may their farmers and tenants; and even their copyholder of inheritance. 1 Ro. Abr. 653, pl. 2, 3, 4, 5. \*<sup>2</sup> 2 Co. 44, *Bishop of Winchester's case*. Cro. Eliz. 216, 475, 511, 512, 704, 784. Moore,

[† Lege customary, see 5 Burr. 2604.]

(c) There may be customary freehold, passing by surrender. Salk. 365. 1 Atk. 474, pl. 17.

In Fortesc. 41, it is said that "it was agreed that the custom of tenant right estates, extends only to three northern counties, i.e. Cumberland, Westmoreland, and Northumberland."

And in another case in the same book, page 55, it is said that "those tenant right estates, are no where to be found but in those three counties," where the evidence of this custom in one of those is evidence in any other of the three. Now in the case of *Gale v. Noble* the lands lay in Wiltshire, and therefore no argument could be inferred, from the determination in that case, so as to affect the case here reported by Burr. because the lands in this case lay in Westmoreland.

(d) Vide post, 1276, where it is said they never pass by feoffment but by grant.

Also that there may be customary freehold passing by surrender. See Salk. 365. 1 Atk. 474. Br. Cust. pl. 17.

\*<sup>1</sup> V. 2 Danv. Abr. 610, p. 3, 7. Yelv. 2. Moore, 618.

[\*<sup>2</sup> Or 9 Vin. 23.]

219, *Branch's case*. Yelv. 2, *Croucher v. Fryar*, Noy, <sup>†1</sup> 132. *Anonymous*. And customary estates of inheritance may be discharged in the same way: for the freehold is in the lord.

These customary estates in the north are not freeholds: but copyholds; and in the nature of tenancies at will. They never pass by feoffment, but by grant; and often by grant and admittance: but an alienee can not maintain an ejectment, till admittance: for the estate does not pass to him, as it does to the heir by descent.

[1277] Though many other parts of this estate have paid tithe, yet there may be a prescription for a discharge for part: a prescription may be for a single part, alone. But this is the only tenement that lies in this particular parish.

As to the unity of possession—Supposing it liable to a doubt, yet you may prescribe, “that the prior held it discharged time immemorially:” *Priddle v. Napper*, 11 Co. 14. And the case of *Wright v. Gerrard and Hildersham*, agrees “that an unity and a perfect discharge may stand together;” and cites 11 Co. 14, as truly saying so. 2 Keb. 459,\* *English v. Johns*. That a unity of possession, and a perfect discharge from tithes, may stand together, can not be disputed.

Here, none have ever been paid. Therefore the Court will presume a legal discharge.

This is a unity, time out of mind: which is a sufficient discharge, after so long a time.

The prior was seised both of the rectory and of the land. It was not necessary to be in actual possession of the lands. Hob. 306, *Wright v. Gerrard and Hildersham*. 11 Co. 14, *Priddle and Napper's case*. 2 Co. 48, *The Archbishop of Canterbury's case*.

These customary tenures are not freeholds: the timber, the mines, are in the lord. Therefore it is the common case of copyholders: which has been determined over and over; particularly in Cro. Eliz. 784, in the case of *Crouch v. Fryer*.

It is enough, if we are discharged in any manner.

Mr. Aspinall, in reply—It shall not be presumed “that tithes are not payable, because they have not been paid.”

The case I mentioned is a prescription for the bishop himself, his farmers, and tenants at will.

The customary estates are not copyholds: the freehold is in the tenant. 1 Salk. 365, *Crouther v. Oldfield*. They pass by the deed, <sup>†2</sup> not by the admittance.

Here was no unity of possession in the prior, of the rectory and of the lands. Moore, 528, *Benson v. Trott*. Moore, 219, *Branch's case*. Cro. Eliz. 704, *Crouch's case*.

Here, the tithes arise, upon leasing out the lands. The [1278] unity ceases, when the prior ceases to hold both lands and rectory together.

Either by prescription or by unity, the lands ought to be charged.

Ulterius concilium.

This cause now standing in the paper for further argument—Mr. Solicitor General (Sir Fletcher Norton,) who was for the plaintiff, said that the particular customs of the manor (which had been inquired after, in the course of the former argument) were not yet sent up.

Lord Mansfield—What signify the customs? clearly, the freehold is in the lord.(e)

Sir Fletcher Norton acknowledged that he had a great difficulty to get over; it being stated in the case itself, “that this was the only customary tenant belonging to the manor, which was within this parish.”

Lord Mansfield and Mr. Justice Denison said it was a settled point, “that the freehold is in the lord.” And Lord Mansfield added, that this is rather stronger than

<sup>†1</sup> *Crouch v. Fryar* is cited there.

\* This was a plea of discharge by reason of the unity. But it was adjourned.

<sup>†2</sup> But it seemed agreed, that in every manor, there is either an admittance, or a licence; and every thing is in the lord, that custom has not taken out of him.

(e) It is stated, in page 1273, that the land in question was parcel of the manor, which could not be, if the freehold was in the tenant; for freehold estates, holden of a manor, are not parcel of the manor, but the rents and services by which they are holden are parcel of the manor. 2 Rol. Abr. 120, (C) or 15 Vin. 218, (C) 1. 11 Mod. 53. Salk. 365. 2 Ld. Raym. 1225, and according to the opinion of the Court of B. R. as reported in Salk. 364, the land in this case must have been copyhold. See also Ld. Raym. 1231, S. C. and S. P. per Holt, Ch.J.



the case of copyholds. (f) For, copyholders had acquired a permanent estate in their lands, before these persons had done so.

Per \* Cur'—Let the postea be delivered to the defendant, in order for a judgment of nonsuit.

FENTON *versus* EMBLERS, Executor of May. 1762. [S. C. 1 Black. 353.] Agreement to leave money by will need not be in writing.

[Applied, *Davey v. Shannon*, 1879, 4 Ex. D. 86.]

This was a special case, reserved at Nisi Prius at the assizes at Abingdon.

It was an action upon the case upon assumpsit, against Emblers, as representative of one May deceased.

The declaration contained six counts: and upon the first four counts, there was a verdict for the plaintiff; and for the defendant, on the sixth. The only doubt was upon the fifth count: which fifth count was "that the [1279] said William May, in consideration that the said Sarah (the plaintiff) would be and become the house-keeper and servant of the said William, and take upon herself the care and management of his family, &c. and perform the same as long as it shall please the said William and Sarah; undertook and promised to pay wages to the said Sarah at and after the rate of six pounds for one year; and also by his last will and testament to give and bequeath to the said Sarah a legacy or annuity of 16l. by the year, to be paid and payable to her yearly and every year from the day of the decease of the said William for and during the term of her natural life; and that she the said Sarah, confiding in the said promise, entered into his service, and became his housekeeper, &c. and continued so for three years and fifty-nine days: but that he the said William had not performed his said agreement, and did not leave her such legacy or annuity, &c."

It was stated in the case, that it appeared upon the evidence, that there was such an agreement between the said William May and the plaintiff; but that it was by parol, and not in writing.

That the plaintiff in performance of her part of the said agreement, did enter into the testator's service, as housekeeper, &c. and continued in such service till the testator's decease.

That the testator did not give her by last will, or otherwise, the said annuity of 16l. per annum, or any other annuity.

A verdict was found for the plaintiff on the fifth count, for 220l. subject to the opinion of the Court; first, whether the evidence was sufficient to maintain the action upon it: secondly, whether the agreement therein set forth ought not to have been in writing.(c)

Mr. Hall, for the defendant, objected—First, that this evidence is not sufficient to prove the special agreement laid in the fifth count: which ought to be proved precisely. He said, there was a material variance between the case laid in the declara-

(f) This must be a mistake; if it was stated in the case, as mentioned by Mr. Aspinall, ante, 1275, that the lands were copyhold parcel of the manor, holden of the lord, without saying at the will of the lord; for the omission of those words cannot make the case stronger than the case of copyholds, but the contrary: for certainly the words at the will of the lord are strong proof that the freehold is in the lord. Vid. 12 Car. 2, c. 24, s. 17. And qu. if the tenure be not copyhold, how can it be any other than tenure in socage? and the freehold is not in the lord in case of a tenure by socage. Vid. 1 P. Wms. 408.

\* Mr. Justice Foster was not present.

(c) It appears by Blackstone's report that there were two questions reserved for the opinion of the Court, the last of which is here omitted: the two questions were these; First, whether the agreement should not have been in writing under the Statute of Frauds. Secondly, whether evidence for hiring for a year (as was the fact) was proof of hiring for so long as both parties pleased, as laid in the declaration; and it appears by the arguments at the Bar and the opinion of Lord Mansfield at the end, that there was such second question; but the hiring as mentioned by Stowe, was a general hiring, which being in legal construction a hiring for a year, might be the reason for Blackstone stating it to be so.

tion, and the case proved. For, the case laid in this fifth count in the declaration, is not a hiring for a year; because either party was at liberty to put an end to the contract: but the case proved is a general hiring; which, in construction of law, is a hiring for a year.

Secondly, that by the Statute of Frauds, (29 C. 2, c. 3, § 4,) this agreement, as it was to be performed within [1280] a year, ought to have been reduced into writing. The statute says "no action shall be brought, whereby to charge any executor or administrator, upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

This is a promise of a legacy, by an instrument revocable at pleasure. It would be extremely inconvenient to establish promises of this kind, not reduced into writing. The present agreement could not be performed, on May's part, within a year: for a whole year from his death was to elapse, before the annuity or any part of it would become payable.

He cited 1 Ld. Raym. 316, *Smith v. Westall*; and relied on a case of *Reynolds v. Spencer Couper*, in Seacc', in 1726, Viner. tit. Contract and Agreement, p. 524, § 47, (which case he said he had ordered to be searched, and found it to be so;) where the rule laid down is—"that a parol promise, to be performed upon a contingency which may or may not happen within a year after the making, is void, within the Statute of Frauds."

Mr. Stowe, contra, for the plaintiff, insisted first, that the evidence does support the declaration; and that the fact is precisely proved.

Secondly, that it was not necessary that this agreement should be reduced into writing. The action is brought for May's not having done what he ought to have done in his life-time: so that it might and should have been done within the year. This consideration is sufficient, at common law, to raise a promise. The Statute of Frauds does not affect this case. Mr. Hall's doctrine would overturn all the cases upon verbal general contracts of matrimony, where the defendant did not actually promise "to marry within the year."

He cited two cases in point; viz. 1 Salk. 280, *Anonymous*, P. 5 W. & M. C. B. and the case of the promise to pay 20l. on marriage, mentioned in 1 Ld. Raym. 316, 317, *Smith v. Westall*.

Mr. Hall, in his reply,—observed that this is a method of binding the assets, without making a will.

[1281] Lord Mansfield—There is only that case in the Exchequer, in 1726, that can make the least doubt. By the other cases it seems settled.

There is nothing in the objection about his leaving it by his will: for there is nothing testamentary in a promise "to leave at his death."

The case in 1726, in the Exchequer, cannot be rightly represented to us: for, as it is represented, one of the two resolutions, viz. that upon the Statute of Limitations, is wrong to the last degree, and obviously so to every body. It is represented to have been there resolved "that that statute bars eventual rights, from the time of the promise made, (after the six years are elapsed:)" whereas no one can doubt but that the bar only takes place from the time when the rent accrued, and not from the time of making the promise.

Mr. Justice Denison—The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only may be performed within the year; and the Act cannot be extended further than the words of it. Skinner, 353,\* *Peter v. Compton*, proves the distinction of a contingency, as I have stated it, as fully and clearly as possible. It was an action upon the case upon an agreement, in which the defendant promised, for one guinea, "to give the plaintiff so many at the day of his marriage." The question was, "if such agreement ought to be in writing;" for the marriage did

\* This case had been mentioned by Mr. Justice Wilmot; and it seems to me to be the very case cited by Mr. Northey, and discussed by Ld. Ch. J. Holt, in the case of *Smith v. Westall*, 1 Ld. Raym. 316, 317.

not happen within a year. The Chief Justice (Holt, before whom it was tried,) advised with all the Judges, and by the greater opinion (for there was diversity of opinion, and his own was *à contra*) "where the agreement is to be performed upon a contingent, and it does not appear within the agreement, that it is to be performed after the year, there a note in writing is not necessary: for the contingent might happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary; otherwise, not."

†<sup>1</sup> Mr. Justice Wilmot concurred; and agreed with the reason of the case in *Salk*. 280, "that by possibility, the ship might have returned within the year; though by accident it happened that it did not: and [1282] the clause in the statute only extends to such promises, where, by the express appointment of the party, the thing is not to be performed within a year."

Lord Mansfield—As to the variance, there is nothing in that objection.

Let the *postea* be delivered to the plaintiff.

APPLETON *versus* SMITH. 1762. No more costs than damages in trespass, if the verdict be under 40s.

The question was, "whether the plaintiff should have full costs, or no more costs than damages:" upon the following case.

This was an action of trespass *vi et armis*, for breaking and entering the plaintiff's dwelling-house, and there making a great noise and affray and disturbance; and continuing it for two hours, and until the plaintiff and his father Richard Appleton the Elder, and one Christopher Atkins were compelled and obliged to give and did give the defendant their promissory note for 6l. 17s. payable to him the said defendant. The jury found for the plaintiff, and gave him a guinea damages.

Mr. Serjeant Nares insisted, on behalf of the defendant, that the plaintiff could, in this case, have no more costs than damages.

For that, by the statute of 22 & 23 Car. 2, c. 9, § ult. "In all actions of trespass, assault, and battery, and other personal actions, wherein the Judge, at the trial of the cause, shall not certify upon the back of the record that an assault and battery was sufficiently proved, or that the freehold or title was chiefly in question; and the damages found are under 40s. the plaintiff shall recover no more costs than damages."

This is a general action of trespass; and there is no certificate from the Judge.

The circumstance of "continuing the noise and disturbance until these three persons gave their note for 6l. 17s. is only aggravation."

[1283] There are two cases in point: viz. *Blunt v. Mither*, in C. B. 1 Sir J. S. 645 (called *Blunt v. Miller* in Gilbert's Cases in Scacc', 197) and *Boilure v. Woolrick*, in 1 Ld. Raym. 566.

The case of *Swinstead v. Lyddall*, 1 Salk. 408, is also a case similar to the present. It was an action of trespass and false imprisonment for such a time, and quousque he paid 11s. It was holden "that the quousque was not the cause of action: but the imprisonment: the quousque was only matter of aggravation."

And there was a late case of \* *Howard v. Parr*, from Staffordshire, which was an action by a school-master, for disturbing him in the possession of his house, and continuing such disturbance, &c. the verdict was for less than 40s. And there was no certificate; and the plaintiff could have no more costs than damages.

Mr. Serjeant Davy argued *contra*, for the plaintiff.

The question in this case is, "whether the freehold could come in question:" for if it could not, then the Judge could not certify. And the settled construction is, "that this statute is restrained to those cases in which the Judge can certify."

Where the damage is consequential, under a "per quod," it is indeed only aggravation. The cases cited against me are, all of them, such cases of aggravation by reason of consequential damages.

Where there is an <sup>†</sup>2 *asportavit*, the title can never come in question: nor in actions of mere assault and battery. For this statute of 22, 23 C. 2, c. 9, § ult. doth not extend to all trespasses, but only to such trespasses *quare clausum fregit*, in which the freehold of the land may probably come in question. And so it is determined

†<sup>1</sup> Mr. J. Foster was absent.

\* Or *Ford v. Parr*.

†<sup>2</sup> It was so settled in the case of *Smith v. Clarke*, P. 13 G. 2, B. R.



expressly, in 3 Mod. 39, *Barnes v. Edgard*; and in *Smith v. Batterton*, there cited, (and reported in Raym. 487, and Sir T. Jones, 232,) and in *Thomson v. Berry*, in C. B. reported in 1 Sir J. S. 551. All the cases apply to this general rule.

Lord Mansfield—This case depends upon the words, “and until the plaintiff, &c. were compelled, &c.” which words are barely an aggravation of the defendant’s continuing in the house; and nothing more.

[1284] On the first words, (viz. “breaking and entering the house,”) the freehold might have come in question.

Mr. Justice Denison concurred, “that they are only words of aggravation; which need not even be answered in a plea.”

The \* Court directed the Master to tax the costs at a guinea only.

☞ See this subject relating to the recovery of full costs, or the not obtaining any more costs than damages, very clearly explained by Lord Chief Baron Gilbert, in delivering the opinion of the Court of Exchequer, in the case of *Reeves v. Butler*, H. 12 G. 1, where he compares and interprets the several statutes upon which cases of this kind depend; and vindicates the reasoning and resolutions of the Judges upon 22, 23 C. 2, c. 9, § ult. Amongst the modern resolutions which he mentions, he reports the case of *Blunt v. Miller* (as he calls the defendant) in the very same words with Sir John Strange; excepting a gross mis-print of “decreed,” instead of “denied,” and a year’s antedate of the time, (M. 11 G. 1) Gilbert’s Equity Cases, 195 to 200.

INGLE *versus* WORDSWORTH, ET AL’. Thurs. 28th Jan. 1762. [S. C. 1 Bl. 355. Say. L. C. 182.] One of two defendants in replevin cannot have his costs of acquittal.

### In replevin.

One of the defendants having been acquitted by verdict (on a plea of “non cepit,” and there being no certificate of the Judge “that there was a reasonable cause for making him a defendant;” Mr. Norton moved, on his behalf, upon Saturday 23d May 1761, that the plaintiff in replevin might shew cause why the Master should not tax the defendant’s costs (pursuant to 8, 9 W. 3, c. 11, “for the Better Preventing Frivolous and Vexatious Suits,”) as if a verdict had been given against the plaintiff, and all the defendants acquitted. All the other defendants had avowed; and issue was taken upon a right of common, which was found for the plaintiff in replevin, viz. “that he had right of common.”

The Master had a doubt whether the action of replevin was within the statute of 8, 9 W. 3, c. 11, § 1, which specifically names only actions of trespass, assault, false imprisonment, and ejectione firmæ.

On Wednesday 10 June 1761, Mr. Clayton shewed [1285] cause; and insisted, on behalf of the plaintiff in replevin, “that this defendant was not intitled to any costs.”

Replevin is not within the Act of 8, 9 W. 3, c. 11. And it is clear, that before that Act, a plaintiff should not pay costs to a defendant who was acquitted; provided he succeeded against any one of the defendants in the action.

There are no direct instances indeed in replevin, determined since the statute: but there are in similar cases; as trover, and nuisance. And the Act ought to be construed strictly, being a penal law.

The case of *Marriner v. Barret* (or *Barwick*) P. 1 G. 2, was in trover. It was there holden that a defendant who was acquitted was not intitled to his costs; because not within the words of the Act: and costs were there considered as a penalty.

In the case of *Dibben v. Cook et Al*, M. 8 G. 2, B. R. for a nuisance, it was holden that the Act only extended to trespasses vi et armis.

In 1 Salk. 194, *D’na Regina v. Danvers et Al*, on an information, one defendant, being acquitted, prayed costs, on the equity of this Act; but was denied.

Mr. Norton, contra, in support of his rule, contended that the acquitted defendant was intitled to his costs. The Act of 8, 9 W. 3, c. 11, is a remedial law; and no otherwise penal than as it gives costs: and so the title speaks it; “An Act for the Better Preventing Frivolous and Vexatious Suits.” And this is certainly frivolous and vexatious, in the opinion of both Judge and jury: for, the one is not certified

"that there was a reasonable cause to make him a defendant;" the other has acquitted him.

A replevin is within both the letter and the spirit of this law. It is properly within the word "trespass;" and the Act uses the word "plaint," with a particular view to this species of trespass. And it is within the spirit of the statute certainly; because, otherwise, the plaintiff in replevin might add twenty or thirty defendants, for the sake of harassing and vexing them frivolously.

[1286] He acknowledged the case of *Dibben v. Cooke* to have been as stated, except as to this law being treated as a penal law; which Lord Hardwicke (as Mr. Justice Denison confirmed) then <sup>\*1</sup> declared, it was not: but he said it was determined upon too narrow principles.

However, that was not an action of replevin: and there is no determination of this sort, in a case of replevin; which seems to be within the very word "plaint."

Mr. Clayton said he had forgot to mention a very material case, in which it was determined that the avowant in replevin can not have his costs, upon error brought by the plaintiff in replevin and judgment affirmed. It is in Carthew, 179, *Coan v. Bowles*. The ground of the resolution is, "that he is not within the letter of the Acts; and the principle there laid down was that these Acts are to be taken strictly, and not extended beyond the letter, because costs are in the nature of a penalty."

Lord Mansfield—If no reason had been given, the authority might have had more weight: but, to be sure, the reason is a false one.

The Court took time to consider of it—

And now Lord Mansfield delivered their opinion.

We have thought of this case. We had a strong bias to have given the defendant his costs, if it had been possible; because it is agreeable to natural justice, that he should receive them, if there was no reasonable cause for making him a defendant.

But the matter is too fully settled to be now gone into, upon reasons at large.

The statute speaks generally of actions of trespass; and does not particularly specify any actions of trespass that are not trespasses *quare vi et armis*. But this is a case of replevin; which cannot have that latitude of construction put upon it, which Mr. Norton has contended for, consistent with the settled cases.

[1287] It has been so settled and established, "that this Act and all Acts that give costs, are to be construed strictly."

The case of <sup>\*2</sup> *Dibben v. Cooke* is not so fully reported in Sir John Strange, as it really passed. Lord Hardwicke gave the solemn judgment of the Court: and declared it to be then settled "that all the statutes relating to costs are and ought to be construed strictly and according to the letter." And he declared, "that actions of trespass upon the case could not be construed to be within this Act of Parliament." And he gave reasons for it: and added that upon inquiry into the practice of the Common Pleas, it appeared that the word trespass was there taken only to relate to trespasses *vi et armis*. And trespass upon the case is nearer to trespass *vi et armis*, than replevin is; which differs, in many things, from a mere action of trespass.

There is another authority, very strong; which is on the writ of error, in the Exchequer-Chamber, on 27 Eliz. c. 8. It is in 2 Ro. Rep. 434, (Farnell plaintiff, in second deliverance,) which determines a replevin not to be an action of trespass within that Act; and that therefore a writ of error would not lie in the Exchequer-Chamber, upon a judgment in replevin in B. R.

The argument in the case of *Dibben v. Cooke* was "that actions of trespass upon the case had been holden to be within the proviso of the Statute of Limitations; though as much excluded there as they are here, by so many other actions being specified in that † clause (even actions on the case for words) and this omitted."

But that proviso is to be construed liberally: this statute is to be taken strictly.

<sup>\*1</sup> Lord Hardwicke's expression appears by my own notes to have been as follows — "And though in my own mind I am not satisfied that costs are in the nature of a penalty; (for they seem to me rather in the nature of a satisfaction;) yet I think we are not authorized to determine contrary to the course of all these former resolutions." He said this upon citing the case of *Coan v. Bowles*, for the rule there laid down "that statutes concerning costs are to be construed strictly:" and he adopted the principle the Court went upon; though he could not come into the reason they there gave for it.

<sup>\*2</sup> V. 2 Sir J. S. 1005, 1006. [2 Barnes, 118, acc. Contra, Cooke's Rep. 107.]

† V. 1 J. 1, c. 16, s. ult.

I consider this as a point so fully settled, as not to be got over, upon any reasoning at large.

Therefore the rule must be discharged.

SONE *versus* ASHTON. Friday, 29th Jan. 1762. Marshal of King's Bench qualified to act as a commissioner of land tax.

This was an action of debt, for 100*l.* brought against the marshal of the King's Bench, on the Land-Tax Act of 33 G. 2, for acting as a commissioner of the land-tax for the county of Surry, without being properly qualified.

[1288] Upon "nil debet" pleaded, and issue joined thereon, the cause went to trial, before Lord Chief Justice Willes, at the Summer Assizes 1761, for the county of Surry: when a verdict was, by consent of both parties, given for the plaintiff for 50*l.* but subject to the opinion of the Court upon the following case.

That the defendant claiming a qualification as marshal of the King's Bench, had acted as a commissioner of the land-tax for the county of Surry, on the 21st August 1760, being the time laid in the first count of the declaration.

That the 10,500*l.* mentioned in an Act of Parliament made in the 27th year of the late King George the Second, intituled "An Act for Re-vesting in the Crown the Power of Appointing the Marshal of the Marshalsea in the Court of King's Bench, &c." had been paid to the mortgagees, and the prison rebuilt, in pursuance of the Act.

That 200*l.* a year, part of the profits of the office of marshal of the King's Bench prison, arise from letting rooms in the said prison.

That the marshal has, as belonging his office, a house to live in; with a garden and a piece of land belonging thereunto, and two houses for his officers to live in; rebuilt also according to the directions of the said Act of Parliament.

That in the year 1759, he was assessed to the land-tax in the county of Surry, as follows, viz. "for the prison of the King's Bench, house, lands, garden, and common side 300*l.*; for his office and perquisites, as marshal 200*l.*;" in all 500*l.*: which assessment was, on an appeal, reduced to 300*l.* viz. "for the prison of the King's Bench prison-house, land, garden, and common side, 250*l.*; for the office and perquisites as marshal 50*l.*."

That the defendant insisted on no other qualification, save what arose to him as aforesaid.

The question submitted to the Court, was—"Whether the defendant is liable to the penalty demanded in the first count in the declaration."

Mr. Coxe, for the plaintiff, endeavoured to shew that the marshal had no qualification, either from the prison, house, land, garden, and common side, or from his office [1289] and perquisites as marshal, to act as a commissioner of the land-tax. For, the qualification required by the Land-Tax Act must arise out of lands and tenements, not out of offices or perquisites. The words of the Act are plainly confined to lands and tenements: the expressions of "lease-hold, copy-hold, ground-rents, &c." are not applicable to offices or perquisites.

And the free-hold of the prison, house, lands, garden, and common side, is in the Crown: they are the Crown's property. The marshal has no free-hold in the prison, house, lands, garden, &c. though he has indeed a qualified free-hold in his office.

To prove "that the free-hold of the prison, house, lands, garden, &c. is in the Crown," he relied upon the statute of 27 G. 2, c. 17, which recites that of 8, 9 W. 3, c. 27, and (by its second clause) re-vests the prison and the site thereof, and the ground and appurtenances thereunto belonging, and the power of granting the custody of the said prison and the office of marshal, in the Crown, for ever, unalienably. And he has only a qualified freehold even in his office.

The same Act (§ 5) appoints the defendant Mr. Ashton, marshal (*a*) so long as he shall behave himself well in his said office: and (§ 8) makes him removeable by rule or order of this Court, for misbehaviour or neglect of duty. And he stands only taxed at 50*l.* for the office, exclusive of the prison, house, lands, garden, and common side.

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(*a*) As to the appointment to this office pursuant to 27 Geo. 2, c. 17, vide 4 Burr. 2183, 4.



Mr. Lee, contra, for the defendant, said the case itself was so plain, that no argument could make it plainer. That the words "lease-holds, copy-holds, ground-rents, &c." are to be applied to the subject matters of them respectively, though not jointly. That the office is granted to the defendant; and the prison, house, lands, garden, and common side, are annexed and incidental and naturally and necessarily belonging to it, and pass with it as being so incidental to the office. That offices are qualifications within this Act; and that it is admitted "that the defendant has a qualified free-hold in this office; which is \*<sup>1</sup> sufficient.

Mr. Coxe replied, that his free-hold is confined to the office: he has no free-hold in the prison, &c. or in any lands or tenements.

Lord Mansfield—Is not his office a tenement? and he has a qualified freehold in it. He is qualified, both within the words, and within the intention of the statute. [1290] Is not the Master of the Rolls qualified for the houses which belong to him in the right of his office? I know, that the Master of St. Catharine's has sat in Parliament, under the qualification of his office.

Per Cur'. (Mr. Justice Foster absent,)

Let the postea be delivered to the defendant.

FAIR-CLAIM, EX DIMISS' FOWLER ET AL. *versus* SHAM-TITLE. Thursday, 4th Feb. 1762. [S. C. 1 Black. 357.] Lord by escheat claiming to be admitted defendant in ejectment. [1 Black. 166, 169.]

#### In ejectment.

Upon Monday 23d of November 1761, Mr. Ashurst, supported by Mr. Serjeant Nares, Mr. Norton, and Mr. Morton, moved (on behalf of the plaintiff,) to discharge a rule whereby it was ordered that Granville, Earl Gower and Thomas Gifford, Esq. landlords of the tenant in possession of the premises in question, should be joined and made defendants with the said tenant, if he shall appear: and the said earl and Thomas desiring that if the said tenant shall not appear, that they may appear for themselves; and consenting that, in such case, they will enter into the common rule "to confess lease, entry, and ouster, in such manner as the said tenant ought in case he had appeared;" leave is given to the said earl and Thomas, pursuant to the late Act of Parliament, if the said tenant shall not appear, to appear by themselves; and, upon their entering into such common rule, to become defendants in the stead of the casual ejector, and to defend their title to the said premises, without the said tenant. The plaintiff, nevertheless, is at liberty to sign judgment against the casual ejector: but execution thereon is stayed, until the Court shall further order.\*<sup>2</sup>

Their objection to the rule was "that Earl Gower and Mr. Gifford had never been in possession:" (of which fact they had affidavit.)(a)

This rule must therefore, as they said, have been obtained by surprize: for that the Act of Parliament of 11 G. 2, c. 19, § 13, was made for the security of landlords who [1291] had been in possession, and whose tenants neglected to give them notice of ejectments.

And they cited a \*<sup>3</sup> case, a few terms ago, where such a rule as this was made,

\*<sup>1</sup> V. 4 Inst. 117, c. 12, (relating to the Chief Baron's office). [Law of El. ed. 1774, p. 34, 35, 36.]

\*<sup>2</sup> N.B. There was a like rule, whereby Sir Hugh Briggs and Lord Bradford (lords of other manors, who also claimed by escheat,) were admitted defendants exactly in the same manner as Lord Gower and Mr. Gifford were by this rule.

(a) See 3 Durn. 783. Just. Inst. lib. 4, tit. 15, text 4. 4 Durn. 122. And note that in 3 Durn. 783 counsel relied on this case; but Lord Kenyon answered that it appeared to have been by consent.

\*<sup>3</sup> The case was *Doe on the demise of James Goore v. Roe*. On the last day of Hilary term, 1761, upon the affidavit of William Scarisbrick, the conditional rule was obtained on Mr. Yates's motion, "to make the said William Scarisbrick (who claimed the premises, as purchaser under the heir at law of Thomas Goore, who died seised in fee,) a defendant with the tenant, if he appeared; or without him if he refused."

Upon the first of May, in Easter term following, Mr. Clayton obtained a rule, to

"to shew cause," only : and on this same cause being shewn, (viz. "that neither party had been in possession,") the said rule was discharged. So here, the earl and Mr. Gifford claim by escheat, on the death of Elizabeth Levison ; and the plaintiffs claim as heirs at law to her : but neither have been in possession.

All the tenants but one have attorned to the lessors of the plaintiff : and that one tenant did not appear.

They cited as a case in point to prove "that the Court have no jurisdiction to admit any person to defend an ejectment instead of the tenant, except one who is in some degree of possession"—2 Barnes, p. 28, of Appendix, M. 29 G. 2, C. B. *Roe, et dimiss. Leake and Others, v. Doe.*

The Court gave them a rule to shew cause.

Upon Friday, 27th of November 1761, Mr. Harvey, Mr. Thurlow, Mr. Aspinall, Mr. Madocks, and Mr. Stowe (on behalf of Earl Gower and Mr. Gifford) shewed cause why the above recited original rule should not be discharged : and they argued thus.

The lessors of the plaintiff claim as heirs : we claim by escheat of a copyhold, pro defectu hæredis : not for a forfeiture for want of an heir's coming-in. If there be an heir, we claim nothing. We therefore only desire to have the cause tried.

A lord of a manor has such a seisin at law, of an escheated copyhold, that the occupier is his tenant at will, and the lord may distrain for the rent : and though perhaps the occupier may not be liable to the penalty of the triple [1292] rent, yet the lord may avow upon him for the single rent.

The lords by escheat claim upon the same foot as if they were heirs to the deceased tenant : and the heir might be admitted to be made defendant : though he had never received rent. The estate originally belonged to the lords, and moved from them, and reverts to them for want of heirs of the tenant : and we are neither strangers, nor collude with the tenant.

The statute of 11 G. 2, c. 19, § 11, 12, 13, is to be extended further than to those cases only where the rent has been actually received : it extends to landlords de jure, as well as to landlords de facto. A probable cause of claim is sufficient to intitle the landlord to be made defendant : his real title is to be tried hereafter, in the cause.

Before the statute, the landlord had a right, by law, to be joined with the tenant : and the statute inforces this right. And it must be construed liberally, to prevent the mischief which occasioned the making of it.

But the plaintiffs come too late, in this application. They have estopped themselves, by proceeding after our rule : they have proceeded even so far as to the nomination of a special jury ; and then they gave notice "that they should not try the cause." So that they have acknowledged us as tenants.

The case of *Goore v. Roe* or *Scarishbrick*, was a case where no rent had been paid by any body : and Scarishbrick had purchased a pretended title. But the lord of this manor is dominus terræ, and within the words of the Act.

As to the case in Barnes—

Lord Mansfield—I do not understand that note. It puts the refusal of the motion, upon want of jurisdiction, and a case cited by Serjeant Davy. Whereas, in ejectments, the Court can never want jurisdiction to prevent the plaintiff from recovering without a proper trial. An ejectment is the creature of Westminster-Hall, introduced within time of memory ; and moulded gradually into a course of practice, by rules of the Courts. The same authority which brought it thus far, may certainly carry it to a higher degree of perfection, as experience happens to shew inconveniences or defects. The Act of 11 G. 2 was drawn and brought in by Sir John Strange : the provisions therein, relative to proceedings in ejectment, were either to inforce a

shew cause why the above rule, "for making the said William Scarishbrick defendant," should not be discharged with costs.

Upon the sixth of June in the subsequent Trinity term, cause was shewn : and upon hearing counsel for both parties, the said rule was discharged, but without costs.

James Goore claimed to be the true heir at law of Thomas Goore : but the possession had been in lessees under a lease granted for ninety-nine years, by Thomas : which lease was recently expired.

right practice, or occasioned by some [1293] case contrary to the general sense of the Bar, which the Legislature virtually condemns as erroneous. And as to the precedent cited from Strange, 1241, it is a total mistake: there is not a syllable in that case about a mortgagee being refused to be admitted to defend as landlord.

The counsel for the plaintiff (who had moved to discharge the present rule) argued that these potential landlords can not be within the stat. 11 G. 2, c. 19. For "such" landlord must be a landlord to whom the tenant is obliged to deliver the declaration.

The Act, they said, was made to defend an actual possession, only; not to give one. Before the Act, no man could have come and been admitted to defend with or instead of the tenant; nor have put himself in possession: and the Act only lets in the landlord, to prevent the tenant from giving up the possession.

The solid construction of this Act is, "that there being no possession, he could be no landlord." And the case of \* *Goore v. Scarisbrick*, went upon this principle; and was fully argued and discussed. It was moved upon affidavit of Scarisbrick's claim; which was a purchase from the heir at law of the reversioner; another person claimed to be heir at law. The rule was discharged. No rent had ever been paid under the lease, in that case: and the Court observed "that the tenant would not have been liable to the penalty for not delivering the declaration to him."

There is no privity between the lord by escheat, and the tenant.

There must have been rent actually received; (except in cases of mortgages after forfeiture, or such like:) but even an heir, who has never received rent, can not be let in to be made defendant, under this Act.

As to any proceedings subsequent to their rule—

The attorney for the plaintiffs might not know of this rule; for, it was obtained only upon the last day of the term: and we could not apply sooner, to get it discharged. Besides, he only attended the naming of the forty-eight of the special jury. No issue was joined: they never were accepted as tenants.

Moreover, we claim as heir: and a lord claiming by escheat is intitled to no favour, where another claims as heir.

Lord Mansfield—It is a point of great consequence: and I am glad that it will be settled.

[1294] An ejectment is an ingenious fiction, for the trial of titles to the possession of land.

In form, it is a trick between two, to dispossess a third by a sham suit and judgment.

The artifice would be criminal, unless the Court converted it into a fair trial with the proper party.

The control the Court have over the judgment against the casual ejector enables them to put any terms upon the plaintiff, which are just. He was soon ordered to give notice to the tenant in possession. When the tenant in possession asked to be admitted defendant, the Court was enabled to add conditions; and therefore obliged him to allow the fiction, and go to trial upon the real merits.

It might happen, that the tenant in possession was a mere farmer at will. He was bound to give notice to his landlord.

The same reason, of a fair trial with the proper party, required the landlord to be admitted defendant; with the tenant, if he was amicable; or without him, if he, contrary to the duty of his relation, should betray the cause.

There can be no ground for admitting the landlord to be a co-defendant, which does not hold to his defending alone in case the other abandons.

The plaintiff ought not to recover by collusion with one, to the prejudice of a third: he ought not to recover, without a trial with the person interested in the question and affected by the judgment.

Every point relative to the proceeding in ejectments is of consequence. I am glad we have this occasion.

There are two matters to be considered:—

First, whether the term "landlord" ought not, as to this purpose, to extend to every person whose title is connected to and consistent with the possession of the occupier, and divested or disturbed by any claim adverse to such posses-[1295]-sion;

\* Vide ante, p. 1291, in margin.



as in the case of remainders or reversions expectant upon particular estates: secondly, whether it does not extend, as between two persons claiming to be landlords de jure, in right of representation to a landlord de facto; so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other.

Where a person claims in opposition to the title of the tenant in possession, he can in no light be considered as landlord; and it would be unjust to the tenant, to make him a co-defendant: their defences might clash. Whereas, when there is privity between them, the defence must be upon the same bottom; and letting-in the person behind, can only operate to prevent treachery and collusion.

It is no answer, "that any person affected by the judgment may bring a new ejectment:" because there is a great difference between being plaintiff, or defendant, in ejectment.

The Court did not, however, give any opinion then; but took time to consider of it, till the second day of the present Hilary term 1762; and ordered that notice should be given to the tenant in possession.

On the said second day of Hilary term 1762, the tenant in possession, having been served with notice as above, did not appear by any counsel.

Mr. Justice Denison proposed to search what was the practice in the Court of Common Pleas, since the Act.

Lord Mansfield—In the case in this Court, which was cited, the tenant in possession opposed both. In that in C. B. the tenant in possession had no sort of right.

His Lordship proposed to have the fundamental principles considered; and old cases prior to the Act of Parliament looked into; and declared that he had it at heart, "to have the practice upon ejectments clearly settled, upon large and liberal grounds for advancement of the remedy."

The great advantage of this fictitious mode is, that being under the \*<sup>1</sup> control of the Court, it may be so modelled as to answer in the best manner every end of justice and convenience.

Public utility has adopted it in lieu of almost all real actions: which were embarrassed and entangled with [1296] a thousand niceties. But, as there was good and bad in the method of real actions, the good ought to be grafted into ejectments, in such manner as to avoid the bad.

He added, it is worth considering, upon what principles landlords were admitted to be co-defendants, before the Act of 11 G. 2. And desired that every body, that knew of any old cases prior to the Act, would inform the Court of them. He mentioned a loose note in 12 Mod. 211, and the case of *Goodright v. Hart* in 2 Sir J. S. 830.

Mr. Justice Denison thought it had been considered in C. B.

Mr. Justice Wilmot thought the \*<sup>2</sup> first part of the Act was not introductory of a new law; (for, before the Act, a landlord might be made co-defendant:) but that the † second part of it was introductory of a new law.

He proposed to have the point settled, and for that purpose, to have the practice of the Court of Common Pleas inquired into.

Lord Mansfield proposed to have it considered, whether there can be any reason for making a landlord co-defendant, which will not also hold for making a landlord defendant in the stead of the tenant; and also to have it considered upon the foot of convenience and expedience; and how it stood before the Act of 11 G. 2, as well as to argue it upon the Act; and also, what was the definition of a landlord, as it was understood when they were admitted as co-defendants before the Act.

It was then ordered to stand for further argument on Wednesday, 3d February 1762.

Mr. Harvey then argued on behalf of the lord by escheat.

A copyholder could never maintain a real action.

But for lessees, there were, in the time of real actions being in use, two sorts of this kind of action: viz. by writ of *ejectione firmæ*, vi et armis; and by writ of *quare ejecit infra terminum*: in the former of which, there was anciently only a judgment for damages, the term not being recovered; in the latter, the judgment was for recovery of the term, as well as for damages.

\*<sup>1</sup> Vide ante, 668.

\*<sup>2</sup> Sect. 12.

† Sect. 13.

But in 14 H. 7, in an *ejectione firmæ, vi et armis*, (the former of the said two sorts of action,) judgment was [1297] given in B. R. "to recover the term, as well as damages: and it was affirmed upon error." And in another case in 17 H. 8, in C. B. the like was done there. V. F. N. B. 506, H. title *Ejectione Firmæ*.

After which, it became the ordinary method of trying titles to land; and was adopted by lessors as well as lessees.

But, at first, the lease was really sealed upon the land (as a guard against maintenance;) and the action was brought against the real tenant in possession.

Afterwards, this mode of proceeding was abused; and casual ejectors were set up: by which method, the tenant in possession might be turned out, even without notice. In 1 Keble, 705, it is said, "that Keeling conceived this way of ejectment was a new device since the late troubles." But it was a much older practice.

After which inconvenience and others being discovered, notice to the tenant in possession was required. V. Raym. 93, *Keys v. Braydon*, (S. C. with 1 Keble, 705).

The modern rule was introduced in the time of Lord Chief Justice Rolfe.

But from the time of setting up casual ejectors, the admitting landlords to defend, together with the tenant in possession has prevailed. In *Style*, 368, H. 1652, it appears that both the Courts of King's Bench and Common Pleas would grant this to a person claiming title to the land. 1 Siderf. 24, 12 C. 2, shews that it was then usual. Lilly's Abr. 497, 23 C. 2. "One who hath title to the land in question may, upon motion to the Court, be made defendant with the tenant in possession, that he may thereby defend his title." And this continued to be the method of practice.

The Act of 11 G. 2, c. 19, was occasioned by the deficiency of justice, in this method; in two respects.

One of them was the under-tenant's not acquainting his landlord. And the loose note in 12 Mod. 211 (*Anonymous*) is the only case where the doctrine is laid down, "that if notice in ejectment be given to the under-tenant, and he doth not acquaint his landlord therewith, but suffers judgment to go against him, the Court (upon motion) will not suffer execution to be taken out, till the right be tried." (d)

[1298] The other deficiency of justice was that mentioned in the case in 2 Sir J. S. 830, *Goodright v. Hart et Ur* P. 2 G. 2, where the tenant would not defend.

The former of the two clauses of 11 G. 2, \* provides against tenants secreting ejectments from their landlords. The † latter of the two clauses consists of two parts. The first part of it only gives power to do what had usually been done before, viz. admitting the landlord to defend together with the tenant in possession. But the second part provides for admitting him to defend instead of the tenant, which had been, in some late cases, denied. See *Cases of Practice* in C. B. (by Mr. Cooke) 99, P. 7 G. 2, in a case of *Right v. Wrong*, it was refused; nor would the Court oblige the tenant to defend, even upon indemnification. So also in 1 Barnes, 114, Tr. 6, 7 G. 2, C. B. in the case of *Balderige v. Paterson*—the Court denied to make the landlords defendants without the tenant in possession, who refused to appear: but they made the common rule, "to add them." 1 Barnes, 120, H. 8 G. 2, C. B. in the case of *Goodright, ex dimiss. Duke of Montague v. Wrong*—the Court refused to admit the landlord to defend alone, instead of the late tenant, who had quitted the possession.

These cases gave rise to the Act of Parliament of 11 G. 2, c. 19, § 13, part the second. They were all of them between the ‡ time of the case of *Goodright v. Hart* (in 2 Sir J. S. 830) and the making of the said Act of 11 G. 2. But since that Act, it is clear, that at least all persons may defend without the tenant in possession, who might, before it, have defended with him.

The 12th and 13th clauses of this Act are not relative to one another. The 13th is an independent clause: (which point he argued at large).

It was many years before this Act, (even in 5 W. & M. Comberb. 209) that a rule is laid down by Lord Chief Justice Holt, "that no man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession or received rents; and not a mere stranger." (e)

(d) The Court will permit a devisee not having been in possession, to defend in ejectment as landlord under 11 G. 2, c. 19, s. 13. 4 Durn. 122.

\* V. s. 12.

† Sect. 13.

‡ P. 2 G. 2.

(e) This seems copied into 1 Lilly's Abr. 498, ed. 1719; or edition 1745, page 676.

But the reason of that rule does not hold in the present case.

A lord by escheat's defending his title can never be considered as champerty : (which was one of the reasons). However, this rule is inaccurately laid down in Comberb. 209.

[1299] The adding unnecessary defendants is now prevented by 8, 9 W. 3, c. 11, (§ 1). \*<sup>1</sup>But before that Act, lessors made several defendants in ejectment, in order to take off their evidence : and they could then have no costs, if acquitted. And the rule was made against lessors of plaintiffs, as well as against defendants : and it means to exclude only mere strangers to the possession.

In Comberb. 339, Tr. 7 W. 3, in the case of *Jones, Lessee of Pride, v. Carwithen* ; — Lord Bath, the reversioner, was admitted a co-defendant with the tenant.

In Comberb. 332.—A trustee may be admitted, if he desires it ; though not without his consent. So, a mortgagee may be admitted.

The true rule of admitting as a co-defendant before the Act, was "that a mere stranger shall not be admitted : a person not a mere stranger has a right to be admitted." He had a right to this. 1 Salk. 257, Tr. 11 W. 3, B. R. in the case of *Underhill v. Durham*, "a landlord may be joined a defendant with the tenant in possession if he requests it : but the Court can not compel him to it."

Now a lord by escheat is not a mere stranger ; but has the immediate right and title, in case no heirship is made out : and therefore he is the most proper person to contest that point of heirship, by whomsoever claimed. And he may very well and reasonably be considered within the word "landlord : " the tenant in possession is his tenant at will, if there be no heir.

A lord by escheat is a title favoured even in a freehold ; as appears by *Lord Buckhurst's case*, 1 Co. 2 a. 10 E. 4, 9 b.(f) Much more shall it be favoured in a copyhold case, where the freehold is never out of the lord. The tenant in possession is only tenant at sufferance to the lord by escheat after the death of the last admitted tenant has been presented. And his not having been in actual receipt of the rents, can be no solid objection.

There must be a trial of the title, before possession can be obtained. This is a fixed principle. In Comberb. 13 (g) a motion was made for judgment in ejectment, upon [1300] a lease sealed on the land ; and denied : for per Cur'.—"You must try it." 12 Mod. 211. Where the tenant suffers judgment without giving notice, &c. the Court will not suffer execution to be taken out till the right be tried.

In the present case, a stranger may get the possession, unless the lord be admitted to defend his title. It is not worth the tenant's while, to defend it : for, his possession will be determined immediately, which-ever side prevails.

Suppose it had been a vacant estate ; the lessor of the plaintiff must have sealed his lease upon the land, and set up a casual ejector. But by Comberb. 13, the Court would not, in that case, have suffered execution to be taken out, without a trial and making out his title. And the Court would have permitted the lord by escheat to have seen that the title was well made out. Consequently, the Court would, in such case, have admitted the lord to defend ; in order to oblige the plaintiff to go down to trial and make out his title.

And there is as much reason to do it, where the tenant deserts his claim.

Suppose two persons, one claiming as heir, the other as lord by escheat, both bring ejectments, and both recover judgment ; how shall the sheriff know to which of them he is to deliver possession ?

This method, of admitting a lord to defend, will prevent a circuitry of litigation.

Then he answered their cases ; viz. \*<sup>2</sup> *Roe v. Doe*, in Barnes ; and † *Scarisbrick's case*.

And qu. if the practice was not clearly settled agreeable thereto ? and so it was holden in a case cited in Bull. 95, 96.

\*<sup>1</sup> V. ante, 1284.

(f) Qu. For it is only thus—N.B. 10 E. 4, 11 b. by "Moile the lord by escheat shall have all the charters which concern the same land ; " and the reason thereof is as "Poph. C.J. said, because the lord by escheat is in the post and cannot vouch."

(g) What is here cited from Comberbach is the whole of a wild *Anonymous case* in Comberb. which is contrary to known practice, and to the case in Barnes, 177, as it part appears by the report of it there.

\*<sup>2</sup> 2 Barnes Appendix, 28.

† Vide ante, p. 1291, in margine.



We do not know the circumstances of the case of *Roe v. Doe*: but there had been a long possession on the other side. *Scarisbrick's case* is within the rule.

We desire only an opportunity to try the title.

Lord Mansfield—We have thought very fully of this matter, since it came on last: and we are all of opinion that it must be tried between the two claimants, the heir and the lord. The occupier has no interest or concern in the question. He ought not to take a side, or prejudice either. (h) He does not appear. The question should therefore be tried in a way to give neither any advantage from his possession. It may be done, in a feigned issue: or, an ejectment brought by the lord, with an admission of his title, will come to the same thing.

[1301] Whereupon the Court recommended, and the counsel on both sides consented to a fair trial of the lord's title to claim by escheat: (i) and the method was, at length agreed upon: viz. that the lord (who could never come into possession without an ejectment to be brought by him,) should immediately bring his ejectment against the present lessors of the plaintiff: and that the said lessors of the present plaintiff (who claimed as heirs of the deceased) should be admitted to defend, either alone or together with the tenant in possession; and such ejectment to be tried at the next assizes. And the counsel for the present plaintiffs were to admit "that all the lands lie in one and the same manor, and that such manor belongs to Earl Gower as lord of it."

And the Court reserved the consideration of the present motion and of the rule now depending, till after such trial should be had: which they did, in order to retain the power over the matter, in case any thing should be attempted at the trial, contrary to the real present intention of having the question fairly tried; and also in order to give such future directions concerning the award of execution, as should then appear to be fit and proper.

Note—Mr. Justice Wilmot observed that it was very remarkable, that two different Acts of Parliament had been made, at near 500 years distance, upon the very same subject, where there was no occasion for either: viz. the Statute of Westminster 2,\* (13 Ed. 1, A. 1285,) and this Act of 11 G. 2, c. 19.

The Statute of Westminster 2, c. 3, he said, was not a new provision; for, before that statute, all those that stood behind the tenant in possession had always a right at common law, to come in and be received, *pro interesse suo*, to defend the possession; which was very material to them, and by the change whereof they would have been greatly incommoded. And he said he was persuaded that the more this doctrine of deceit was looked into, the stronger this would appear. And therefore he wondered that there should have been any doubt, before the Act of 11 G. 2, of admitting landlords to defend in the stead of the tenant in possession; especially, as they were suffered to make themselves co-defendants with the tenants. (He referred to Lord Coke and to Bracton: but did not † specify the particular passages or pages.)

[1302] So, before the Act of 11 G. 2, c. 19, it was certainly the practice to admit the landlord and the tenant in possession co-defendants.

He took notice likewise, that notwithstanding all the pains that the Legislature had taken to cut off dilatories, yet it was the Courts of Westminster-Hall to whom the public were obliged, for finding out this easy and expeditious method of trying titles by ejectments.

Lord Mansfield asked the counsel on both sides, "if they had found any case prior

(h) It seems that the tenant did right, for the reason abovementioned in this page, opposite the N.B.

(i) How is this consistent with what is mentioned in the last page, of trying the question in a way to give neither any advantage from the tenant's possession? And qu. if it was possible for the question to be tried in that way between the contending parties; for the onus probandi would lie on the plaintiff's lessor, and how could it be tried without making some of them lessors of the plaintiff? for the Court neither could nor ought to oblige the occupier to defend several ejectments to be brought against him by the several claimants; therefore qu. whether the Court ought to have interposed at all in this case?

\* Westm. 2, c. 3.

† V. 2 Inst. 344, 345, and Bracton, lib. 5, fo. 393 b. No. 14.

to that of *Goodright v. Hart*, *et Ux.* P. 2 G. 2, in \*Sir J. S. where the Court had refused to let in persons who stood behind the tenant in possession, to defend pro interesse suo, in the stead of the tenant in possession.

Answer—None at all.

Lord Mansfield—Then there is no other but that which denies the authority of the case in 12 Mod. 211.

The precedents before are more liberal.

In 1652, it was said by the protonotary, "that the Court would upon terms, allow him who alledged title, to defend it." (a)

In the 7th of King William, Lord Bath claiming the reversion by deed, after the death of tenant for life, who received the rent, was admitted a defendant, because it might shake his title.

In the 10th of King William, it is laid down as a certain rule, "if notice in ejectment be given to an undertenant; and he doth not acquaint his landlord therewith, but suffers judgment to go against him; the Court, upon motion, will not suffer execution to be taken out till the right be tried." Which is decisive, that the landlord should not be betrayed, but might defend alone.

In the first of Queen Anne, Holt says, "it is due, of right, to the landlord, to be made defendant: for otherwise, the tenant in possession might combine with the lessor of the plaintiff, and oust the landlord of his rent. And to deny the lady that right, would be upon the presumption of her marriage; which [1303] would be directly to determine the point in question." The combination of the tenant in possession could not be prevented, unless the landlord might defend alone. And the rule is laid down in a case like the present, where the question turned upon "who was landlord."

Thus stood the reasoning and practice, when the motion was made in *Goodright v. Hart et Ux.* in 2 G. 2. It seems to have been very little considered. The only reason given why the tenant might betray his landlord by refusing to appear, ("because the landlord was made a defendant *unà cum* the tenants in possession,") equally, at least, proved the contrary. It was a breach of the rule, in the tenant, to prevent his defending. No wonder Sir John Strange adds a "*quære tamen*; for, this is giving tenants much too great a power; and makes them absolute masters of the estate, and to choose their own landlords." The Court refusing to relieve the landlord, he practised with the tenants, to attorn. Then the plaintiff in ejectment moved: but was denied relief. So the Court first suffered the plaintiff in ejectment, by corrupt practice with the tenants, to dispossess the landlord by a judgment, without any opportunity of trial; and then suffered the landlord, by corrupt practice with the tenants, to defeat the judgment and possession given in consequence thereof. This case certainly occasioned the clause in the Act of Parliament relative to this subject. As the Parliament has contradicted it, one may venture to say, "it was hasty." Every reason of private justice and public convenience, and every authority was the other way.

A rule by consent having been ordered to be drawn up against to-day,

Lord Mansfield now declared, that he was clear that this method of "putting the person claiming to be lord by escheat to bring his ejectment;" was the proper way of trying the right upon the merits.

If there was really no heir, then the lord stood in the place of the deceased: but if there was any heir whosoever, the lord's claim was at an end.

The Court would have obliged him to come into some method of trying the right, in a proper issue; and this method into which it was now put, (*viz.* his bringing an ejectment,) is the most proper issue for that purpose.

If the heir had refused, the Court would have admitted the lords to defend; which would have given them the [1304] benefit of possession. If the lords by escheat had refused to consent, we would have discharged the rule. For certainly, where the sole question turns upon "who ought to be landlord to the tenant in possession," he should stand neuter, and his possession avail neither: the question ought to be tried between the claimants. The plaintiff must consent: else, the other

\* 2 Sir J. S. 830.

(a) Style, 368. But note that this case in Style is very shortly reported, and in the latter part of it not intelligible, though the unintelligible part is here omitted.

is admitted to defend; (as in the case of *Fenwick and Gravenor*). The other must consent: because to insist "that he is landlord," begs the question to be tried.

Rule by consent, as before, p. 1301.

REX *versus* HEYDON, HEAD, AND ROPER. Friday, 5th Feb. 1762. Costs allowed upon informations for misdemeanors for not going on to trial.

Upon informations for misdemeanors.

Mr. Morton, on behalf of the defendants, moved to discharge a rule for referring it to me "to tax costs to be paid to the defendants, for the prosecutor's not going on to trial." These were three informations for bribery at an election to Parliament. And the same rule had been made in all the three causes.

He moved it, first, on a point of law; secondly, upon the merits.

First, there were no costs at all, he said, upon informations, before the statute of 4, 5 W. & M. c. 18. And by that Act\* the Court have no authority to give costs against the prosecutor, till he shall have neglected to prosecute with effect for the space of a year: the words of it are—"In case the prosecutor shall not within one whole year next after issue joined, procure the same to be tried." But this is within the year.

Secondly, the merits were, that the adverse party detained the books, which were the prosecutor's only evidence; which detention obliged the prosecutor to withdraw his record, and was the only reason of his not going on to trial.

Mr. Stowe and Mr. Ashurst, contra, for the defendants.

First, the Act of 4, 5 W. & M. c. 18, § 3, means the [1305] final event of the cause; and relates only to the not proceeding at all in the cause for a whole year.

But by the course of the Court, without any aid from this statute, a prosecutor shall pay costs for the vexation of not going on to trial, without countermanding his former notice of trial: and they mentioned a case of † *Rex v. Rossier et Al'*, where precedents of it upon informations were cited.‡ Executors shall pay costs for not going on to trial.

Secondly, the defendant is not bound to furnish the prosecutor with evidence against himself. He should have come prepared; and ought not to have given notice of trial, till he was prepared.

The counsel for the plaintiff in reply—

Upon the gentlemen's own principle, the prosecutor ought not to pay costs in this case: for here was no vexation, or any thing like it; nor is there any reason why the Court should punish the prosecutor in costs. He had reason to expect that the books would be produced at the trial; the defendants gave him hopes of producing them.

Lord Mansfield—First, by the constant course of the Court, the defendant is intitled to costs, if the prosecutor gives notice of trial, and neither goes to trial, nor countermands it in time: and no instance can be produced, that I know of, to the contrary.

Secondly, yet if the defendant had drawn the prosecutor "in, to give notice of trial," by giving him hopes of producing any books: that might be a reason for not giving the defendant any costs.

But no such thing appears in this case: there is no colour, upon the affidavit, to say it.

Therefore there is no reason to except this out of the general rule.

Mr. Justice Denison—I am of the same opinion.

Mr. Justice Wilmot—And I.

(Mr. Justice Foster was absent.)

Nothing taken by the motion.

\* V. § 3.

† In Trinity term 1761.

‡ There were so; viz. *Rex v. Allen and Hazard*, M. 5 W. and M. (v. Comberb. 225,) and *Rex v. Earle*, Tr. 4 G. 2, (v. Stra. 874). See Salk. 193, *Rex v. Edwards*; and 1 Stra. 33, *Rex v. Powell, et Al.*



[1306] REAVELY *versus* MAINWARING, ESQ. WALKER ET AL'. Saturday,  
6th Feb. 1762. New trial not granted in an hard case.

This was an action of trespass *vi et armis*, for taking five boys, apprentices to the plaintiff, out of the hands of the plaintiff.

Lord Mansfield, who tried the cause, reported the evidence.

These were apprentices regularly bound to Reavely, for the sea service. The action was trespass *vi et armis*, for taking them.

It was proved, on the part of the plaintiff, that they were voluntarily indentured to him; and were by his direction delivered to one Jones, to be kept by him, to prevent their running away. Part of Jones's house was a prison; part, a public house.

The justices, at their session of gaol-delivery, upon a complaint of "an intention to sell them in Guinea," discharged them.

Reavely ordered them to be put into the hands of Jones. Walker sent a note to Jones, to deliver them to the lieutenant of a tender of a man of war: who thereupon delivered them, and took a receipt for them.

This was the evidence for the plaintiff.

On the part of the defendants, it appeared that one Lane told Walker, of the boys complaints, and of the affecting scene that he had seen.

One of the boys also gave evidence of Blackwood's picking them up; and of their being deceived, and ill used at Jones's, and their endeavours to escape. That Walker and Pell came to the prison: and the boys made their complaints to them. Upon which, they were sent for to the Court-House: and they all made their complaints to the justices, of their being deceived, imprisoned, ill used, &c. and their apprehensions of being sold. The plaintiff, next morning sent coaches to carry them away. They resisted. Walker (who was lieutenant of a man of war) being present, asked them if they were willing to serve the King. They assented. He sent a press-gang. They went with their own consent. They begged of the justices to be set at liberty. They were brought into Court before the justices as prisoners.

[1307] But no commitment being produced, the justices discharged all and each of them, by writing against their names—"discharged." Walker bid Jones to keep them that night. But there was no order to deliver them to Walker: they were only discharged from being kept as prisoners. Whereupon Walker asked if they were willing to serve the King: to which they assented. And Walker gave Jones a guinea to take care of them that night.

At the trial, all the defendants were found "not guilty;" as well the justices as the lieutenant.

Mr. Yates now shewed cause against a new trial, which had been prayed by the plaintiff.

He insisted, that as the boys were in the hands of Jones, who, he said, was agent to the plaintiff, and delivered them to the lieutenant who commanded the press-gang, upon a note from Walker, and took a receipt for them from him; here was no force: therefore trespass *vi et armis* will not lie. It ought to have been an action upon the case, or an action upon the Statute of Labourers; for which, he cited Bro. Abr. title Labourer, 21, 28, as in point. 6 Mod. 182, *Queen v. Daniel*, (the second resolution) is in point also, "that a common action of trespass will not lie, for enticing an apprentice or servant from his master, if there be no force."

And here, Jones's delivery was the delivery of the plaintiff: he was the owner's agent.

Mr. Solicitor General and Mr. Morton, on behalf of the plaintiff, did not dispute the law, but the fact.

The justices discharged the boys: they were put into the hands of Jones, by the justices. Walker ordered them out of Jones's hands into the hands of the lieutenant who headed the press-gang.

Here was no seduction or incitement; but a forcible taking away a man's apprentices by a press-gang, and carrying them on board a man of war: in which, Walker was concerned, as having actually sent the press-gang to fetch them. And in trespass, all are principals.

Lord Mansfield—It was objected, at the trial, that Walker could not be liable

to an action of trespass vi et armis: for that Jones delivered them up voluntarily to the lieutenant.

[1308] But I thought then, and now think that he was liable to this action; because he sent a force, a press-gang, to take them.

As to the justices—There was no colour to maintain the action against them.

A special jury of gentlemen found all the defendants not guilty.

I think they ought to have found Walker guilty, upon the evidence that was laid before them. Yet it would have been very hard, if Walker had suffered for his behaviour upon this occasion; because he seems to have acted with good intentions.

Therefore I think there ought not to be a new trial.

Rule to shew cause “why there should not be a new trial”—discharged.

REX *versus* CLARKE, ET AL'. 1762. [See 16 Vin. 259.] Prosecutor cannot prosecute in forma pauperis.

Mr. Nash moved to make a rule absolute, (on a proper affidavit of service,) for admitting a prosecutor of an \* indictment to prosecute in forma pauperis.

But the Court, (on being apprized that it was on behalf of a prosecutor,) denied to make the rule absolute; as it was founded only on the common petition and affidavit usually produced by defendants in order to their obtaining such a rule: for, they held that prosecutors ought not to be admitted to prosecute in forma pauperis, unless some special ground was laid for the motion.

And Mr. Justice Wilmot observed that in civil cases, plaintiffs were not admitted to sue in forma pauperis, unless counsel certified “that there was some foundation for their suing.”

REX *versus* INHABITANTS OF MINCHIN-HAMPTON. Friday, 12th Feb. 1762. Beech being timber according to the custom of the place is not rateable to the poor's rate. [See 2 P. Wms. 606. Moor, 812, acc. Bunb. 192, pl. 269, acc. 2 Burr. E. L. 416, acc.]

Samuel Sheppard, Esq. having appealed to the Quarter-Sessions of the county of Gloucester, from a rate (confirmed by two justices of the peace) which [1309] charged him for some wood-lands which he owned and occupied; the sessions upon such his appeal, discharged that part of the rate, and amended it with respect to the charge upon Mr. Sheppard; holding him not to be rateable for them, upon his particular case; which they stated to be as follows, viz.

That the said Samuel Sheppard is owner and occupier of two hundred and fifty acres and upwards of wood-land in Minchin-Hampton. The wood growing thereon consists chiefly of beech, and some oak and ash. There is no coppice wood. The under wood is left to grow as standards. Great quantities of such beech wood have yearly been cut and sold by the said Samuel Sheppard, (and in the two last years, forty or fifty cord each year, for fire-wood; of the value of from twenty-three shillings to twenty-six per cord: all which said wood so cut for cord-wood is of thirty years growth, or upwards; and some, of sixty or eighty years; and, generally, from ten to twenty inches square. That many of the largest beech-trees cut in such wood, are sold as cord-wood and faggots for fire-wood; and that the other of such trees cut therein, are sold for making gun-stocks, saddle-trees, and card-boards; and some part for building. That pigs were let run in those woods, for the eating of the masts: for which the proprietor had a pecuniary profit, when so done. That twenty pounds worth of such wood is sold for fire-wood, to twenty shillings worth sold for any other purpose. And in the last year there was made a clear fall of three or four acres. The sessions are of opinion “that such woods are not rateable to the poor's rate, by law.”

On the last day of Michaelmas term 1760, Mr. Price, on behalf of the parish, moved to quash this order of sessions; urging that Mr. Sheppard ought to be rated for these under-woods, as saleable under-woods, within the express words of 43 Eliz. c. 2, though some part of the produce of this two hundred and fifty acres of wood had been

\* V. *Rev. v. John Spooner*, 28th Nov. 1770, B. R. (which was an information).

used for building: for it is stated, that twenty pounds worth was sold, for twenty shillings worth used in building. And he had a

Rule to shew cause.

On Saturday, 7th Feb. 1761, instead of shewing cause, why this order of sessions should not be quashed;

Mr. Norton, (now Sir Fletcher Norton,) who was for discharging the rate, insisted that beech was esteemed [1310] timber in that country; and that it ought to have been, and was intended to have been so stated: and that therefore the case was imperfectly stated, and ought to be sent down again to be re-stated.

Which was denied by Mr. Gould, who was counsel on the other side.

After much litigation,

The Court directed that it should be sent down to be re-stated; and that Mr. Norton's client should pay the costs hitherto incurred.

On Monday, 23d November 1761, M. 2 G. 3, the re-stated order being sent up, a rule was made (as before) to shew cause why it should not be quashed.

The words of the new state are as follow,—“We are of opinion, that the same wood, being timber-trees as aforesaid, are not rateable to the poor's rate, by law.”

On the last day of that term, Mr. Serjeant Nares, (who was for quashing the order) offered to try, in a feigned issue, “whether beech-wood is timber, by the particular custom of that country.”

Lord Mansfield—Beech is certainly not timber by the general law of the land: yet it may be timber by the particular custom of the place; I do not mean, of the county, but of that particular part of the country where the trees grow.

Therefore let it go back to the sessions, to be positively stated, “whether beech is or is not timber, there.” For, they have not yet stated positively, whether it is or is not so.

Hilary term 1762, 2 G. 3.

The order being returned up again, is as follows, viz.

Upon the re-hearing of the appeal of Samuel Sheppard, of Minchin-Hampton in this county, Esq. in pursuance of and in obedience to another rule of His Majesty's Court of King's Bench made in Michaelmas term last, against part of the rate or assessment made for the relief of the poor of the said parish of Minchin-Hampton, that is to say, touching the sum of money charged upon him the said Samuel Sheppard, in respect to and for certain woods of the said Samuel Sheppard in the said parish of Minchin-Hampton in his own possession; this Court, having fully [1311] re-heard as well the said Samuel Sheppard as the churchwardens and over-seers of the poor of the said parish of Minchin-Hampton, touching the said appeal and premises, do find, adjudge, and finally determine, that the said Samuel Sheppard is charged for his said wood there, being timber trees, when in fact he ought not to have been charged for the same, and is thereby aggrieved: it is therefore ordered by this Court, that the said rate or assessment (now brought again into Court) be forthwith amended in Court, in respect to him the said Samuel Sheppard, as to the item therein, where he is charged for the said woods; and that the said item or charge in respect thereof be entirely struck out of the said rate or assessment; and that he the said Samuel Sheppard be and is hereby absolutely acquitted, exempted, and totally discharged of and from all payments charged or rated in the said rate or assessment upon his said woods as aforesaid; the case appearing to be, that the said Samuel Sheppard is now owner and occupier of two hundred and fifty acres and upwards of wood-lands in the said parish of Minchin-Hampton; that the wood growing thereon consists chiefly of beech, and some oak and ash trees; that there is no coppice wood; that the under-wood is left to grow as standards; that by the custom of the country where the aforesaid beech, oak and ash trees grow, (being the trees in question on this appeal,) beech is timber; that great quantities of such beech-wood have yearly been cut and sold by the said Samuel Sheppard, (and in the two last years, forty or fifty loads each year,) for fire-wood, of the value of from twenty-three shillings to twenty-six shillings per cord; all which said wood so cut for cord-wood, is of thirty years growth or upward, and some of sixty or eighty years, and generally from ten to twenty inches square; and that many of the largest beech trees cut in such wood are sold as cord-wood, and the faggots for firewood; and that the other of such trees cut therein are sold for making gun-stocks, saddle-trees and card-boards, and used as timber, for the several purposes of building, but not so frequently as elm or oak:



that pigs were let run in those woods, for the eating of the masts; for which, the proprietor had a pecuniary profit, when so done; and that twenty pounds worth of such wood is sold for fire-wood, to twenty shillings worth sold for any other purpose; and last year, there was made a clear fall of three or four acres. And therefore, we are of opinion, "that by the custom of the country where the trees and woods in question as aforesaid grow, beech is timber, and therefore not rateable to the poor's rate by law."

On Saturday, 6th February 1762, Mr. Serjeant Nares moved to quash this order: for that although the sessions [1312] have now indeed returned it as their opinion, "that beech is timber in that country, by the custom of the country;" yet they have drawn their conclusion from wrong premises, which they state particularly, and conclude that therefore they are of that opinion. So that the Court will judge for themselves, whether the sessions have determined right, or not.

A rule was thereupon made to shew cause why the said new order should not be quashed.

The said new order being now read,—

Lord Mansfield said, that though the justices at sessions state a great many things that are immaterial, yet they expressly state "that beech is timber by the custom of that country." It is not the use it is put to, that makes it either timber or not timber: its being or not being timber depends upon the custom of the country. And if it be timber by the custom of the country, it must be presumed (and it may be true in fact) "that it was timber before the time of Queen Elizabeth."

The order of sessions must be affirmed.

The end of Hilary term 1762, 1 G. 3.

#### [1313] EASTER TERM, 2 GEO. III. B. R. 1762.

REX *versus* SMOLLET; REX *versus* HAMILTON. Monday, 10th May, 1762. Clerk in Court and attornies bill taken together, to be paid into the hands of the clerk in Court. V. 2 J. S. 1126.

Mr. Solicitor General moved on Thursday last, in behalf of Mr. Barlow, clerk in Court for Admiral Knowles the prosecutor in these causes, to whom the executrix of his late attorney Mr. Chapone (lately deceased) had delivered a bill, which included Mr. Barlow's bill in these causes, which bill of Mr. Barlow's had already been taxed, as well as Mr. Chapone's own bill; that Mr. Knowles might be at liberty to pay to Mr. Barlow his bill as clerk in Court; and that on payment of the remainder of Mr. Chapone's bill to the executrix of Chapone, she should deliver up to him all his papers and writings remaining in her hands.

And he cited a case in Hilary term 1739, 13 G. 2, B. R. where the like rule had been made, for the payment to Mr. Henry Walrond, by Sir John Rushout and Mr. Rudge, of Mr. Walrond's bill, after the death of Mr. Ingram, attorney for Sir John Rushout and Mr. Rudge, in the Evesham causes: which bill of Mr. Walrond's as clerk in Court in the cause between *The King and Biddle*, was included in Mr. Ingram's bill delivered to them.

Lord Mansfield said, it was so plain, and so obviously just and reasonable, that it did not want any precedent to support it. Accordingly, a rule was made to shew cause.

And, it was now made absolute.

#### [1314] MAXWELL *versus* MAYER. 1762. [S. C. 1 Black. 364.] Wholesale traders need not take out a licence from the hawker's office.

This was an action of trespass, for taking the plaintiff's goods: to which, "not guilty" was pleaded. On the trial at Nisi Prius, a case was reserved for the opinion of the Court.

The case stated was this—

That the plaintiff was a native of Scotland. That he was a hawker and pedlar, carrying linen goods of the manufacture of Scotland, from town to town in England; and exposing them to sale, in a room in each town, by wholesale only. And that he traded in St. Sampson's parish in York, without any licence.

That upon an information duly made against him for this before the defendant, who was a justice of peace for the City of York, the plaintiff was required by the defendant, the justice of peace, to produce a licence for so doing : but he insisted, that it was not necessary for him to have a licence ; as he was a native of Scotland, a wholesale dealer in linen of the manufacture of Scotland, and sold by \* wholesale only.

That the defendant thereupon convicted him in the penalty of twelve pounds ; which penalty he refused to pay. That the defendant, the justice of peace, therefore issued his warrant to distrain, &c. which was executed, &c. And for this, the present action was brought.

The question was, "whether the plaintiff (who was a "native of Scotland) being a † wholesale dealer in linens of the manufactures of Scotland, was obliged to take out a licence, to qualify him to trade thus, by wholesale in England."

It was first argued on Tuesday 25th of November 1760, by Mr. Clayton, for the plaintiff, and Mr. Yates for the defendant ; and again, on Friday 6th of February 1761, by Mr. Aston for the plaintiff, and Mr. Norton for the defendant.

For the plaintiff, it was insisted, that the Union took away all distinction between the two kingdoms, and between the natives of one or the other ; and that the manufactures of Scotland are, since the Union, the manufactures of "this kingdom," within the meaning of [1315] 9, 10 W. 3, c. 27, § 1, 2, 3, taken together with the following sections, 4, 6, 14, 18, and 25 : (upon which Act of 9, 10 W. 3, this conviction was founded).

And all claims arising under subsequent statutes are good and valid for the future, under precedent statutes ; though they did not even exist, when the former statutes were made. In *Plowden*, 120, and 127 a. b. *Sir Richard Bulkley v. Rice Thomas*, upon the stat. of 27 H. 8, c. 26, (uniting England and Wales,) upon the third exception ; Brooke, Saunders, and Browne were of opinion for the plaintiff. Staundforde, Pysne Justyce held indeed for the defendant : but the three others held, "that the subsequent statute communicated the remedy given by the preceding one."

By 5 Co. 49 b. *Vaughan's case*, second resolution, "all the statutes of England extend to Wales ; because Wales is made parcel of England."

And so also the Legislature declared, in 20 G. 2, c. 42, § 3.

The counsel for the defendant argued, that the present question depends singly upon the Acts of Parliament made relating to hawker and pedlars ; and that where several laws are made relative to the same thing, all of them must be taken together, or as one law.

The Act of Union did not mean or intend to meddle at all with the Hawkers Acts. And the Scots have never borne any part of the burthen imposed by the Acts relating to hawkers and pedlars : therefore they are not intitled to the benefit of them.

The Act of 5 Ann. Parliament 2, sess. 2, c. 19, § 1, continues the Hawkers Act for 96 years, without saying a word about Great Britain : and this Act was made immediately after the Union.

The 6 Ann. c. 5, § 4, continues these duties, within the whole kingdom of Great Britain, for one year after the expiration of the 96 years. So that this question can not properly arise, till after the year 1806.

The exemptions of 3 Ann. and of 9 W. 3 must be taken to be equally extensive : for, the provisions are the same in both.

This law never attaches upon the manufactures of Scotland. The Hawkers Act does not extend to them : therefore it can not exempt them. Nor ought it to extend to [1316] them, when the burthen does not. And it is a great advantage to Scotland, that neither the burthen nor the exemption do, for 96 years, extend to them.

And for this reason, the arguments from *Plowden* are out of the case : neither do the arguments from 5 Co. *Vaughan's case*, apply to the present case.

An exemption presupposes a lien. But here is no lien : therefore there can be no exemption.

And they alledged that their construction of these Acts of Parliament were confirmed by usage.

The counsel for the plaintiff replied that every man who sells these manufactures

\* V. 3 Ann. c. 4, s. 4.

† V. 3 Ann. c. 4, s. 4.

in England, is liable to the burthen: it is the selling in England, that renders them liable to the burthen, and within the exemption, therefore the burthen and the exemption are co-extensive. This is no particular or local regulation of trade: it is a benefit of trade, in general.

The Scotch do bear the burthen imposed by the Hawkers and Pedlars Acts, equally with the English: and they are equally obliged to take out a licence, if they sell manufactures not exempted out of those Acts.

The Court thought it proper that the following facts should be ascertained, before they gave their opinion; viz. "Whether, since the Union, persons coming from Scotland, and bringing linen or woollen goods into England, and selling them by wholesale, do or do not usually take out licences:" or "whether there have been any, and what convictions of such persons who have sold Scotch linen thus by wholesale."

After having taken time to inquire into these facts, and to consider it.—

Lord Mansfield now delivered the resolution of the Court.

He said they had had certificates from the commissioners, and answers to them; and replies, and rejoinders, and surrejoinders without end: but upon the whole, they (the Court) were clear that there was no pretence for supporting such an usage as had been pretended on the side of the defendant.

[1317] The usage then being out of the case, the single question is, "whether the linen manufactures of Scotland is or is not the linen manufacture of this kingdom, within the Act of 9, 10 W. 3, c. 27, and the Act of Union."

And we are of opinion, "that the linen manufacture of Scotland is the linen manufacture of this kingdom, within those Acts."

The argument "that the Scots are not intitled to the benefit, because they have never borne any part of the burthen," does not conclude to the point; because they will bear their part of the burthen, from the time when the Legislature have thought proper that it should commence upon them.

Therefore let the *postea* be delivered to the plaintiff.

REX *versus* INHABITANTS OF ST. DEVEREUX. Thurs. 13th May, 1762.

This case is already published, in my quarto edition of Settlement Cases, No. 162, page 509.

REX *versus* WILLIAMS. REX *versus* DAVIS. Saturday, 15th May, 1762. Information will lie against justices of the peace, for corrupt and oppressive practices.

An information was granted by the Court against the defendants, as justices of the peace for the borough of Penryn; for refusing to grant licences to those publicans who voted against their recommendation of candidates for members of Parliament for that borough. It appeared, that they had acted very grossly in this matter; having previously threatened to ruin these people, by not granting them licences, in case they should vote against those candidates whose interest these justices themselves espoused; and afterwards actually refusing them licences, upon this account only. And Lord Mansfield declared, that the Court granted this information against the justices, not for the mere refusing to grant the licences, (which they had a discretion to grant or refuse, as they should see to be right and proper;) but for the corrupt motive of such refusal; for their oppressive [1318] and unjust refusing to grant them, because the persons applying for them would not give their votes for members of Parliament as the justices would have had them.

REX *versus* BAYLIS ET AL', Justices of Peace for the City of Gloucester. Friday, 21st May, 1762. Unless justices act corruptly and oppressively an information will not be granted.

The same principle was laid down in this case, as in the last mentioned case; though the present rule "for shewing cause why there should not be an information," was discharged, upon the merits; the justices not appearing to the Court to have acted from the corrupt motive which the prosecutor of the rule had charged upon them.



V. ante, S. P. Pasch. 1758, 32 G. 2, pa. 556, 561, *Rex v. Young and Pitts, Esqs.* and pa. 653, *Rex v. Athay*, Mich. 1758, 32 G. 2.

The end of Easter term, 1762, 2 G. 3.

[1319] TRINITY TERM, 2 GEO. 3, B. R. 1762.

COLEBROKE *versus* DOBBS. Wednes. 16th June 1762. Counsel not being prepared is no cause for the Court to withhold from proceeding.

The plaintiff having obtained judgment against the defendant, in an action of debt for an amercement in the court leet of the manor of Stepney, the counsel for the defendant moved in arrest of judgment; and the case remained long depending: the first motion was made by Mr. Altham, on Wednesday 26th January 1757; the judgment of this Court was pronounced on Friday 26th January 1759; and the Exchequer Chamber affirmed it, in this Easter term 1762. It was debated on Friday, 10th February 1758, by Mr. Altham, supported by Sir Richard Lloyd, on the part of the defendant; and Mr. Lawson, supported by Mr. Norton, on the part of the plaintiff: and the Court took time to look into the record.

The Court of King's Bench, in Easter term 1758, directed the case to be set down in the paper as a concilium, for argument in the next following term, and to be then spoken to by one counsel on each side. It was afterwards set down accordingly, in the paper; and stood for argument upon Friday, 26th January, 1759: but the defendant's counsel said he was not prepared: having received his brief, but the preceding evening.

The Court told him, that was his client's own fault: the defendant ought to have been ready. And they ordered the *postea* to be delivered to the plaintiff.

Note—The only reason of mentioning this case at all, is to prevent its being hereafter cited as an authority; upon a mistaken apprehension of its having been determined in a solemn manner after argument and deliberation upon the weight of the objections.

[1320] REX *versus* RISPAL. Saturday, 19th June 1762. [S. C. 1 Black. 368.]  
Conspiracies are cognizable at sessions.

This was an indictment found at the Westminster Sessions of the Peace, against the defendant and two others, for a conspiracy: but the *certiorari* was brought by Rispal only.

The indictment set forth that Antoine Rispal, Henry Bolney, and John Delaporte, wickedly and maliciously devising and intending unjustly to vex and aggrieve one John Chilton, and to deprive him of his good name, fame, credit, and reputation, on, &c. at &c. wickedly, and unlawfully did among themselves conspire, combine, confederate, and agree, falsely \* and without any reasonable or probable cause, to charge and accuse the said John Chilton, "that he the said John Chilton, had then lately before taken out of a bag, a quantity of human hair, which bag was contained in a bale, which consisted of five bags of hair, of the goods and chattels of the said Antoine Rispal."

That the said Henry Bolney afterwards, to wit, on, &c. at, &c. in pursuance of and according to the said conspiracy, combination, confederacy and agreement between him and the said Antoine Rispal and John Delaporte so as aforesaid before had, did say to the said John Chilton "that he the said John Chilton was a man of credit: and that he the said John Chilton had better make it up, than have his credit blasted."

That the said Antoine Rispal, in pursuance of and according to the said conspiracy, combination, confederacy and agreement between him and the said Henry Bolney and John Delaporte so as aforesaid before had, afterwards, to wit, &c. at, &c. unlawfully and wickedly did exact, receive, and had of and from the said John Chilton the sum of thirty pounds of lawful money of Great Britain, of the monies of the said John Chilton, and also a certain promissory note in writing, bearing date the said 28th day of February in the year of our Lord 1758, signed under the hand of the said

\* See note in 2 Burr. 993.

John Chilton, for the payment of the sum of thirty-three pounds to one Thomas Higginson or order, six weeks after date, and which said note was indorsed by the said Thomas Higginson to the said Antoine Rispal; for and as a composition for the pretended offence above specified, and to desist from all prosecutions against the said John Chilton for the same; which said sum of thirty-three pounds hath been since paid by the said John Chilton, in discharge of the said note: whereas, in truth and in fact the said John Chilton never was guilty of the said offence so falsely charged on him as aforesaid, or of any such like offence. [1321] To the great damage, impoverishment and disgrace of the said John Chilton; to the evil example of all others in the like case offending: against the peace of our said late lord the King, his Crown and dignity; and against the peace of our present Lord King George the Third, his Crown and dignity.

The defendants Bolney and Delaporte pleaded "not guilty:" and the indictment was tried as against them, at the Westminster Sessions. Bolney was acquitted: Delaporte was found guilty.

The defendant Rispal did not then come in: but he afterwards came in, and pleaded "not guilty:" and was tried and found guilty. Whereupon he brought a certiorari to remove it into this Court. •

On Tuesday, 26th January last, Mr. Lucas, on behalf of the defendant, moved in arrest of judgment.

First objection—An indictment for such a conspiracy as this is, does not lie before the General Sessions of the Peace.

Second objection—The fact which the defendant conspired to charge the prosecutor with is no offence: it is only an indictment for "wickedly and unlawfully conspiring &c. falsely \*1 to accuse John Chilton of taking hair out of a bag;" (without alledging it to be an unlawful or felonious taking;) whereas the offence whereof the party was accused, ought to be particularly charged; no implication will make it good.

A rule was then made to shew cause why the judgment should not be arrested.

Afterwards on Thursday, 29th of April following, Mr. Lucas enforced his objections in arrest of judgment; and Mr. Solicitor General for the prosecutor, shewed cause against arresting the judgment: and it was then adjourned.

On Wednesday, 12th of May, it was argued by Mr. Baynham for the King; and Mr. Morton, and Mr. Stowe for the defendant.

The Court were of opinion, that the justices of peace had jurisdiction in the present case; a conspiracy being a trespass, and tending to a breach of the peace; and they held, that the indictment was well laid; and that the gist of the offence is the unlawful conspiring to injure the man by this false charge. They all therefore concurred in opinion, that the rule ought to be discharged.

Rule discharged.

[1322] HART, QUI TAM, &c. *versus* HAWKINS. Tuesday, 22d June 1762. [S. C. 1 Black. Rep. 372.] Defendant in a qui tam action cannot be discharged under the Lords Act.

On shewing cause against a rule which was drawn up generally, "to shew cause why the defendant should not be discharged out of custody of the marshal, as to the execution with which he stands charged in this suit;" but which only meant to bring in question, "whether he could be discharged as to the informer's moiety:" (for it was not pretended even by the defendant's own counsel, "that he would be discharged as to the Crown's moiety;"—)\*2

The Court resolved, clearly and unanimously, "that defendants in qui tam actions are not at all included in the 13th clause of the Act of 32 G. 2, c. 28, pa. (434,) for discharge of debtors in execution for sums not exceeding one hundred pounds, upon exhibiting their petition and assigning over all their estate and effects for the benefit of such of their creditors as shall have charged them in execution:" and accordingly they

Discharged the rule.

Mr. Solicitor General was for the plaintiff; and Mr. Baynham for the defendant.

[\*1 See note in 2 Burr. 993.]

[\*2 19 Vin. 522, and qu. 5 Co. 14 b. 11 Co. 72 a.]

REX *versus* SIR THOMAS HARRISON, Chamberlain of London. Wednes. 23d June 1762. [S. C. 1 Black. 372.] Bye-law that a butcher in London must be free of the Butcher's Company is good.

(In the Crown paper.)

A mandamus having issued, directed to Sir Thomas Harrison, Knight, Chamberlain of the City of London, to admit William Cope into the freedom of the said city; having served an apprenticeship to John Cope, a freeman of the Company of Cloth-Workers, and having afterwards duly admitted himself into the freedom of the said Company of Cloth-Workers.

The return sets forth, that the City of London is an ancient city, &c. and a body corporate, &c. and that there are several guilds, companies, &c. which guilds, companies, &c. have used and ought to have the overseeing, correction and government (a) of the several persons using and exercising the several arts, trades, mysteries and manual occupations belonging to such several societies, guilds, fraternities, fellowships and companies, in the use and exercise of such arts, trades, mysteries, and manual [1323] occupations within the said city and the liberties thereof, and that the said several societies, guilds, fraternities, fellowships and companies of the said city, and the men of the same, for all the time aforesaid have used and ought and yet use and ought to be under the order, government and regulation of the mayor and aldermen of the said city for the time being, with the commonalty of the said city in common council assembled.

The return further certifies a custom, "that every person, at the time of his or her admission into the said city, be free of some one of the aforesaid societies, guilds, fraternities, fellowships or companies of the said city; and be admitted into the freedom of the same city, as a freeman or freewoman of or in such society, guild, fraternity, fellowship or company."

Then it certifies another custom, "that no person not being free of the city may sell by retail, or keep any shop for retail sale, or use any occupation for hire, gain or sale, within the said city or its liberties;" and that there is another custom within the said city, "that if any customs, obtained, prevailing and used in the said city, be or have been difficult, or defective in any part; or if any things newly arising in the same city, where a remedy is not or hath not been already ordained, should want or have wanted amendment; the mayor and aldermen of the said city for the time being, with the assent of the commonalty of the said city in common council assembled, may apply and ordain, and have been used and accustomed to apply and ordain, and of right ought to apply and ordain, as often as to them shall or hath seemed meet, an apt and proportionable remedy in that behalf, for the common benefit of the citizens of the said city, and of other persons resorting thither; so as such ordinances be agreeable to good faith and reason, not prejudicial to the King and his progenitors, or to the people, and in no wise contrary to the laws and statutes of this kingdom." Which said customs, together with all the other customs of the said city, were ratified and confirmed to the then mayor and commonalty of the said city and their successors, by the authority of the Parliament of the Lord Richard formerly King of England, &c. the second after the Conquest, holden at Westminster, in the seventh year of his reign.

The return further certifies, that there hath been for all the time aforesaid and still is, within the same city, a certain ancient society or company of persons using and exercising the art, trade, and mystery of butchers, within [1324] the said city and the liberties thereof; which said ancient society or company, on the 20th day of June in the twenty-seventh year of the reign of the late Lord George the Second, King of Great Britain, &c. and long before, was and still is a body corporate, by the name of the Master, Wardens and Commonalty of the Art or Mystery of Butchers of

(a) Vide 2 Stow. 298, that the Butcher's Company were incorporated by Jac. 1; that the Joiners Company were incorporated by Queen Elizabeth, but as Stow saith had been a brotherhood ever since the time of Henry 7th, 2 Stow. 305. Qu. therefore how a custom which is necessary to restrain trade could be laid on them? it seems it must have been within the principle mentioned in *Ld. Raym.* 499.



the City of London; and that the said company or society is and for all the time aforesaid hath been one of the aforesaid companies or societies.

The return then sets forth a bye-law, made at a common council of the said city holden according to the custom, &c. on the 20th of June 1727; namely—that it was, by the authority of the same common council, in and by an Act of the said common council, intitled “An Act for Regulating the Company of Butchers of the City of London,” enacted, ordained, and established in manner and form as follows, to wit, “Whereas the Master, Wardens and Commonalty of the Art or Mystery of Butchers of the City of London are and have been an ancient fellowship and long since incorporated, and have obtained several Royal grants for confirmation of their privileges; and whereas many persons who exercise the trade of a butcher within the City of London, have obtained their freedoms of other companies, by redemption and otherwise; by reason whereof, the said Company of Butchers is much diminished and may fall in decay; for remedy whereof, be it enacted, ordained and established, by the Right Honourable the Lord Mayor, Aldermen and Commons of the City of London in this present common council assembled, and by the authority of the same, that from and after the 29th day of September next, every person not being already free of this city, occupying, using or exercising, or who shall occupy, use or exercise the art, trade or mystery of a butcher within the City of London or liberties thereof, shall take upon himself the freedom and be made a freeman of the said Company of Butchers; and that no person or persons now using or exercising, or who shall hereafter use, occupy or exercise the said art, trade or mystery of a butcher within the said city or liberties thereof, shall from and after the said 29th day of September be admitted by the chamberlain of this city for the time being, into the freedom or liberties of this city, of or in any other company than the said Company of Butchers; any law, usage or custom of this city to the contrary notwithstanding: provided always, that all and every person and persons not being already free of this city, and who now are or hereafter shall be intitled to the freedom of any other company within this city by patrimony or service, and ought (in pursuance of this Act) [1325] to be made free of the said Company of Butchers, shall be admitted into the freedom of the said Company of Butchers upon payment of such and the like fine and fees (and no more) as are usually paid and payable upon admission of the child or apprentice of a freeman of the same company.”

The return then sets forth, that the said William Cope was educated as an apprentice in the art, trade or mystery of a butcher; and at the time of the presentment of the said William Cope to the chamberlain to be admitted into the freedom of the same city (as in the writ is mentioned,) did use, occupy and exercise, and still doth use, occupy and exercise the art, trade or mystery of a butcher, within the said city and the liberties thereof; and that the said William Cope, at the time of such presentment as aforesaid, was not, nor yet is a freeman of the said Company of Butchers.

And for these causes, the chamberlain returns that he had refused to admit him into the freedom of the said city: nor can he admit him into it.

Mr. Yates, for the prosecutor of the writ, argued that this bye-law is totally void.

He premised, that *Wannell's case*, which he supposed would be relied upon by his opponent, and which is reported in 1 Sir J. S. 675, and in 8 Mod. 267, is distinguishable from this case.

Then he proceeded to object to the present bye-law.

First objection—This bye-law is beyond their jurisdiction.

Secondly, the cause of making it is insufficient.

First—It exceeds the jurisdiction of the makers of it. For first, it varies the constitution of the city essentially; secondly, it injures all the other companies of the city; and thirdly, it restrains trade.

First, it essentially varies the constitution of the city. *Rex v. Philips*, in Carmarthen, Trin. 1748, is an authority to say that a bye-law contrary to the charter is not good.

Here, all persons, in general, intitled to be free of any company, were before the making of this bye-law, intitled to their freedom of the city: whereas this bye-law expressly confines these persons to be free of the particular Company of Butchers.

[1326] The case of *Robinson v. Gros court*, in 5 Mod. 104, is good law, notwithstanding the case of *Wannell*, above-mentioned.

Secondly, it injures all the other companies in the city, particular customs of the

city may indeed be regulated: but ancient franchises can not be extinguished or dissolved by a bye-law. Now this bye-law is injurious to all the other companies.

Thirdly, it restrains trade. This bye-law narrows the privilege, and is an injurious restraint to trade and traders, and a clog to their liberty.

But it will be said, "that the mayor and aldermen have a power, by the custom, to do this." To which I answer—The custom does not empower them to go so far as this bye-law carries it: here is an additional expence laid upon persons intitled to their freedom.

He mentioned 5, 6 W. & M. c. 10, § 6, which obliges every person free of any of the companies, who shall take an apprentice, to bind him before the master and wardens of the company, whereof the master is a member; which apprentice, at the time of his binding, is to pay them two shillings and sixpence: and cited 1 Ro. Abr. 364, title Bye-Law, pl. 5, in the case of *Payne v. Hawghton*, a bye-law (about carmen and the hospital) holden void, because only for private benefit.

Second general objection—If the mayor and aldermen and common council really had power to make such a bye-law as this is, yet the cause here assigned for making it is insufficient.

Their bye-laws must be made for the common good of the citizens; where any ancient custom is difficult or defective: or any thing, newly arising, wants amendment.

But this bye-law is not agreeable to any of these requisites.

The return does not pretend that this Company of Butchers have any power of regulation over the members of their own company. \* Here, nothing is suggested, but the diminution of the Company of Butchers, and the danger of their falling into decay: and the increase of their profits is the only view of the bye-law. So that this is not a bye-law made for the common benefit of the corporation: the other companies are injured. (He here mentioned Sir Thomas Raym. 446, *Taverner's case*.) And no general grievance appears to have happened, to have occasioned the making of this bye-law.

Therefore he concluded, that it was, upon the whole, a bad one.

Mr. Eyre, contra, for the return, argued that this was a good bye-law.

First—It is within the jurisdiction of the makers of it.

Secondly—The cause of making it is a sufficient one.

First—It does not exceed their jurisdiction.

First, it does not vary any essential point of their constitution: it is only a regulation.

Every man intitled to the freedom of the particular company may be admitted to the freedom of the city, as easily as before. The right remains, in substance, as it was before: it is only regulated. Therefore it is not like the case of *Rex v. Philips*.

4 Co. 77 b. the case of corporations, proves that this is not varying the constitution.

Secondly, it is not injurious to the other companies. It only reduces them to their original institution.

Thirdly, it is not an unlawful restraint of trade in general, or of the privileges of particular persons. It does not exceed the custom.

No additional expence appears upon this return. On the contrary, there is a provision against it.

The statute of 5, 6 W. & M. c. 10, § 6, makes nothing against us.

Nor is 1 Ro. Abr. 364, pl. 5, applicable to this case.

The customs of London are subject to a reasonable control by the corporation: and this is a reasonable control.

As to the second general objection—this bye-law is agreeable to all the requisites. And the cause of making it is a sufficient and political one: it is to preserve the Company of Butchers from falling to decay and being de-[1328]-stroyed; and it will be attended with public benefit. It classes butchers by trade, in the particular company to which they belong: and the natural tendency of it is to regulate that company.

The case of *Wannell against The Chamberlain of London* was a solemn opinion, in

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\* N.B. *Wannell's case* being here cited from 8 Mod. 267, the Court treated that book with the contempt it deserves; and they all agreed that the case was wrong stated there. (I mean the old edition of that book.)

a case similar to the present. And in which the case of *Gros court* was considered and over-ruled.(b)

The reasons of making this bye-law are not confined to those particular and specifical ones which are mentioned in the preamble of it.

Mr. Yates, instead of replying, conceded, that if the case of *Wannell* was to be considered as an authority in point; and if the only objection in that case arose from a circumstance which does not exist in this; it would be useless for him to pretend to reply.

Lord Mansfield—It seems, that case was so.\* And the end of this bye-law is to reduce the matter to what must have been the original institution.

This is a regulation of a very extensive trade, that concerns every body who eats in the City of London.

It is not necessary that all the reasons of the bye-law should be given in the preamble of it.

Mr. Justice Denison—The case of *Wannell* was determined to the satisfaction of every body at that time: and I took the point to be thereby settled.

And this is not an alteration of the constitution; but agreeable to and a true exposition of the original custom.

This case is as different from that of *Rex v. Philips*, as light and darkness. That bye-law put the right of being elected into another set of men than the constitution required: whereas they could not alter the right to be [1329] elected. But this is only regulating the trade to what is most right and reasonable, and restoring it to the true meaning of the custom.

I am extremely satisfied with the resolution of the case of *Wannell*.

I think this a very good bye-law: and the objections are of no weight.

Mr. Justice Foster concurred in opinion, that this bye-law only restored the constitution to what it originally must have been and ought to be; and that it was right and reasonable, and must have been the meaning of the custom, "that each company should have the inspection of their own members."

Mr. Justice Wilmot quite concurred also. He said, the only doubt in *Wannell's* case turned upon the power of the Joiners Company to refuse admitting the man: but when that was gotten over, there was no more doubt.

Corporations were originally instituted for the regulation of trade: and every company must have had and ought to have the inspection and regulation of their own trade. It must be understood, *reddendo singula singulis*.

Therefore he was very clear, that this was no innovation or alteration of the constitution, but a restoration of it to its true and original institution.

Per Cur'. (clearly and unanimously)

Let the return be allowed.

REX versus PLUNKET, ESQ. Tuesday, 29th June, 1762. An attachment for a contempt, costs were granted.

An attachment had been granted against Mr. Plunket, upon the application of Sir Thomas Frederick (the plaintiff in an action brought by him against Mr. Lookup)

(b) In the report of *Wannell's* case in Str. 676, it does not appear that the case was over-ruled; but the answer given by counsel was, "that that case was adjudged on the foot of a dancing-master not being a trader."

\* It was determined in Michaelmas term, 1725, 12 G. 1, when the resolution of the Court was delivered by Sir Robert Raymond, then Lord Chief Justice. It had been twice argued. The first argument was in Lord Chief Justice Pratt's time; who held the bye-law to be reasonable, in respect of its tending to prevent frauds; and said "that the only difficulty was whether Wannell had a right to demand his freedom in the Joiner's Company;" having served a master who was not free of the joiners but of the merchant taylors. But the Court, after hearing a second argument, and taking time to advise, held "that a mandamus would lie to the Joiners' Company, to admit him." My note of this case of *Wannell*, is agreeable to Sir John Strange's report; it was upon a mandamus directed to Sir George Ludlam, then Chamberlain of London.



for Mr. Plunket's not appearing to give evidence, in obedience to a subpoena regularly served upon him. Mr. Plunket swore upon his examination, "that Sir Thomas had undertaken to give him further notice, if it should be necessary for him to attend; but that Sir Thomas neglected to do it." And he swore, "that he had been subpoenaed on a former intended trial of the same [1330] cause and had then attended; but the said intended trial did not come on." He further swore, "that he would have attended, if he had received such further notice from Sir Thomas, to do so."

Whereupon I reported "that he had cleared himself of the contempt." And it appeared to the Court, that the complaint against him was groundless and unreasonable, and must have been known to the prosecutor himself to be so.

The Court, after declaring it to be contrary to their general course and practice, to give costs to persons who had purged themselves of contempts upon their examination, in consequence of attachments which had been granted against them by the Court, on cause shewn; yet thought that it ought to be done in this particular instance; because the prosecutor must, within his own knowledge, be satisfied that this complaint was ill-founded and vexatious.

Therefore they ordered that Sir Thomas should pay costs to Mr. Plunket.

#### REX *versus* INHABITANTS OF STOCKLAND. 1762.

See this case at large in the quarto edition of my Settlement Cases, No. 163, page 508.

REX *versus* HARRIS ET AL'. Wednes. 30th June, 1762. [S. C. 1 Bl. 378.] The venue in a criminal information will not be changed but on strong grounds.

Mr. Stowe and Mr. Selwyn shewed cause against the following rule, which had been made on the motion of Mr. Ashurst; viz.

"Wednesday next after fifteen days from the Holy Trinity, in the second year of King George the Third.

"City of Gloucester: *The King against Gabriel Harris and Two Others.*—Upon reading the affidavit of Thomas Rickstock and others, it is ordered that Tuesday next be given to the defendants, to shew cause why this cause should not be tried at the next assizes to be held in and for the county of Gloucester, by a jury of the said county of Gloucester, instead of the city; upon notice of the said rule to be given to the said defendants in the mean time."

The affidavit, upon which the rule was obtained, went no further than to swear generally, "that they verily believed [1331] that there could not be a fair and impartial trial had by a jury of the City of Gloucester;" without giving any particular reasons or grounds for entertaining such a belief.

The cause to be tried was an information against the defendants (as aldermen of Gloucester) for a misdemeanor, in refusing to admit several persons to their freedom of the city; who demanded their admission, and were intitled to it, and, in consequence of it, to vote at the then approaching election of members of Parliament for that city: and whom the defendants did admit, after the election was over; but would not admit them till after the election, and thereby deprived them of their right of voting at it.

The prosecutors had moved for this rule, on a supposition "that the citizens of the city could not but be under an influence or prejudice in this matter:" though there was, in fact, a list returned up to the proper officer, of above six hundred persons duly qualified to serve on the jury.

The cause now shewn by Mr. Stowe and Mr. Selwyn on the part of the defendants, against trying the matter by a jury of the county at large, instead of a jury of the city, was, that this was an application both unprecedented and ill-founded. For that, as this information was a criminal proceeding, it was local and must be tried by a jury of the county where the fact arose: and if that were not so, yet here is no kind of reason shewn for going out of the ordinary course, but mere unsupported imagination.

In the case of *The Mayor of Poole v. Bennet*, in 2 Sir J. S. 874, the action being laid in the county of the town of Poole, for a duty claimed to be due to the corpora-

tion; and it appearing manifestly, that there could be no fair trial in Poole; the venue was indeed changed to the county of Hants. But that was a civil action.

In the case of *The King* against *Clendon*, in 2 Sir J. S. 911, an information was laid for an assault in Middlesex: and the Court refused to amend it, by laying it in London.

*Rex v. Burton et Al*, Tr. 1754, 27, 28 G. 2, B. R. was an information for a false return to a mandamus, laid in the town of Nottingham; and the Court refused to change the venue from the town to the county of Nottingham, or to any other county (though it was sworn there was not a sufficient number of freeholders in the town, who were not burgesses :) because it was a criminal proceeding, [1332] and the cause ought to be tried where the facts arose. And yet that information might have been originally laid in Middlesex.

The case of *Norwich*, Clift's Entr. 741, pl. 2, was a civil action.

There is a vast difference between civil and criminal proceedings. In the latter, the Court will not grant a rule to inspect books: it was refused last Hilary term, in the cases of *Rex v. Head*, and *Rex v. Heydon*, and in *Dr. Purnel's case* in Hil. 1748.

Mr. Ashurst, supported by Mr. Solicitor General and Mr. Morton, argued on behalf of the prosecutors, for making the rule absolute.

They denied that there was any distinction, in this respect, between civil and criminal proceedings. An indictment may be removed by certiorari, out of a county where a fair trial can not be had, to be tried in one where it may. And they urged, that here must be a failure of justice, if it was not done: for, here are no persons in the City of Gloucester, who are impartial and unprejudiced. The affidavit, "that it is verily believed that an impartial and fair trial can not be had by a jury of the city," stands uncontradicted; and must, therefore, be taken for fact and truth.(d)

*Burton's case* was an application by the prosecutor, to change the venue, in an information for a false return to a mandamus; and the refusing to change the venue did not occasion a failure of justice there; because the prosecutor of the mandamus might bring his action for a false return. Whereas here must be a failure of justice: which shall never be suffered. The case of *The Mayor of Poole* against *Bennet* was determined upon this principle. And the case of *Norwich* also went upon this ground.

The present case is almost in point (they said) with that of *Norwich*: and there was the same suggestion as they now make.

Therefore they concluded with praying to have their rule made absolute; and that they might have liberty to enter a suggestion on the record, (as was done in that case,) "that there can not be a fair and impartial trial had in the county of the city;" and therefore prayed that the venire may be directed to the Sheriff of the county of Gloucester, to return a jury out of the county at large. (V. Clift's Entries, p. 741, title, *Venire Facias*, pl. 2, *Calum-[1333]-nia Juratorum Civitatis Norvici*.) So, in the *Berwick* causes, a suggestion was entered on the roll. (See it in the preceding volume, page 863.)

Lord Mansfield—No two things can be more different than changing the venue, and continuing it as it was, with such a suggestion on the roll as is now proposed. In the Nottingham case, *Rex v. Burton et Al*, the motion was, "to change the venue:" this is, "to enter a suggestion on the roll, with a nient dedire."

Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter can not be tried at all, or can not be fairly and impartially tried in the proper county, it shall be tried in the next adjoining county. The case of *Berwick* was determined upon the foundation—"that the writ of venire facias did not run there." And so it is likewise in the Cinque Ports. In these cases, there could otherwise be no trial had at all. That of *Norwich* was a case where, in respect of the particular circumstances, there could not be a fair and impartial trial had by a jury of that city.

But, as the party can not traverse such a suggestion, when entered by a rule of Court, there must be a clear and solid foundation for it.

(d) Qu. For in that case, according to a MS. note of it, an action could not have been supported, because no person or persons in particular, was or were interested: for it was a mandamus to the corporation of Nottingham, to proceed to an election for six burgesses to fill up a vacancy of that number in the common council, therefore an action would not lie. See also Salk. 374, pl. 16.

Now, in the present case, this general swearing to apprehension and belief only, is not a sufficient ground for entering such a suggestion; especially, as it is sworn on the other side, "that there is a list returned up, consisting of above six hundred persons duly qualified to serve."

Surely a person may espouse the interest of one or another candidate at an election, without thinking himself obliged to justify, or being even inclined to defend, the improper behaviour of the friends or agents of such candidate.

This question to be now tried, is no general question of right, or a general question that can affect the corporation in future, or by way of example: it is only, "whether the present defendants, who were not the candidates, acted partially and unjustly, upon an occasion and in a matter where they alone are personally concerned;" and it is a mere personal charge upon them.

So that here is a want of foundation in fact, for such a suggestion; and therefore there is no reason for the Court's granting what is now prayed.

[1334] Mr. Justice Denison—The Court will be cautious of admitting the entry of a suggestion which cannot afterwards be contradicted.

It is true, that where an impartial trial can not be had in the proper county, the venire may be awarded to the next county. In a Norwich case, relating to a bridge, the City of Norwich and the county at large being both interested, the venire was therefore awarded into Suffolk.

But there ought to be the clearest evidence in the world, to ground such a suggestion upon; or it must arise out of the record itself.

Now here it does not arise out of the record; nor is there a sufficient ground to support it.

The case of *The King against Burton and Others*, in Nottingham, was a motion to change the venue. In this method of entering a suggestion upon the roll, the venue remains; and the Court only award the venire to the next adjoining county: but they ought not to do it in this case; because the place of trial ought not to be altered from that which is settled and established by the common law, unless there shall appear a clear and plain reason for it; which can not be said to be the present case.

Mr. Justice Foster was of the same opinion.

Here is no fact suggested, to warrant the conclusion "that there can not be a fair and impartial trial had by a jury of the City of Gloucester." It is a conclusion without premises. The reason given, or rather the supposition, would hold as well, in all cases of riots at elections.

This is no question relating to the interest of the voters: it is only, "whether the defendants, the persons particularly charged with this misdemeanor, have personally acted corruptly or not."

Mr. Justice Wilmot concurred.

There was no rule better established, he said, than, "that all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed." And therefore that rule ought never to be infringed, unless it plainly appears that a fair and impartial trial can not be had in that county.

Where that does plainly appear, he said he had no doubt of the Court's having power to depart from the general rule.

[1335] The case of *The King against The Inhabitants of the County of Nottingham*, in 2 Lev. 112, was a question upon the right of repairing a bridge. There the information brought against them for not repairing it was tried at the Bar, by a Middlesex jury. That was done by consent: and it was a sort of civil right that was to be tried. However, if it be considered as a criminal case, all the inhabitants of the county were interested.

The true rule about suggestions entered upon the record, is "that the facts proving that a fair and impartial trial can not be had in the ordinary course, must be themselves suggested upon the record." Whereas, here, it is only a conclusion without premises; it is only supposed, conjectured, "they verily believe," that there can not be a fair and impartial trial by a jury of the city. Nor, in the nature of the thing, can such a suggestion be credited. It does not follow, that because a man voted on one side or on the other, he would therefore perjure himself, to favour that party when sworn upon a jury. God forbid! the freemen of this corporation are not at all interested in the personal conduct of these men upon this occasion; the same reasoning would just as well include all cases of election-riots.



Therefore, though he had no doubt, he said, of the authority and jurisdiction of the Court, to award the venire into another county, upon a suggestion of facts clearly and fully proved to the Court, shewing "that a fair and impartial trial can not be had in the county where the fact is laid:" yet he was as clear, that in this case there was no sort of foundation for such a suggestion being entered.

Per Cur'—unanimously.

Rule discharged.

V. *Dean and Chapter of Gloucester versus Pitt et Al.* Trin. 1767.

REX versus PITT. REX versus MEAD. 1762. [S. C. 1 Black. 380.] Sentence on conviction of bribery.

[Referred to, *Drinkwater v. Deakin*, 1874, L. R. 9 C. P. 635.]

The defendants having been convicted of bribery at an election for members of Parliament, upon an information granted by the Court, as at common law; the Court had a doubt about the sentence they should pronounce upon them.

It was argued on Friday last, (a) (the 25th of this instant June) by Sir Fletcher Norton, Solicitor-General, Mr. [1336] Morton, and Mr. Thurlow for the defendants; and by Mr. Serjeant Davy, Mr. Serjeant Burland, and Mr. Popham, for the prosecutor.

The counsel for the defendants argued, that this Court had no jurisdiction at common law, to punish bribery at elections to Parliament. There is no instance of any such judgment given by this Court: which proves that there can be none given by them.

The House of Commons (b) are the proper judges of this matter. 4 Inst. 23, *Thomas Long's case*, of *Westbury*, was adjudged in the House of Commons, secundum legem et consuetudinem parliamenti: and the mayor was fined and imprisoned; and Long removed.

Lord Mansfield—That was for a contempt; in which case the House of Commons had jurisdiction. The latter part can not be true: there could be no fine set there; it must have been in the Star-Chamber.

The counsel for the defendants proceeded.

If this Court can give any judgment at all, it can be no more than a judgment "quod convictus est;" as the two years limited by the \* statute are not yet expired. For, otherwise, the party might be liable to a double punishment for the same offence: since any common informer may still bring an action, being within the time limited; and the offender will after judgment be liable to the penalty of five hundred pounds, and also to the disabilities mentioned in the † statute.

In *Rex v. † Luckup*, 2 Sir J. S. 1048, upon the Gaming Act, the judgment was only "ideo convictus est:" and that was after argument and consideration. (c)

(a) Vide 1 H. H. P. C. 171. 2 Hawk. 210, 211. 2 Atk. 672. 4 Doug. 288, 289. 6 Durn. 630, and post, 1359, 1423, 1586.

(b) There is another precedent there cited, to the same point; and see 2 Doug. 402, that the case of *Thomas Long*, as cited in 4 Inst. 23, is warranted by the journals of the House.

\* 2 G. 2, c. 24.

† V. 2 G. 2, c. 24, s. 7, and s. ult.

‡ His name was Lookup and his coat of arms is an eye in base, looking upwards.

(c) Winning by fraudulent gaming was an offence at common law; and by 9 Ann. c. 14, s. 5, every person winning by fraud above 10l. at one time, or one sitting, being thereof convicted, upon indictment or information, shall forfeit five times the value of the money so won, and be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; the penalty to be recovered by any one who will sue for the same. Now in the above case of *The King v. Luckup*, it appears from a MS. note of that case, that it was holden after great argument and consideration, that the Court could not set any fine on a person convicted on an information for the above offence; and though that statute is penned very particularly, which prevents this determination from being in point on the present case, yet the reasons, or some of them, for that determination, apply to this case.

Here, indeed, the action may be brought for the penalty of five hundred pounds, without such a judgment.

The Court may therefore, in the present case, either give this judgment "quod convictus est;" or postpone and suspend the giving any judgment, till after the expiration of the limited time.

At least, the punishment ought to be greatly mitigated, in case the Court should now give any judgment at all.

The counsel pro Rege said the statute of 2 G. 2, c. 24, does not take away the offence at common law: it only inflicts a [1337] new further penalty. Therefore the Court may now inflict the common law punishment: the Legislature have only inflicted an additional one. The punishments inflicted by this Act are cumulative. *Queen v. Wigg*, Salk. 160. *Hawk. P. C.* 178. And they cited 2 Hale's Hist. P. C. 191, to prove that the party may still be indicted at common law. But they made a doubt whether an action could be brought upon the statute after a judgment given against the defendant at common law.

This is now to be considered in the same manner as if it were a conviction upon an indictment: for, whether the Court had thought proper to grant an information or not, yet the same conviction might have been obtained upon an indictment. However, it appears by the words of the statute itself, ("or being any otherwise lawfully convicted thereof,") that an information might properly be granted within the limited time of two years.

Lord Coke in 2 Inst. 200, (upon W. 1, c. 20, de Malefactoribus in Parcis,) says, it is a maxim in the common law, "that a statute made in the affirmative, without any negative expressed or implied, does not take away the common law."

Lucas, 336, *The King against Diron and his Wife*, an indictment for keeping a gaming-house, is in point. That was laid "contra formam statuti," and was brought within the time limited by the statute for bringing the action for the penalty.

In 6 Mod. 42, *Regina v. Orbell*—there is no such objection: and yet it appears by the record, that the indictment was brought within the limited time.

In *Rex v. Wolston*, Fitz. Gibb. 66, (for blasphemy,) the above-mentioned maxim was laid down. So in *Rex v. Robinson*, Tr. 1759, 32, 33 G. 2, B. R. Yet there the parish might have proceeded for the allowance. (V. ante, p. 799.)

The Act of 2 G. 2, c. 25, does not take away the common law proceeding for perjury.

Though the reasons urged might be an objection against actually punishing them a second time, yet the mere apprehension of a second punishment is no reason against punishing them once.

In 2 Shower, 30—*Rex v. Stanton*, judgment was given for the King upon the information, though an action lay for the party.

[1338] And very few prosecutions are commenced at common law, for the facts punishable by such Acts of Parliament as this is.

The counsel for the defendants replied, that though a prosecutor may have an election of one of two remedies, yet that does not at all tend towards proving "that he shall have both." It is contrary to the law of this country; it is contrary to natural justice, that the party should be twice punished for the same offence. And this judgment now prayed against the defendants, would be no bar to an action in a civil suit.

"Ideo convictus est" is the proper judgment. The disabilities will follow it: and the party will remain open to an action for the penalty. The judgment ought to be general: the disabilities only follow as a consequence.

This case differs from the cases that have been cited; and is not at all like cases of a person being liable to both civil actions and criminal prosecutions for the same matter: for, they are diverso intuitu; whereas these are both of them penal.

The Court directed the inquiry, "whether, since the Act of Parliament, the propriety of granting informations before the time limited for bringing an action upon the statute was expired, had been solemnly considered."

Upon examination, it came out "that no objection had ever been made upon the ground of the penalties introduced by the Act: where the affidavits were full, the rules had been made of course."

Lord Mansfield now delivered the resolution of the Court.

He premised, that wherever a practice, which is wrong or unreasonable, has

happened to have been introduced, for want of a sufficient advertence to the consequence of it, the best way is to set it right immediately, as soon as the inconvenience is observed, if former cases be not affected by the retrospect.

Bribery at elections for members of Parliament must undoubtedly, he said, have always been a crime at common law; and, consequently, punishable by indictment or information. But the Act of 2 G. 2, c. 24, has introduced a very severe penalty in order to enforce the laws then already in being, and because they had not been sufficient [1339] to prevent the evil. It enacts in the seventh section,—“That if any person, claiming a right to vote, shall ask, receive, or take any money or other reward, or agree or contract for any, either to give his vote or to forbear voting, in any such election; or if any person, by himself or any one employed by him, shall by any gift or reward, or by any promise, agreement, or security, for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes in any such election; such person so offending shall for every such offence forfeit five hundred pounds (to be recovered as before directed,) together with full costs of suit; and after judgment obtained against him in any such action of debt, bill, plaint, or information, or summary action, or prosecution, or being any otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election to Parliament, and also to hold any office or franchise as a member of any city, borough, town-corporate or Cinque Port, as if naturally dead.” And the last clause limits the prosecution to be within two years.

It is true, that some informations at common law have, since the commencement of this Act, been applied for and granted within the two years. But it now appears, upon looking into the matter, that the granting such informations at the suit of a prosecutor, subsequent to the making of this Act of Parliament, was a point never litigated or argued, or particularly considered: it probably was thought warranted by *Spinage's case, in the borough of Abingdon*;\* which, very likely, was apprehended to be a precedent for it; though, in fact, it was not a precedent for granting these informations for bribery at elections of members to serve in Parliament; being, as it appears now it comes to be looked into, only for bribery at the election of a mayor of the corporation. In such informations as are carried on by private prosecutors, the costs stand upon a very different foot from the costs given to those who sue upon this statute: this Act gives the person who recovers the penalty, full costs of suit.

This crime certainly still remains a crime at common law. The Legislature never meant to take away the common law crime; but to add a penal action.

This appears by the words, “or being any otherwise lawfully convicted thereof:” and we are all of us clear, “that it still remains a crime at common law.” And the present conviction, upon an information granted by the Court, is just the same as if the defendants had been convicted upon indictment.

[1340] But this case has raised a great doubt in our minds, upon the propriety of granting informations within the two years.

The shewing cause, and the trial, may be auxiliary to the penal action. After conviction, the Court is under a great difficulty “what punishment to inflict;” not knowing whether the penal action may follow, or not.

As at present advised, we all think, that in general, the Court never ought to interpose by information.

After judgment for the penalty, they certainly would not interpose, to grant a second prosecution in an extraordinary way, by information.

By parity of reason, it ought not to be granted while the person is liable to such judgment.

If there is evidence to convict, there is evidence to support the action of a common informer.

There may possibly be particular cases, founded on particular reasons, where it may be right to grant informations, before the limited time for commencing the prosecution is expired: but the present case is not one of them. And the Court now considers the two defendants as remaining still liable to the forfeiture and disabilities directed by the Act of 2 G. 2, as the time limited for commencing prosecutions upon it is not yet expired: and therefore in adjusting the punishment which ought at present to be inflicted upon them, they do not consider it as a punish-

\* P. 1754, 27 G. 2, B. R.



ment adequate to their offence; but as an additional punishment, over and above the punishments inflicted by the Act of Parliament; to which statute punishments they still remain liable.

Therefore, since both of them have already suffered imprisonment for some time, they only order that

Pitt be imprisoned for six months longer; and

Mead, for three months longer.

V. post, 1359, 1389, and *Rex v. Smith, Esq.* and *Rex v. Brand Hollis, Esq.* Pasch. and Trin. 1776, 16 G. 3.

The end of Trinity term, 1762. 2 G. 2.

[1341] MICHAELMAS TERM, 3 GEO. III. B. R. 1762.

GOVERNOR AND COMPANY FOR SMELTING DOWN LEAD, &c. *versus* RICHARDSON, ESQ. AND OTHERS. Friday, 12th Nov. 1762. [S. C. 1 Bl. 389.] Lead-mines are not chargeable to the poor.

[See *Morgan v. Crawshaw*, 1871, L. R. 5 H. L. 314.]

This was an action of trespass, for taking goods by way of distress; tried in Cumberland: and a verdict for the plaintiffs, subject to the opinion of the Court upon a case reserved: the state of which, was long; but the question contains all that is necessary to be reported.

It was, "whether the plaintiffs, lessees of certain lead-mines in the parish of Aldstone in the county of Cumberland, rendering as rent a certain part of the lead-ore gotten thereout, were liable, in respect of the said lead-mines, to be rated to the relief of the poor." (a)

This case was first argued, on Tuesday, 15th June 1762; by Mr. Clayton for the plaintiffs, and Mr. Yates for the defendants.

Mr. Clayton, on behalf of the plaintiffs, argued that they were not liable to be rated, upon the facts stated in this case.

They are not within 43 Eliz. c. 2, which, in naming the persons rateable, mentions occupiers of coal-mines, but avoids the mention of any other sort of mines.

Lead, tin, or copper-mines are wholly fluctuating and uncertain as to profit or loss: they may happen to produce no profit at all to the adventurer: nay, they are very frequently detrimental to those who hire and work them. [1342] And it is not stated, that these lead-mines produced any profit to the lessees: though they did to the lessors. And therefore lead, tin and copper-mines pay to the land-tax, which is a charge upon the landlord; whereas the poor-tax is a charge upon the lessee, who may be a loser, instead of a gainer. But the reason why lead, tin and copper-mines pay even to the land-tax is because they are expressly mentioned and specified in the Land-Tax Acts.

Lead-mines have never been used to be taxed. They are not taxed in the counties of York, Durham, Northumberland, Cumberland, and Derby, nor in North Wales; nor the tin-mines in Cornwall. And these recent instances in 1757 and 1758, and 1760 and 1761, are of no sort of weight.

The expence of these mines may exceed the profits: and the profits are, at best, uncertain, casual and precarious; and as much so, as the heriots and other casual profits of a manor; which were determined not to be rateable to this tax, in *Rex v. Vandewall*, P. 33 G. 2, B. R. (V. ante, p. 991.)

(a) A lessee under the Crown of cope and lot, made an under-lease, reserving a certain rent, the lessor is liable to be assessed to the poor for this rent; for the poor's rate is a rate, not on the estate, but on the person in respect of the estate; and the reason why the lessor is not in ordinary cases liable to be rated, is because the tenant is rated: and therefore the landlord is excused, because otherwise the same land would be twice charged; but in this case the tenant is not rateable, 3 Burr. 1341, and therefore there is no reason why this sort of property should be excused, 17th of May, 16 G. 3, B. R. adjudged on a special case stated at Derby Assizes. *Rowls v. Gell*, Cowp. 451.

Mr. Yates, contra, for the defendants, argued that the occupiers of lead-mines are liable to this rent.

They are equally within the reason and meaning of 43 Eliz. c. 2, as coal-mines are, and that Act only names coal-mines by way of instance or example; but intends to take in all other mines also. So, when executors only are specified in an Act of Parliament, it shall nevertheless include administrators; and where the warden of the Fleet only is particularly named, yet it shall be extended to all gaolers.

The Land-Tax Acts speak of mines in general; and the Act of 17 G. 2, c. 37, (relating to improved wastes and drained marsh-lands) after reciting the words of 43 Eliz. (which are "occupiers of coal-mines,") repeats them in the enacting part by the general term "mines."

Coal-mines are as uncertain and precarious, as other mines; and yet they are specifically made liable. Even tithes are fluctuating in their value.

If any of these are rated, at times when they are not profitable, the proper remedy is by way of appeal.

These mines may bring in an immense profit; and they certainly introduce many poor into the parish.

Profits of manors are not annual profits; no more [1343] are the profits of timber, but profits of a market are rateable to the poor. Dalton, cap. 73, p. 218. So are all things that yield a yearly revenue.

Mr. Clayton, in reply, enforced what he had before urged; and observed as to 17 G. 2, c. 37, that it refers to 43 Eliz. And therefore the general word "mines" must be understood only of such mines as are therein specified, viz. coal-mines.

The Court and counsel agreed that it must be determined upon the general question, "whether lead-mines are rateable to the relief of the poor."

Lord Mansfield said that this was a very extensive and general question, with regard to the property of many persons in the kingdom: and would have it argued again; and he wished that the fact of rating even coal-mines might be inquired into. If they be not always rated, it must arise from some other reason than the construction of the Act of Parliament.

Mr. Just. Wilmot mentioned an Act of Parliament made in the same reign (31 Eliz. c. 7), where the Legislature speaks of "any mineral works, coal-mines, quarries, &c."

#### Uterius Concilium.

N.B. The certificates, procured subsequent to the foregoing argument, tended, in general, to shew "that it was not the usage, to tax lead-mines."

Lord Mansfield now, upon a second argument, stated the question (for the observation of the Bar) to be this:—"Whether the plaintiffs, who are lessees of lead-mines within the parish of Aldstone, who pay no rent, but only a certain part of the ore raised, are liable, in respect thereof, to be rated to the relief of the poor."

Mr. Solicitor General (Sir Fletcher Norton) for the plaintiffs, at present, only stated the case.

Mr. Morton, contra, for the defendants, (the justices and parish officers,) insisted that the uncertainty of the profit to the landlord made no difference as to the lessee.

He argued that lead-mines were rateable; and urged, that coal-mines were only mentioned by way of example, in 43d Eliz.

[1344] The case of *Rex v. Vanlewail* is not at all, he said, applicable to this case: that case went upon another person's having been already rated for the casual profits; and not upon the uncertainty of the profits. There, the same fund was taxed twice.

The surface of the ground is lessened in value, by the working of the mines; consequently, if the surface be taxed at less than it used to be, the complement ought to be made up by the tax upon the lessee of the mines, and the labourers in lead-mines equally gain settlements, as other servants of the like kind do.

Lord Mansfield prevented Mr. Solicitor General from replying; for that the case was too plain to need it.

He stated the question, as above; and observed that the words of the Act of 43 Eliz. c. 2, are "coal-mines," not mentioning any other kind of mines; and that is equal to an express exception or exclusion of all other mines. For, coal-mines are not lead-mines, tin-mines, copper-mines, iron-mines, or any other but coal-mines: and there were, at that time, other mines in this county.

These other mines are governed by particular laws. The worker of them is not

always the owner of the soil. The particular laws of them give the right of working (under certain regulations and conditions) to other persons than owners or lessors, or persons having any right of property in them. This alone might be a sufficient reason to except them out of this Act of Parliament. And as there may be a reason for the strict letter of the statute, and none appears for extending it beyond the letter, we have no ground, or authority, or pretence for giving it that extensive construction; nor is there any foundation for imagining that the Legislature meant so.

And the fact, upon certificate (though the certificates do not exactly concur in every particular) appears to be "that lead-mines are not rated throughout England; and particularly in Derbyshire, Somersetshire, and Cornwall." And my brother Adams, who was desired by us to inquire, gives the same account, upon his return from the Western Circuit, with regard to the tin mines in Cornwall.

I am now keeping clear of inhabitancy, which is no part of this case: for, these persons are not rated as inhabitants, but only as lessees.

[1345] Therefore the postea ought to be delivered to the plaintiff.

Mr. Justice Denison concurred.—In the 43d of Elizabeth, coal-mines are put as an exception, not as an example. The specifying them excludes other sorts of mines.

Mr. Justice Wilmot also concurred.—Lead-mines and coal-mines essentially differ as to the expence of finding: though not so much, in the expence of working. There is infinite expence and uncertainty in finding lead-mines. They are governed by particular laws: and the finder is obliged to pay certain proportions to the owner of the land.

Therefore it is reasonable that lead-mines should not be put upon the same foot with coal-mines: because there is so much greater risque in the search after them; even so much, that a man may be ruined by it, instead of succeeding.

The Legislature have not, in this statute, mentioned lead-mines, but only coal-mines: and *expressio unius est exclusio alterius*. There is no reason to think they meant to include them.

Therefore this case is not within the words or meaning of that Act. And I think this is confirmed by the Act of 31 Eliz. c. 7, against the erecting and maintaining of cottages; which excepts\* "cottages for the habitation of workmen and labourers in any mineral works, coal-mines, quarries, &c." So that when they had it in contemplation, they specified them particularly.

Therefore I am clear that this Act of 43 Eliz. c. 2, does not extend to lead-mines.

Per † Cur'.—Let the postea be delivered to the plaintiffs.

BIRD *versus* RANDALL. Tuesday, 16th Nov. 1762. [S. C. 1 Bl. Rep. 373, 387.] No action lies for seducing a servant from his master, who has been paid the stipulated penalties for leaving him. [See Vin. tit. Bar. (B 2). 2 Bosanq. 69.]

[See *Voight v. Winch*, 1819, 2 Barn. & Ald. 668; *Brunsdon v. Humphrey*, 1884, 14 Q. B. D. 147.]

This was a case reserved at Nisi Prius at Guildhall, upon a trial before Lord Mansfield, in an action upon the case, wherein a verdict was given for the plaintiff, and twenty pounds damages assessed: but [1346] subject to the opinion of the Court, upon a case stated.

The substance of the case stated was shortly this.

The plaintiff Bird and one Mary Hogg were silk-dressers, and partners in trade. And articles of agreement were entered into between the plaintiff Bird and one Burford, dated 25th of August 1760; whereby Burford covenanted with Bird, to serve the plaintiff Bird and the said Mary Hogg and the survivor of them, as a journeyman in their said trade and business of silk-dressers, for five years from the date; and to work at the usual and accustomed house daily, and not to discover the mysteries of the trade, or the secrets of the plaintiff and his said partner: and Bird covenanted to pay Burford, weekly, twenty shillings a week for his work. And for the true performance of all and every the covenants and agreements contained in the articles, each party bound himself to the other in the penalty of one hundred pounds.

The case then goes on, and states that Burford accordingly entered into the said

\* V. § 5.

† Mr. J. Foster was absent.



service, under the said articles: and that he continued therein until the 19th of September 1761: when the defendant, knowing of the said articles, persuaded, procured, and enticed him to depart from and out of it; and he accordingly did so: and never returned again into it.

It further states that the plaintiff Bird, in Trinity vacation 1761, and before the commencement of the present action against Randall, brought an action of debt against Burford for the penalty of one hundred pounds for his departing out of the said service; and obtained a verdict and judgment against him in the said action, and recovered the said money, with costs: but the said monies (the debt and costs) so recovered were not actually paid to him by the said Burford, till the 29th of March 1762; which was after the commencement of the present action, but before it came on to be tried.

The present action, (which is an action of trespass upon the case,) is brought by the same plaintiff Bird, against the present defendant Randall, for the enticing and seducing the said Burford out of the plaintiff's service.

The question was, "whether the present action be maintainable or not, under the circumstances of this case."

It was first argued on Tuesday, 22d of June 1762, by Mr. Stowe, for the plaintiff, and Mr. Ashhurst, for the defendant; and again, on Friday the 12th of this month [1347] of November 1762, by Sir Fletcher Norton, Solicitor General, for the plaintiff, and Mr. Morton for the defendant.

Upon the first argument, the Court did not declare any opinion; but only threw out some doubts, by way of breaking the case; and desired to hear it argued again.

Mr. Solicitor General.—The question is, whether the plaintiff, who has already recovered the penalty against the servant, can bring this action against the seducer.

He agreed, "that if the plaintiff had once received a full satisfaction for the same thing, he could not recover a second." And also, "that a recovery of a penalty upon a deed is a full bar to an action to be brought upon that deed." But he said, it must be allowed to him that the party, to whom the deed is made, may bring either covenant or debt, at his election: and that a jury, in an action of covenant, even upon such a deed where there is a penalty, are not confined to give damages within the penalty, but may go beyond it.

He repeated his concession, "that a person who has once recovered a full and complete satisfaction from one man, shall not recover it again against another for the same thing," as upon indorsed notes; or upon trespasses committed by several persons; or upon a rescue and escape; or, the penalty on breach of a covenant in a lease; or in an action of waste.

But he denied that here has been a full satisfaction or recompence for the same thing.

A seduction of a covenant-servant is undoubtedly a good cause of action against the seducer: and it arises *ex delicto*, *ex maleficio*. But the ground of action against the servant himself arises *ex contractu*.

Therefore a recovery in an action for a breach of contract against one person, cannot be a bar to an action against another for a tort.

Bars must be reciprocal. But the servant, in a subsequent action against him, could not have made use of a recovery against the seducer: neither, therefore ought the seducer to make use of the action against the servant. It is not a full satisfaction according to the circumstances of the case.

[1348] If an offender in perjury be punished, that shall not hinder the suborner from being punished too.

The action against the servant, and that against the seducer are *diverso intuitu*: and the recovery in one can not be a bar to the other.

There are cases to this effect; though not in point.

In case of an action brought against me by the instigation of a third person, or of a violation of my property; I may have a remedy not only against the injurer, but also against the instigator. *Aleyn 3, Newman v. Zachary, M. 22 C. 2.* And a case there put by Hale, of slander of title; where the person whose title is slandered, shall have an action against him that caused the disturbance, though he has a remedy against the trespasser. A recovery is no bar, unless it be a recovery of the same thing; a satisfaction for the very same injury. So it is on notes of hand: so, on torts; it must be the same trespass. Whereas here, the cases of the two defendants, the servant and the seducer, are very different: the injuries are different injuries.

Besides, at the time of bringing the present action, there was no actual satisfaction had: for, though there was judgment, there was no execution. Therefore it ought to have been pleaded. But what has arisen since the commencement of the action could not be given in evidence in bar of it: though it might, in mitigation of damages: and they have had the benefit of it, in mitigation of damages.

It has been said, "that this was *damnum sine injuria*:" which I deny. For, damages were here proved: and if they had not, the law would imply an injury, whether it could have been directly proved, or not.

It is not like erecting a new building, so as to stop the lights of a house. Here, the seduction itself was a wrong and an injury to the master.

It has been said, "that the servant was only liable to one hundred pounds penalty: after paying which, any man might hire him." To which, I answer, he could not do it, whilst the "servant was under the unexpired contract with the former master."

[1349] Mr. Morton, contra, for the defendant, argued that the recovery against Burford the servant was a full and complete satisfaction for the injury done to the plaintiff: and he has made his election, to bring his action against Burford for the penalty; which is the stipulated quantum of the damages for the breach of the contract, and can not be exceeded. It is like a *nomine pœnæ*, for plowing up sword-land: and Burford could not have been relieved against the penalty recovered; neither could Bird have any further satisfaction. He has already received all the satisfaction stipulated: and he cannot shew any further damage.

In trespass, there shall be but one satisfaction for one injury: though several parties are concerned in doing the injury: a recovery against one of the trespassers, or a release to one of them, will be a bar. Hob. 66, *Cocke v. Jennor* is full and clear to this purport.

This has no analogy to criminal cases; which are only for example, not for satisfaction: therefore it is not applicable to the case of subornation of perjury. It is like the case of escape, in Cro. Eliz. 237, *Salteston and Offely v. Payne*; where satisfaction acknowledged upon record was a bar to the sheriff's action against the defendant who escaped. So rescuers shall pay nothing, where the debt is received: which he inferred from *Congham's case*, in Hutton, 98. So here, the stipulated damages being received, the plaintiff can have no second cause of action *ex maleficio*.

I do not see how trespass can lie against the instigator of a trespass? for all are principals, in trespass.

In slander of title, a man suffers a general loss, superadded to the particular damage by the ejectment.

In the cited case from Aleyn, there was defamation, as well as loss: and besides there does not appear to have been any other satisfaction. Whereas, here has been other satisfaction received.

Upon Mr. Solicitor's reasoning, the plaintiff might recover against several persons, who might successively have employed Burford.

It was not necessary to plead this: any thing may be given in evidence, which shews that there is no cause of action in the plaintiff.

[1350] On the following day, Saturday 13th November, Mr. Solicitor General proceeded to reply.

He agreed, that as between the master and the servant, the plaintiff has received satisfaction from the servant: and he supposed (though he knew no case to prove it) the master could not proceed further against him upon the covenant at large, after having elected to take the penalty. But this is no satisfaction for the wrong done to the master by Randall.

As to the case of *Coke v. Jennor*.—A satisfaction was received, and a release was given to the joint-trespasser, for the very same trespass.

But, in the present case, there was no actual satisfaction really received, at the time when this action was brought: and the mere recovery is not, alone and of itself, a bar.

This case essentially differs from all those cases where the same thing has been recovered; which is the case of joint torts and joint contracts. There, it is the same individual injury; the very same thing, for which the damages are recovered: therefore the plaintiff ought not to recover twice, though he proceeded by different species of actions. Here, it is the seduction itself that is the gist of the action; and not the consequence of the seduction. The damage arises out of the nature of the action.



The nature of the case implies a damage ; though perhaps none can be proved, or even though the servant was a very bad one. The consequential damages may be more or less, according to the circumstances of the case : but some damages there must be, however small.

As to Mr. Morton's objection, "that, upon the principles above laid down on the part of the plaintiff, the plaintiff might receive several satisfactions from several persons who might employ the servant during the unexpired term."—The answer is, future employers of the servant would not be liable ; because they would not take him out of the plaintiff's service, but out of another person's. But this defendant seduced him out of the plaintiff's actual service.

As to the cases cited from Hutton and Cro. Eliz.—He did not deny the principle and doctrine of them ; but they are not applicable, he said, to the present case.

[1351] Suppose the master had forgiven the servant, or accepted a private voluntary satisfaction from him ; yet he might have brought an action against the seducer : and that satisfaction received from the servant could not have been pleaded in bar ; nor could it have been given in evidence in bar of such action against the seducer.

Here was a good cause of action, at the time when the action was brought : for, the plaintiff had not then received any thing from the servant : and the mere recovery could not be given in evidence upon the general issue.

The Court took time to consider, till this day. And now

Lord Mansfield delivered the resolution of the Court.

He previously observed, that it does not appear upon the case stated, that the plaintiff was under any difficulty of receiving the money recovered from Burford.

This case turned, he said, upon two points ; 1st. Whether the plaintiff could have maintained this action against the defendant for seducing his servant, if the 100l. penalty before recovered by him against the servant himself had been actually received by him before the commencement of the present action against the seducer : 2dly. If it could not, then whether his having received it subsequent to the commencement of the present action, be such a circumstance as will vary the case, so as to intitle him to maintain his action, which he could not have maintained, if the actual receipt had been prior to the commencement of it.

In the first place, therefore, he would consider the nature of these articles, and of all other articles with penalties annexed to the breach of them.

In every case of articles with a penalty, the party injured may, if he chooses it, have an equitable relief, so often and so far as he suffers injury : (b) he may recover partial damages upon partial breaches, proportionable to the respective injuries done him, as often as the injuries are repeated ; he may do this, toties quoties. So, in the present case, the master might have done, if the servant had left his service several different times, for a short space of time (as a week, or a fortnight or month) [1352] at each departure ; and had, every time returned again to his service ; he might, upon this equitable remedy, have recovered partial damages against the servant, for each breach of his contract, in proportion to its degree, but not beyond it : and for civil injuries, a man ought not, in point of justice, to recover more than in proportion to what he has actually suffered.

Besides this equitable relief, there is, in these cases, a further election given to the party injured, "to proceed by the summum jus, and by a rigorous remedy, for the penalty ;" which is intended in terrorem, and by way of punishment for breaking the contract ; which rigorous remedy may be taken for a very slight breach, and includes the idea of more than the damage actually sustained, certainly not of less.

But this rigorous remedy can not be repeated : for, the penalty extends to the uttermost farthing that can ever be recovered for all and every of the breaches : (c) and when the party injured has once got all that he could be entitled to have for every breach, there is an end of the articles, and consequently of all further remedy upon them.

It was candidly agreed, at Guildhall, by the counsel on the part of the plaintiff,

(b) Lord Raym. 814, acc. Gilb. Rep. 114.

(c) 6 Vin. 472, 473, 474. 4 Burr. 2228. 2 Durn. 388.



"that after the penalty had been so recovered against the servant, the servant himself was totally at liberty to go into what service he pleased." And so also was the master at liberty and quite freed from the articles, with respect to the servant: for, there was a total end of the contract, as between them two.

Then how will the case stand as to the seducer? it is actual injury done to the master, that gives him the action against the seducer: a bare attempt to seduce, without any damage following upon it, would not be an injury to the master; and consequently, would be no ground upon which he could maintain an action.

Here is no injury at all done to the master: for, he has recovered and received a complete satisfaction and more. Therefore all the injury is done away, and is as if it never existed.

A penalty, in the very term, includes more than the real damages actually suffered. And if the seducer or second master, who employs the servant after the servant has paid the penalty, were to be liable to damages in an action brought by the first master for so doing, this would finally fall upon the servant, and in effect be an addition to the penalty: for, the second master will pay the servant for his service no more than he estimates [1353] it to be worth to him: and if he must pay a sum of money (20*l.* for instance) to the first master, for damages for entertaining his servant, he will make his bargain with the servant in such manner as to pay him so much the less.

Therefore there is no colour for the plaintiff to maintain his action upon this first point, viz. upon supposition of his having actually received the penalty of the servant, before the commencement of his action against the second master, as the seducer of his servant.

2d point.—But taking it, as this case was, "that he had not actually received it of the servant till after the commencement of the present action;" let us see whether this circumstance will vary the case.

Several arguments were drawn by the counsel for the defendant, from cases of joint-trespassers and joint-contracts: which were urged as being applicable to the present question. But they were sufficiently answered by Mr. Solicitor General.

There, the recovery is against them all, for the same thing: and there is no analogy, at all, between those cases and this. In those cases, there is a recovery of the self-same thing, for a joint injury: the defendants are all of them liable to the plaintiff, and he may proceed against any, or all of them if he pleases; as it is but one trespass, one contract, and all are liable. Yet he shall have but one satisfaction from them all.

Another essential difference between those cases upon torts and actions upon the case, is, that those are actions *stricti juris*; and therefore such a former recovery, release or satisfaction can not be given in evidence, but must be pleaded: but an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore such a former recovery, release or satisfaction need not be pleaded, but may be given in evidence. For whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only.

Whether he could have recovered in an action commenced against the present defendant, after having reco-[1354]-vered the penalty from the servant, but without having actually received the money so recovered from the servant, I will not now determine: I should have doubted of it, extremely.

But here, the penalty recovered by him from the servant was actually received by him before the present action came on to be tried; without any sort of difficulty. He might have received it, when he would: but he chooses to lie by, till he has brought his action against a third person who would not have been liable to any thing, if the plaintiff had received the money of the servant in due time; and then receives it of the first defendant, and afterwards proceeds in this action to recover it against the second defendant; which is against conscience. Therefore in such an action as this is, (an action of equity, not a formed action *stricti juris*,) it is enough if it appears upon the evidence that the plaintiff ought not in conscience to recover it.

If he had actually recovered it, through the defendant's not knowing "that the penalty had been paid," an action would lie against him, for money had and received:

like the \* case out of the Court of Conscience, not long since determined in this Court.

As the plaintiff has already received, from the servant, more than ample satisfaction for the injury done him, he can not afterwards proceed against any other person for a further satisfaction.

And my brother Denison suggests to me, that the Court would upon the application of the present defendant, by way of motion, have stayed the plaintiff's proceeding further against him upon the defendant's shewing them "that the plaintiff had actually received the money recovered by him in his former action against the servant."

Per Cur'.—Let the postea be delivered to the defendant.

PRICE *versus* NEAL. The same 16th Nov. 1762. [S. C. 1 Bl. 390.] An innocent indorsee cannot be compelled to refund the money paid to him on a forged acceptance.

[Discussed, *London & River Plate Bank v. Bank of Liverpool* [1896], 1 Q. B. 10.]

This was a special case reserved at the sittings at Guildhall after Trinity term 1762, before Lord Mansfield.

It was an action upon the case brought by Price against Neal; wherein Price declares that the defendant Edward Neale was indebted to him in 80l. for money had and received to his the plaintiff's use: and damages were [1355] laid to 100l. The general issue was pleaded; and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows—"Leicester, 22d November 1760. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-Lane Cannon-Street, London;" indorsed "R. Ruding, Antony Topham, Hammond and Laroche. Received the contents, James Watson and Son: witness Edward Neale."

That this bill was indorsed to the defendant for a valuable consideration; and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of 40l. and take up the said bill: which was done accordingly.

That another bill was drawn as follows—"Leicester, 1st February 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-Lane, Cannon-Street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and Son. Witness for Smith, Right and Co." That the plaintiff accepted this bill, by writing on it, "Accepted John Price:" and that the plaintiff wrote on the back of it—"Messieurs Freame and Barclay, pray pay forty pounds for John Price."

That this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery.

The defendant Neale acted innocently and bona fide, without the least privy or suspicion of the said forgeries or of either of them; and paid the whole value of those bills.

The jury found a verdict for the plaintiff; and assessed damages 80l. and costs 40s. subject to the opinion of the Court upon this question—

"Whether the plaintiff, under the circumstances of the case, (a) can recover back, from the defendant, the money he paid on the said bills, or either of them."

[1356] Mr. Stowe, for the plaintiff, argued that he ought to recover back the money, in this action; as it was paid by him by mistake only, on supposition "that these were true genuine bills;" and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

He owned that in a case at Guild-Hall, of *Jenys v. Fowler et Al*, (an action by an

\* *V. Moses v. Macfarlan*, 19th May, 1760. V. ante, p. 1005.

(a) See 12 Mod. 494. Str. 648. Salk. 344. Carth. 357. Str. 1154. 2 P. Wms. 76. Doug. 618. Plowd. 166. 1 H. Bl. 590. 4 Durn. 325.

indorsee of a bill of exchange brought against the acceptor,) Lord Raymond would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer, to swear "that they believed it not to be so:" and he even strongly inclined, "that actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee."

But he urged, that in the case now before the Court, the forgery of the bill does not rest in belief and opinion only; but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff's case is much stronger upon the other bill which was not accepted. It is not stated "that that bill was accepted before it was negotiated;" on the contrary, the consideration for it was paid by the defendant, before the plaintiff had seen it. So that the defendant took it upon the credit of the indorsers, not upon the credit of the plaintiff; and therefore the reason, upon which Lord Raymond grounds his inclination to be of opinion "that actual proof of forgery would be no excuse," will not hold here.

Mr. Yates, for the defendant, argued that the plaintiff was not intitled to recover back this money from the defendant.

He denied it to be a payment by mistake: and insisted that it was rather owing to the negligence of the plaintiff; who should have inquired and satisfied himself "whether the bill was really drawn upon him by Sutton, or not." Here is no fraud in the defendant; who is stated "to have acted innocently and bonâ fide, without the least privy or suspicion of the forgery; and to have paid the whole value for the bills."

Lord Mansfield stopt him from going on; saying that this was one of those cases that could never be made plainer by argument.

[1357] It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff can not recover the money, unless it be against conscience in the defendant, to retain it: and great liberality is always allowed, in this sort of action.

But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bonâ fide paid, without the least privy or suspicion of any forgery.

Here was no fraud: no wrong. It was incumbent upon the plaintiff, to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it: but it was not incumbent upon the defendant, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him: and he sends his servant to pay it and take it up. The other bill, he actually accepts; after which acceptance, the defendant innocently and bonâ fide discounts it. The plaintiff lies by, for a considerable time after he has paid these bills; and then found out "that they were forged:" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the whole value, bonâ fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man: but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

Per Cur'. Rule—That the postea be delivered to the defendant.

TROTTE, QUI TAM, &c. *versus* WELCH. Tuesday, 23d Nov. 1762. [S. C. 1 Bl. 392.]

Limitation of qui tam actions on contraband goods must be after condemnation.

This was an action of debt, brought by a Custom-House officer, upon an Act of Parliament of 26 G. 2, c. 21, for a penalty of 200l. for having wrought silks found in his possession, unsealed.

[1358] This Act of Parliament was made for encouraging the silk-manufacture of this kingdom, and for securing the duties upon velvets, wrought silks, &c. The first section directs all velvets, wrought silks, &c. to be sealed. The third section enacts, that if any be found unsealed, they shall be forfeited, and may be seized by any officer



of the Customs: and shall, after condemnation, be publicly sold to the best bidder; and one moiety of the produce shall be to the use of His Majesty, and the other moiety to the officer who shall seize the same; and the person in whose possession the goods so seized are found, shall for every such offence forfeit 200l. The sixth section directs, that all pecuniary penalties imposed by this Act, shall be sued for, in any Court of Record at Westminster, or in the Court of Exchequer at Edinburgh, respectively, by action, &c. in the name of His Majesty's Attorney General, or of His Majesty's Advocate in Scotland, or in the name of some officer of the Customs: and one moiety of every such penalty shall be to His Majesty, and the other moiety to the officer of the Customs who shall inform and prosecute. Then comes a proviso, in the seventh section, "that if any officer of the Customs shall neglect or refuse, for the space of one month, to prosecute to effect any person or persons for any pecuniary penalty or forfeiture by this Act inflicted upon offenders against the same, then it shall be lawful for any person or persons whomsoever to sue for, prosecute, and recover the respective pecuniary penalties and forfeitures by this Act inflicted, in like manner as is therein before directed with regard to the officers of the Customs: and one moiety of the said respective forfeitures, when recovered, shall, in such case, go and be applied to the use of His Majesty his heirs and successors; and the other moiety, to the person or persons who shall sue or prosecute for the same respectively."

The defendant in the present action pleaded a recovery of the same penalty, in a former action brought against him for it, by another person; and payment of it to that other person pursuant to the said recovery: and he sets forth the particulars of the said recovery. He also stated, in his plea, the Act of Parliament abovementioned; and alledges "that the Custom-House officer did not bring his action within a month after the seizure;" whereupon, the other person brought his action, and recovered, as aforesaid.

The plaintiff in the present action (replies, protestando that the judgment pleaded by the defendant was obtained [1359] by fraud,) "that he, the now plaintiff, did, within one month after the condemnation of the goods seized, bring his action against the defendant, and prosecuted it to effect:" and he alledges, that the seizure was made on the 2d of May; that his information in the Exchequer was filed on the 22d of May; and that the condemnation was on the 3d of November.

To this replication the defendant demurred: and the plaintiff joined in demurrer.

Mr. Walker, for the defendant, argued that the Custom-House officer ought to have brought his action within the space of one month from the seizure of the goods. The prosecution for the pecuniary penalty is not tied up to the time of the condemnation: the limitation refers to the time of the seizure.

Mr. Yates, contra, for the plaintiff, argued that the meaning of the Act of Parliament is, "that if the Custom-House officer shall neglect or refuse, for a month after the condemnation, it may then be lawful for any other person to do it." He has attached the interest in himself, by exhibiting the information. He cannot be said to have neglected or refused to prosecute to effect: for, he has seized the goods; he has proceeded in rem, (which attaches the right of action in him;) and he now prosecutes for the penalty.

The Court were clearly and unanimously of opinion with Mr. Yates. They held that the Custom-House officer had used due diligence; and that the right of action attached in him, by his seizure, exhibiting an information, and proceeding to condemnation: and accordingly they gave an unanimous

Judgment for the plaintiff.

REX versus HEYDON. Wednes. 24th Nov. 1762. Sentence in bribery at elections.

The defendant stood convicted of\* bribery at an election for members to Parliament.

And because the time limited for bringing the qui tam action will expire in March next, the matter was adjourned till the first day of next Easter term: and Heydon

† Mr. Just. Foster was not present.

\* V. ante, p. 1270, 1304. [And 4 Doug. 288, 9, and post, 1387.]

entered into his own recognizance only, in one hundred pounds, (which was not at all opposed by the prosecutor's counsel,) to appear here again at that time.<sup>(a)</sup>

This was S. P. with *Ree v. Pitt*, and *Ree v. Meud*, ante, pa. 1335. V. post, pa. 22d April 1763.

[1360] HUNT *versus* COXE. Thursday, 25th Novemb. 1762. [S. C. 1 Bl. 393.] Sci. fa. against bail may be sued out after a ca. sa. returned, though not regularly filed, and short notice to the bail is immaterial. [See 2 Durn. 757, 758. 1 East, 87. 6 Durn. 285.]

The Court unanimously agreed, that it was right and necessary to adhere strictly to the established rules of the Court relating to the time and manner of bail's surrendering their principal.

The two points chiefly disputed in the present case, were the filing the return of the ca. sa. against the principal; and the actual surrender of the principal within the limited time.

The Court considered the ca. sa. against the principal as little more than matter of form; and chiefly intended to intimate to the bail, in what species of execution the plaintiff determined to proceed: and as the leaving it in the sheriff's office was a notice to the bail, "that the plaintiff would proceed against the person of the defendant," it was incumbent upon the bail to search "whether any ca. sa. was left in the office;" and that the Court would not enter into an examination by affidavit, "whether the ca. sa. was actually returned, or such return actually filed, before the issuing of the scire facias against the bail;" and the rather, because if the bail had pleaded to the scire facias, "that no ca. sa. was returned and filed before the teste of the scire facias," such return might have been filed at any time before putting in a replication to such plea.

As to the time and manner of surrendering—they held that a surrender at about half an hour after eleven at night on the last day, (which was the last day of the term,) without an actual bringing the defendant into Court, (which was then risen,) or before a Judge (none being accessible at that late hour,) in order to have an exoneretur entered upon the bail-piece, was not sufficient; though it was so late at night as to render the doing this impracticable; and though the defendant was actually delivered to a Judge's tip-staff, and even lodged in the King's Bench prison, that very night; which the bail swore was the utmost that the very late notice they received from the sheriff of the ca. sa. (which was returned "scire feci") gave opportunity to them to do.

Their rule to shew cause why the proceedings against them should not be stayed, and an exoneretur entered on the bail-piece, &c. was discharged, with costs: for, the Court would not meddle with [1361] the sufficiency of the time for surrendering the principal; because a scire feci had been duly returned by the proper officer.

WILSON *versus* DUCKET. Saturday, 27th Nov. 1762. Not decided what proportion of a premium ought to be returned where a policy is cancelled.

This was an action upon a policy of insurance on a ship; with a count of a general indebitatus assumpsit for money had and received to the plaintiff's use: and damages were laid at 98l.

The trial was had under a decree of the Court of Chancery, where the now defendant, the insurer, being there complainant, had offered to pay back the premium, which was 10l.

No money was, in the present case, paid into Court; though the usual course in these cases is for the defendant, the insurer, to bring the premium into Court.

The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his use; although they were of opinion against the policy, upon the foot of fraud; and found against it as being fraudulent. (In fact, the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, "that he should not be bound by his signing the policy;" which this Court considered

(a) Qu. if an original could not have been filed and kept in secret.

as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent.)

By concurrence of Lord Mansfield, (before whom it was tried,) and of the counsel on both sides, it was agreed to bring this question before the Court, "whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff the insured, or retained by the defendant the insurer."

The method taken was by the defendant's counsel moving (on Monday the 22d instant) for a rule to shew cause why the judgment should not be entered up for the defendant; and the Court's making a rule to shew cause.

Mr. Harvey, for the plaintiff, now shewed cause. He argued that this contract was to be looked upon as void ab initio. Therefore no risque was run by the defendant; and consequently, he had no right to retain the premium.

There is no case at common law, on this head, that has [1362] been judicially determined. But in cases like this, Equity and Common Law Courts have concurrent jurisdiction; and must determine alike, upon like circumstances: and the two cases in Equity, of \* *Whittingham v. Thornborough*, and † *De Costa v. Scandret*, are nearly in point.

Mr. Morton and Mr. Yates, for the defendant, mentioned a case of *Rucker v. Hollingbury* before the Master of the Rolls; who was of opinion contrary to Mr. Harvey's two cases.

But Lord Mansfield said that there must be some mistake, in reciting this last case before the Master of the Rolls: for, the practice of the Court of Chancery is certainly agreeable to Mr. Harvey's cases. But what he wanted to know was, "whether there was any common-law determination to the same effect:" (which it did not appear that there was).

Whereupon Lord Mansfield said, it was plain what must be done in this case: for, he looked upon the offer made by the complainant's bill in Equity, to be the same thing as if the money had been actually brought into Court, in the present case.

Therefore a rule was made, that the verdict found for the plaintiff be vacated; and that a verdict be entered for the defendant.

REX *versus* WILLIAM CLARKE. Monday, 29th Nov. 1762. When it appears that the party is actually insane, the Court will not direct the body to be brought up on an *hab. cor.*

An *habeas corpus* having issued, on Friday last, directed to Mr. Clarke, who was the keeper of a private mad-house at Clapton, commanding him to bring up the body of Mrs. Anne Hunt, who was kept confined in his house.

Mr. Solicitor General now moved to return the writ; at the same time offering an affidavit from Dr. Monro, importing "that about nine months ago he was applied to by Mrs. Threlkeld, Mrs. Hunt's daughter, for his advice and assistance concerning Mrs. Hunt, as a person disordered in her senses; and that thereupon he recom-[1363]-mended her to the care of the said William Clarke, who keeps a private mad-house, and is accustomed to have the care of such unfortunate persons; and that she is still in the custody of the said William Clarke, upon the same occasion:" and he further swears "that from the time of her being so placed under the care of the said William Clarke, to this time, the said Anne Hunt hath appeared and is yet, in his judgment, a lunatic; and is now in so disordered a state of mind, that she is not fit to be brought into this Court." The affidavit adds, "that he is informed and verily believes that a commission of lunacy will shortly be issued against the said Anne Hunt; and that the same hath been deferred on no other account but because of the late minority of Anne Bowen, the grand-daughter and one of the next akin of the said Anne Hunt; which said Anne Bowen is now come of age, as the doctor hath been informed and believes."

But Lord Mansfield proposed to put this matter into another method; viz. to use this affidavit of Dr. Monro's as a reason for enlarging the time to return the writ, instead of actually filing the return at present.

\* V. Precedents in Chancery 20, where a policy was decreed to be delivered up; and the premium to be repaid; the plaintiff's deducting thereout their costs.

† The like decree-policy to be delivered up, with costs: but the premium to be paid back, and allowed out of the costs.



Accordingly, Mr. Solicitor took back the writ and return: and

The Court enlarged the time for making the return till the next term, being perfectly well satisfied by the affidavit of Dr. Mouro, that Mrs. Hunt was not in a condition fit to be taken out of the care and custody of those to whom her person was intrusted, and who were upon the point of obtaining a proper legal authority for what they were doing; which, however intended for her benefit and advantage, had not yet obtained that strict legal sanction which they were now in a regular pursuit of.

Mr. Serjeant Whitaker, who had moved for the habeas corpus, came afterwards into Court, and desired a rule for liberty to have access to and inspection of Mrs. Hunt, in order to see that she was properly treated. But as he could not make out, that his application was made on behalf of any person who had the least pretension to demand this, the Court rejected his request.

FISHER *versus* PRINCE. 1762. A specific thing demanded in trover may be brought into Court upon payment of costs.

Upon shewing cause by the plaintiff's counsel, "why, upon delivering to the plaintiff the several goods and chattels for which this action (which was an action [1364] of trover) was brought, and paying him his costs to the day of making the motion, further proceedings should not be stayed;" (which rule to shew cause had been obtained upon a motion made by the counsel for the defendant;) it was urged, on the part of the plaintiff, that this is, in effect, a motion "to bring the goods into Court;" and it was contrary to the course of the Court, in actions of trover, to bring into Court the thing demanded, (excepting the single case of trover for monies numbered;) and that the reason which has been often given for it is, "that this Court do not keep a warehouse:" and a case was hinted at, where a motion to bring in a \*gold watch was denied.

And the Court denied it in the present case, and discharged the rule: but it was not upon that general principle that they denied it, but upon the circumstances of the case: such as the complicated quantity of the goods demanded, and the uncertainty of their remaining of the same value as they were when taken; and some other like circumstances. For

Lord Mansfield and Mr. Just. Wilmot both concurred in the following distinction, "that where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value, must be the sole measure of the damages, there the specific thing demanded may be brought into Court; (and Mr. Just. Wilmot said, this was the more reasonable as this action of trover comes in the place of the old action of detinue:) where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in." Lord Mansfield said, it is pity that a false conceit should, in judicature, be repeated as an argument: "the Court does not keep a warehouse," what then? What has a warehouse to do with ordering the thing to be delivered to the plaintiff. Money paid into Court is payment to the plaintiff. The reason and spirit of cases make law; not the letter of particular precedents. In trover for money numbered, or in a bagg, the Court have ordered it to be brought in: yet the jury may give more in damages; they may allow interest, (and in some cases they ought).

[1365] The reason holds to every other case, where a thing clearly remains of the same value; yet the jury may give damages for the detention.

I remember its being done twice or thrice, in things of small value. It ought to be done to prevent vexatious litigation: which a plaintiff may be tempted to pursue, when in all events he is sure of costs. It ought to be done, because it is the specific relief.

It ought to be done: because at the trial, when the thing remains in the same condition, there generally is a rule "to deliver it."

\* *Harding v. Wilkin*, H. 27 G. 2, B. R. [See Bull. 49. Salk. 557. Str. 142, 822, 1191. 7 Durn. 54.]

An estimated value is a precarious measure of justice, compared with the specific thing.

I am aware of the cases where a laced head, a gold watch, a diamond ring, and Chinese pictures were refused to be brought in.

But, as I think "such motions ought neither to be refused or granted, of course," they must depend upon their own circumstances. No injury is done the plaintiff, if the Court should think "he ought not to proceed for damages beyond the specific thing;" because he may still proceed for more, at the peril of costs; and so he ought.

But in this particular case, the goods are altered, and their value changed.

REX *versus* WHITEAR, ET AL'. 1762. Sessions have no jurisdiction to make an original order for payment of the balance of overseers accounts.

Mr. Serjeant Stanniford and Mr. Yates shewed cause why an order of sessions should not be quashed. It was an order originally made at the Quarter-Sessions for the borough of Portsmouth; and purported to be an order made upon the appeal of the present overseers of the poor of the parish of Portsmouth, directing their predecessors, the late overseers, to pay over to the appellants, the present overseers, the balance of their accounts; which accounts were settled and balanced by the said order of sessions.

[1366] To this order, four exceptions had been taken: the first of which was a material one; the three others were slight, and not necessary to be here specified, because the Court quashed the order upon the first objection, without taking any notice of the rest.

The first exception was to the jurisdiction of the sessions, to make an order upon late overseers to pay over monies to their successors, by way of original order, in the first instance; without any previous application having been made to two justices, pursuant to the directions of 43 Eliz. c. 2.\*

It was urged, in support of this exception, that all subordinate jurisdictions must shew "that they have jurisdiction of the matter they take upon them to determine." But here has been no previous application to two justices, or any appeal to the sessions from any former order; and the sessions cannot take it up *per saltum*, nor have they any original jurisdiction. Therefore their jurisdiction fails.

All this was, fully and on mature deliberation, determined in the case of *Rex v. Bartlett, et Al., Churchwardens and Overseers of Brackley St. Peters*, Tr. 7, 8 G. 2, B. R. † 2 Strange, 983.

The answer given to this objection by the serjeant and Mr. Yates was, that the present order was not made upon the Statute of 43 Eliz. (as that of *Rex v. Bartlett* was,) but upon 17 G. 2, c. 38, § 4, which gives an appeal to the next General or Quarter Sessions of the Peace, "to any person or persons who shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein; or shall have any material objection to such account as ‡ aforesaid: or any part thereof; or shall find him, her, or themselves aggrieved by any neglect, act or thing done or omitted by the churchwardens and overseers of the poor, or by any of His Majesty's justices of the peace."

The reply made by Mr. Solicitor General (who had taken this exception) was, that the statute of 17 G. 2, [1367] c. 38, does not give power to apply to the sessions *per saltum*, to make such an order as this; but the previous application to two justices remains as necessary, as it was before.

And of this opinion was the Court; who said that this Act of 17 G. 2, made no alteration in this respect, but had quite another view.

Order of sessions quashed.

The end of Michaelmas term, 1762, 3 G. 3.

\* V. § 4, and § 6.

† N.B. Sir J. S. gives only a short account of it, in a few lines; but it was argued and discussed several times, both at the Bar and by the Bench.

‡ Which is the account of the churchwardens and overseers.

## [1368] HILARY TERM, 3 GEO. III. B. R. 1763.

Memorandum.—There was but one single case determined within this term, that seemed worthy of being reported; though some few cases were under the consideration of the Court, which afterwards received their determination, and will follow in their course; particularly the cases of *Bidleson v. Whytel*, and *Glover v. Black*.

HOWARD, Widow, AND ANOTHER, Executors, *versus* JEMMET, Executor. Saturday, 12th Feb. 1763. [S. C. 1 Bl. 400.] Bankrupt's executor pleading a false plea after commission, liable to costs. [See 7 Vin. 131. Cooke's B. L. 168, 9.]

On shewing cause against setting aside a fieri facias, and paying back to the defendant the monies levied thereon, it appeared that the defendant was a bankrupt, against whom a commission had issued, and who had afterwards obtained his certificate; and that the present action was brought against him as executor, upon a bond entered into by the defendant's testator: and the defendant had, between the time of the issuing of the commission and the time of obtaining his certificate, pleaded a false plea (*viz.* "that he had no assets," where in fact he had some assets in his hands,) which was found against him; and thereupon the plaintiffs had judgment *de bonis testatoris si*, &c. and against the defendant himself, *de bonis propriis*, for the costs.

Mr. Solicitor General, on behalf of the defendant, urged, that by virtue of the Bankrupt Act of 5 G. 2, c. 30, the defendant was not liable to the execution as to his own proper goods; because he had given up his all under the commission of bankruptcy, and stood discharged [1369] by the certificate against all demands which might have been made upon his estate and effects under the commission: and he alledged, that these costs having arisen from the necessity he was under of staying off the judgment, they were such a debt as might have been proved under the commission.

But per Cur'.—The pleading a false plea was his own act, and his own fault; and the judgment and execution *de bonis propriis*, for costs, was singly owing to this his false plea: which was subsequent to the issuing of the commission. Consequently it could not have been proved under the commission; and therefore cannot be discharged by the certificate.

Rule discharged.

V. 2 Sir J. S. 1196, *Graham v. Benton*.

Note

Per Lord Mansfield.—If an executor becomes bankrupt, the commissioners can not seize the specific effects of his testator: not even in money which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself.

The end of Hilary term, 1763, 3 G. 3.

## [1370] EASTER TERM, 3 GEO. III. B. R. 1763.

BONAFOUS *versus* RYBOT. Wednes. 20th April, 1763. Principal and interest due on a bond payable by instalments may be paid into Court.

[Dissented from, *Preston v. Dania*, 1872, L. R. 8 Ex. 22. Discussed, *In re Dixon* [1899], 2 Ch. 561; [1900], 2 Ch. 561.]

Mr. Eliab Harvey and Mr. Thurlow, on the part of the plaintiff, shewed cause against a rule which had been obtained by the defendant in this action (which was debt on bond,) for the plaintiff to shew cause why it should not be referred to Mr. Owens, to compute what is due to the plaintiff, of the several instalments stipulated by articles of agreement bearing date on or about the 26th day of January 1758, and made in defeasance of the bond whereupon this action is brought; and why upon payment of what shall appear to be due, with interest for the instalment unpaid, together with the plaintiff's costs to be taxed by Mr. Owens; all further proceedings in this action should not be stayed.



This rule was obtained upon the Act of Parliament of 4, 5 Ann. c. 26, § 13, whereby it is enacted, "that if at any time, pending an action upon any <sup>\*1</sup> such bond with a penalty, the defendant shall bring into the Court where the action shall be depending, all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond; the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the Court shall and may give judgment to discharge every such defendant of and from the same accordingly."

The fact of the present case was, that the bond upon which this action was brought was a bond conditioned for payment of a gross sum of money absolutely at a day certain (in April 1759;) but no mention was therein made [1371] of paying the money by instalments; nor was that any part of the original agreement: which original agreement is dated the 13th of January 1758. But

Afterwards, on the 26th of January 1758, the parties came to a subsequent agreement, and entered into articles dated on that day; by which articles it is agreed between the said plaintiff and defendant, "that the money shall be paid by instalments:" four of which instalments were fixed to Midsummer 1759, Midsummer 1760, Midsummer 1761, and Midsummer 1762; and the last, at Midsummer 1769.

In these articles is contained a defeazance to the bond of 13th January 1758, in case the sum mentioned in the condition thereof to be payable in gross at the certain day therein fixed, should be paid by instalments upon the particular specified in this defeazance: provided that the said sums agreed to be taken by instalments should be punctually and regularly paid by the defendant at and upon the very days specified in the defeazance for making the respective payments; and that the defendant should live till all the said days be past. Otherwise, this defeazance was to be void.

The defendant paid the two first payments at Midsummer 1759 and 1760, and part of the instalment due at Midsummer 1761; but totally neglected to pay that which became due at Midsummer 1762, or even any part of it. At Michaelmas 1762, (subsequent to the last mentioned instalment,) the defendant paid to the plaintiff, and the plaintiff received of him the whole interest then due upon the whole debt up to that time; including interest for the sum payable at the preceding Midsummer, as well as for all the remaining money not yet become payable.

The plaintiff's counsel urged, in discharge of this rule—

1st. That the case of a bond conditioned for payment of money by instalments is not within this Act of Parliament. For, it is confined to common and ordinary bonds conditioned for payment of a lesser sum at a day certain; and does not extend to such as are conditioned or defeazanced upon payment of the money by instalments; at least, not till after all the days of payment are past: as is manifest by the direction "that the money brought in shall be taken to be in full satisfaction of the bond, and that the Court shall give judgment to discharge the defendant from the same;" which would destroy all [1372] the plaintiff's security for the subsequent payments not yet become payable. And they said, that they could find <sup>\*2</sup> no case where it had been holden to extend to bonds conditioned for paying the money by instalments.

2dly. That even admitting that a bond conditioned for paying money by instalments, or so defeazanced at the time of executing the bond, might be construed to be within the intention of the statute; yet it would by no means follow, that a case circumstanced as the present case is, would be within it likewise: for, here the defeazance was not made nor thought of at the time when the bond was executed; but is a distinct subsequent transaction, at a future time, and in a distinct deed or instrument executed long after the bond.

3dly. That the Court could not enter into this matter, without taking upon themselves to try a cause in Equity, upon affidavit only, without bill, answer, interrogatory, or examination of witnesses; and to give an equitable relief to the defendant upon his own affidavit only, against a legal right actually vested in the plaintiff: for, the defeazance, which was in favour of the debtor, not being complied with, is become totally void, by the proviso contained in it; and the bond and penalty stand in full

<sup>\*1</sup> This word "such" refers to the preceding clause which mentions "any bond which hath a condition or defeazance to make void the same upon payment of a lesser sum at a day or place certain."

<sup>\*2</sup> V. 2 Str. 814.

force at law ; and the defendant has no claim to be relieved against the forfeiture ; especially, considering the value of money at the time when the plaintiff ought to have received it. The defeazance being void, by the express terms of the proviso ; all the agreements contained in it, relating to the paying the money by instalments, are quite out of the present case, as much as if no such defeazance had ever existed.

4thly. They asserted that if the Court were at liberty to enter into the equitable circumstances of the case, they would appear to be strongly on their client the plaintiff's side.

Sir Fletcher Norton, Solicitor General, and Mr. Yates, contra, for the defendant, maintained the contrary ; and argued thus, in support of the rule.

1st. A bond conditioned or defeazanced for payment of the money by instalments is, after any of the days are past, within the intention and purview of this Act : and they said that there have been <sup>\*1</sup> cases so determined ; but did not specify any in particular.

[1373] 2dly. Its being upon a separate paper can make no difference, upon the equity of the statute : no more can its being subsequent to the execution of the bond.

3dly. The plaintiff has waved the forfeiture by receiving interest not only for the sums due at Midsummer 1761, and Midsummer 1762, but even quite up to the following Michaelmas.

4thly. The equitable circumstances of this case they alledged to be quite with the defendant, instead of being strongly on the side of the plaintiff.

Mr. Justice Denison thought the case to be within the Act ; or, at least, that the proviso in the defeazance makes no difference : for, that proviso "that the defeazance should be void on failure of any of the payments by instalment," imports nothing more than what would have been implied though it had not been inserted.

But Lord Mansfield said, that this proviso in the defeazance makes the whole money due upon failure of any of the payments by instalment : and it seemed to him, that the whole turned upon this.

This Act of Parliament reforms, in some instances, an erroneous course of proceeding in the Courts of Law and Equity ; which ought never to have prevailed ; and which the Courts themselves might and ought to have remedied, but did not. Therefore it should not only have the most liberal construction ; but the Courts ought to exercise their own authority, to extend the spirit and reason of this Parliamentary interposition, "for the easier, speedier and better advancement of justice," to cases not mentioned in the Act. So Lord Hardwicke did. When a cause was set down to be heard upon a bill and answer, and the bill dismissed ; the plaintiff, by the course of the Court, only paid forty shillings costs. The Act provides for the case of the plaintiff's dismissing his own bill, or its being dismissed for want of prosecution ; but does not mention the case of dismissal on hearing : so that the plaintiff, by putting the defendant to more expence and vexation, avoided making reparation. This course continued in Chancery till late in Lord Hardwicke's time ; when he made an order to alter it.

It is surprising, that after the Statute of Usury, 37 H. 8,<sup>\*2</sup> which excepts obligations with condition, made upon a just and true intent, the Courts of Law did not consider the just intent of a bond to be principal, interest, and costs, secured by a penalty ; and suffer the party, at any time, to save the forfeiture by performing the intent.

[1374] It is more extraordinary, that after this was settled in a Court of Equity "to be the nature of a bond," and therefore every party to a bond understood it in this sense ; the Courts of Law did not follow equity, but still continued to do injustice, as of course ; and put the parties to the delay and expence of setting it right elsewhere, as of course.

The Act of Parliament meant that in cases of penalties by way of security, the clear final justice of the case should be attained in the Courts of Law : (much to the benefit of both parties).

I cannot see a doubt, upon bonds conditioned for payment of money by instalments : and I am glad to hear that it has been so determined.<sup>\*3</sup>

<sup>\*1</sup> V. 2 Str. 814, 957, 958.

<sup>\*2</sup> c. 9.

<sup>\*3</sup> See 2 Stra. 814, *Bridges v. Williamson*, 2 G. 2, and in *Maine v. Somner*, Hil. 1730.

[1375] The defeazance being dated at a subsequent time, and written on a distinct and separate paper from the bond, makes no difference.

But what makes the difference, is this. The bond here is conditioned for payment of a gross sum, then due, to be paid at a certain fixed day. Then there is a subsequent agreement made in favour of the debtor, easing him of that stipulated single payment at that fixed day, and allowing him to pay it by instalments; provided that he pay it punctually on the days agreed upon; and that he live till they shall be all past: otherwise this agreement and defeazance to be void. And consequently, as the debtor has not paid the money punctually, they are void, and the gross sum is due to the obligee.

There is a distinction in the Court of Chancery, "that if five per cent. be reserved for interest on a mortgage, with a condition, to accept four if punctually paid; this condition must be strictly performed; and the debtor shall not have relief in Equity after the day of payment is elapsed, (because the one per cent. was to be abated upon a condition which is not performed:) but if four per cent. be reserved, with an agreement that if the four be not punctually paid at the day, the mortgagee shall pay five, that shall be considered as a penalty added; and the Court of Equity will, in such case, relieve against it."

Now the present case is in effect, within the former part of this distinction; for it is a condition unperformed. Therefore the debtor cannot have relief in a Court of Equity, any more than he can have it at common law: but the creditor has a right to have recourse to his bond.

As to the waver—It could, at the most, be only a constructive one. But in reality, it is none at all: for, the interest (even upon the sums payable by instalment) is part of the original debt due upon and secured by the bond; and therefore the plaintiff was entitled to receive it as part of the original debt.

Unless the defendant pays the whole money, he cannot be relieved from the penalty. However this rule must certainly be discharged; there being no ground to make it absolute.

\* Mr. Justice Wilmot expressly concurred: and

Mr. Justice Denison said nothing further in opposition to it.

Rule discharged, with costs (to be paid by the defendant to the plaintiff).

MONCASTER *versus* WATSON, ET AL'. Friday, 22d April, 1763. [S. C. 1 Bl. 402.]

An exemption and modus not extending to former lands shall not exempt the allotted common. [See 5 East, 355. 7 Durn. 649, 651.]

This was a case reserved from the Northern Circuit, in an action brought on 2, 3 E. 6, c. 13, by a lay-impropriator against the occupiers of lands in the parish of Felton, in the county of Northumberland; for taking away their corn and hay, without setting out the tithe, or agreeing for it.

The substance of the case stated was, that they claimed to be exempt from paying any tithe at all for these lands upon the following foundation, viz.

That a private Act of Parliament was passed in the year 1753, (26 G. 2, c. 46,) "for dividing and inclosing the common called Felton Common, in the parish of Felton, in the county of Northumberland."

That the lands in question had been, till the said year [1376] 1753, (when the said common was so divided and inclosed,) part of the said common, whereupon the commoners had used to have common for their cattle levant and couchant, &c.

That ninety acres, part of the said common, were, by the said Act of Parliament, allotted to the owner of Swardland demesne: under which said allotment, the defendants occupy the said ninety acres, formerly parcel of the common, but now made parcel of Swardland demesne.

That the Act directs that the divided lands (before parcel of the common) shall be holden by each person to whom the respective divisions are allotted, subject to the same charges and incumbrances as their own former lands to which they are allotted

4 G. 2, in this Court in a like case, where the first day only past, it was moved by Mr. Pilsworth, and opposed by Mr. Filmer: and the Court after some hesitation granted it.

\* Mr. Justice Foster was not present.



and consolidated, were before subject : and it is declared in the Act itself, (a) "that it be construed beneficially to the said land-owners to whom the respective divisions are allotted."

That the owners of Swardland demesne had never paid tithe of corn, grain, or hay ; having been always exempt from the payment of tithe of corn and grain, in consideration of having always kept in repair the north end of Felton church ; and being exempt from the payment of tithe of hay, under a modus.

The question stated upon the case, (and the only question then intended to be brought before this Court,) was—

"Whether the occupiers of these 90 acres, late parcel of the common, but now allotted to the owner of Swardland demesne, are or are not liable to the payment of tithe of corn and hay."

But the counsel, when they came to argue it, made two questions, viz.

1st. "Whether Swardland demesne was itself exempted from the payment of tithe for corn : " (it was agreed to be exempt from tithe of hay, by the modus).

2dly. "Whether the 90 acres of inclosed common be exempted from tithe of corn and hay."

However, the Court would not enter into the first question "whether non-payment of tithes can be set up against a lay-impropriator, (b) as a presumption of title : " (c) because it was never intended by the parties, to be meddled with by the present action, most plainly.

As to the second question—

Mr. Wallace, who argued for the defendants, contended that as the allotment was to bear all the burthens of the ancient estate to which it was now annexed, it [1377] ought therefore to enjoy all the privileges of it : and as this ancient estate was exempt from tithes, so also ought the allotted ninety acres to be.

And he relied very much upon a case in the Court of Chancery, determined by Lord Hardwicke on 15th July 1748 ; which he cited as in point : the name of it was *Stockwell v. Terry*. (d) Stockwell was rector of the parish, and filed his bill against the occupier of some land (then plowed up) for tithe of the corn which grew upon it. The defendant insisted upon a modus of 15s. in lieu of all tithes arising upon the Grange Farm ; and that the Grange Farm had never paid any tithes. Then he shewed, that the land for which Stockwell demanded this tithe of corn by his bill, had been part of a down which had been inclosed by a private Act of Parliament, and had been thereby allotted to, and had ever since continued part of the Grange Farm ; and therefore ought to be exempt from all tithes, as well as the Grange Farm itself. And Lord Hardwicke dismissed the rector's bill, so far as it related to this land which had been down-land, and was so allotted to the Grange Farm.

Mr. Thurlow, for the plaintiff, argued, that notwithstanding this decree in *Stockwell's case*, yet in the present case (which differs much from that) the allotted common is not exempted from the payment of tithes.

(a) It is not so in the Act, for the clause is thus : "Be it further enacted by the authority aforesaid, that this Act and every clause and matter therein shall by all and every Judge and Judges and other person and persons, be construed and adjudged as largely and beneficially in all Courts of Law and Equity, and all other places as can be for the ends and purposes herein above mentioned."

(b) Bunb. 325, 345.

(c) Vide Com. 643, that presumption cannot. Sed qu. whether a presumption of title may not ? In reason it ought.

(d) S. C. 2 Bur. E. L. 388. 1 Vez. 115. Bunb. 138, and see Salk. 169, pl. 1, and vide Buller, 191, which shews it was determined on the same ground as that in Bunb. 138. The note on the case of *Stockwell v. Terry*, 14 July 1748, in Buller's Nisi Prius, page 178, was long before Vezey's Reports were published, and therefore cannot be supposed to be taken from that report, but from a communication from Lord Bathurst, or at least, from notes collected by him. The clause in Buller's Nisi Prius, ed. 1775, p. 191, is as follows, viz. "Lord Hardwicke held" (stating a point not material to this case) "a note in the same cause : it appearing that a modus of 13l. was paid for the tithe of Grange Farm, to which there was common appurtenant in the land inclosed, a parcel of which was allotted by the Act for inclosing, to the farm : the Chancellor held the modus extended to such inclosed land."

This demand of the impropiator, in the present case, is a claim of the tithe of corn, grain, and hay. But corn, grain, and hay could not be part of what grew on a common: the tithes that arose upon this common (appendant to Swardland demesne) could have been only tithes of agistment, or of lambs, calves, wool, milk and other things that could be the produce of a common.

Now a modus or other compensation must be in lieu of these specific tithes. This exemption therefore can not relate to any other tithes but such as could in their nature have arisen out of the common. So that it is not within the substantial idea of the modus or compensation insisted upon by way of exemption from paying tithe for these lands, which were part of the common, but now bear corn, grain and hay. For, the rector could have no benefit from this modus, which was confined to the tithe of corn, grain, and hay, in respect of any of that sort of [1378] tithe which could arise from the common, whilst it remained common.

Tithes are not issuing out of the land, but collateral to it: and they cannot be discharged but by special words; which this Act does not make use of, the words of it being only general words. Cro. Eliz. 161, *Parkins v. Hinde*. 11 Co. 13 b. S. C. 1 Leon. 300, *Stile v. Miller*. Owen 39, S. C.

An exemption may be easily destroyed. An alteration of the use of the land will destroy it: as where a buck or a doe is to be paid out of a park; (e) and the park is disparked. For which, he cited Hutton 58, *Poole v. Reynold* (upon a prescription "to be discharged of all tithes, by delivering deer annually:" and the park was afterwards disparked).

Here the exemption claimed is, "to be discharged of the tithe of corn, grain, and hay arising and growing on Swardland demesne." But the common now inclosed and allotted was not, whilst it was common, capable of producing either corn, grain or hay. Therefore it is not exempt from tithe of corn, grain and hay.

If a mill be discharged of tithe; and the owner turns the water-course but a very little way, and re-edifies his mill upon such turned water-course, this re-edified mill shall not be discharged. 1 Ro. Abr. 652, title Dismes, letter F. pl. 2.

So that changing the substance of the exemption is sufficient to destroy it; even supposing it to have been a good one.

Lord Mansfield.—The case of *Stockwell v. Terry* differed very much from the present case. The modus insisted upon in that case extended to all kinds of tithes: whereas the exemption insisted upon in the present case is confined to the specific land called Swardland demesne, and does not extend to the right of common. Here is no equivalent at all for the tithes of agistment of wool, milk, lambs, or any other tithes of such a kind as could arise upon a common. The equivalent goes only to corn, grain and hay; the tithe whereof could not arise upon the common, whilst it remained a common.

In the case cited, the rector was, as owner of the glebe, a party to the Act of Parliament: here, the impropiator is not party to this Act of Parliament.(f) And there the modus covered the right of common: it was a modus of 15s. which was paid for the Grange Farm, [1379] in lieu of all tithes arising upon it, "and of all the tithes of all the cows and sheep belonging to that farm that should be depastured on the said down," (which was afterwards inclosed and allotted to it). So that the modus covered not only the Grange Farm itself with its appurtenances, but the common also: (which is not the present case). Lord Hardwicke decreed, "that modus should stand for the allotted lands, as well as for the Grange Farm and its appurtenances;" and accordingly, he dismissed the bill as to those lands which the modus covered: but as to all the other lands of the common, which had before used to pay tithe of wool, agistment and other small tithes, he decreed an account.

Here all rights are saved, generally, by this Act of 26 G. 2. Consequently, the impropiator's right to tithes remains: and there is no need to shew how they are due, because they are due of common right.

The whole Court were very clear (g) that in the present case, the exemption and

(e) This argument was used in 1 Vez. 116, but did not prevail.

(f) This is true, there is not a word mentioned about tithes in any part of the Act; and this takes off one of the reasons given by Lord Hardwicke, for his opinion in *Stockwell v. Terry*, as appears 1 Vez. 118.

(g) This is contrary to what was before admitted, as appears in p. 1376. There

modus did not extend to the waste and common; and therefore that the allotted lands, which had been part of that waste and common, having been subject to tithes before the allotment, must remain liable to them after if: which they held to differ materially from the cited case, where the modus did extend to the waste and common.

They understood the words "subject to the same charges and incumbrances as their former lands were subject to," (*h*) to mean only incumbrances upon the estate, (as dower, &c.) and not to intend its being subject to the repair of the church of Felton.

See the case of *Lambert v. Cumming*, 21 November, 1723, in the Exchequer: Bunbury 138.

Lord Mansfield said, that case was determined upon the same ground as Lord Hardwicke's decree went upon, viz. that what was before exempted shall remain exempted; and what was not before exempted shall pay tithe.

Per Cur. unanimously,

Let the postea be delivered to the plaintiff.

REX *versus* BARKER ET AL'. Thurs. 28th April, 1763. [S. C. 1 Black. 300, 353.]  
Leave given to withdraw return to mandamus.

Upon Mr. Dunning's motion, consented to by Mr. Solicitor General,

The Court gave leave to the defendants, to withdraw their \* return to the mandamus: and a peremptory mandamus was by consent on both sides awarded; (the parties concerned having, since the last motion, gone [1380] to a new election).

Peremptory mandamus (by consent on both sides).

PLUMER, Spr. *versus* WILLIAM MARCHANT, Administrator of Peter Marchant.  
Tuesday, 3d May, 1763. Administrator defendant may give evidence of retainer or plead it.

[Followed, *Sander v. Heathfield*, 1874, L. R. 19 Eq. 26.]

This was a case reserved from the Sussex Assizes, holden before Mr. Serjeant Wynne.

An action of debt was brought, in Michaelmas term 1762, upon a bond of the defendant William Marchant's intestate, in the penal sum of 200l.

The defendant, in Hilary term, 1763, pleaded plene administravit.

is also another point mentioned towards the bottom of the same page; which, if determined one way, would have been a bar to the plaintiff: and the Court would not enter into that question, "because it was never intended by the parties to be meddled with by the present action most plainly:" whereas, the Court ought to consider every point material, though omitted to be insisted on, and yet with respect to the modus for hay, they determined against the admission of the parties.

(*h*) Even if there had been no such clause, yet by the rules of law and justice, the land allotted ought to be subject to the same charges, as the land in lieu of which it was allotted, Pickering's Finch. 67, Reg. 93; therefore this clause ought to have been extended to all charges and incumbrances, and consequently to the repairs; and dower is particularly mentioned: so that it was absurd to say, the general words had reference to that; and if the lands allotted were subject to repairs, they could not be subject to tithes, as that would make them doubly charged with respect to tithes: as to all benefits and exemptions, as well as to all burdens, the lands allotted ought to be considered as the same as those "in lieu of which they were allotted;" and so is the rule in the statute. The clause in which is thus, "be it further enacted by the authority aforesaid, that the lands intended to be allotted and inclosed as aforesaid, shall after such allotments thereof respectively be held and be enjoyed, by such person and persons respectively, and in such course, order and manner; and shall be subject to such jointures, dowers, estates, portions, charges, and incumbrances respectively, as the lands and hereditaments, in respect whereof such allotments shall be made, ought to have been held and enjoyed, and should have been subject to in case this Act had not been made."

\* V. ante, p. 1265, 23d Jan. 1762.



The plaintiff, in the same Hilary term, replied, "that the defendant then had, and on the day of exhibiting the bill had sufficient goods and chattels, &c. to have satisfied to the plaintiff, the debt and damages aforesaid." And issue was joined thereon.

At the trial, the defendant's counsel offered to give in evidence the following covenant, contained in the after-mentioned deed of settlement; viz.

By articles of agreement indented, dated 7th August 1759, made between Peter Marchant the Elder of Hurstperpoint in Sussex, gent. and the intestate, Peter Marchant the Younger, nephew of the said Peter Marchant the Elder, of the first part; Mary Longhurst of Limester in the said county, and Sarah Longhurst of the same place, spinster, daughter of the said Mary Longhurst, of the second part; and the defendant William Marchant, and John Balcomb of Angmering, in the said county, of the third part; after provision being made (in consideration of an intended marriage between the said intestate Peter Marchant, and the said Sarah Longhurst, and the sum of 330*l.* and upwards, as a marriage portion,) by settlement and surrender of divers freehold and copyhold estates on the said Sarah Longhurst and the issue of the said intended marriage: it was witnessed as follows—

[1381] "And the said Peter Marchant the Younger, in consideration of the said marriage, and as a provision for the said Sarah his intended wife in case she shall happen to survive him, and for the issue of such intended marriage, doth for himself, his heirs, executors and administrators covenant, promise and agree, to and with the said William Marchant and John Balcomb their executors and administrators, that he the said Peter Marchant the Younger shall and will in and by his last will and testament, or that his executors or administrators shall, within six months after his death, well and truly pay and deliver, either in money, goods, chattels or effects, out of his personal estate, the full sum of 700*l.* unto the said William Marchant (the defendant) and John Balcomb or the survivor of them, or to the executors or administrators of the survivor of them: and that the interest and produce of the same shall be advanced and paid to the said Sarah, for and during the term of her natural life, for the maintenance of herself, and for the maintenance and education of the children of such marriage: and after her decease, it is declared and agreed to be the intent and meaning of all the said parties to these presents, that the same shall be equally divided amongst the issue of such intended marriage, and to be paid to them respectively as they shall attain to the age or ages of twenty-one years or if any of them are daughters or daughter, to be paid respectively to such daughter or daughters at their respective ages of twenty-one years or day or days of marriage; and in default of such issue at or after the death of the said Sarah Longhurst, to be paid to such person or persons as he the said Peter Marchant the Younger shall in and by his last will and testament give, leave and bequeath the same. And for the better performance of the said covenant, article and agreement herein before-mentioned to be by him the said Peter Marchant the Younger done, paid and performed, he the said Peter Marchant the Younger doth hereby bind and oblige himself his heirs, executors and administrators, unto the said William Marchant (the defendant) and John Balcomb their executors and administrators in the penal sum of 1400*l.*"

Which articles were sealed and delivered by the said Peter Marchant and the said John Balcomb.

The said marriage afterwards took effect: and the said Peter Marchant the husband died intestate, in November 1762; leaving the said Sarah his widow, but no issue of the said marriage.

[1382] The defendant William Marchant, the trustee named in the said articles, admits effects sufficient to satisfy the plaintiff's debt; unless he has a right to retain the same, towards satisfaction of the 700*l.* above mentioned: which he insists, he has a right to do, under the said covenant and deed of settlement; and that, upon his said plea, he might give the above covenant in evidence.

The question submitted to the Court, is, "whether the defendant, as administrator of the intestate Peter Marchant the Younger, could, upon the plea of *plene administravit*, give in evidence the covenant above stated, to support his plea."

Mr. Eliab Harvey, for the plaintiff, argued that he could not.

1st. There can be no retainer at all, in this case; because here could have been no action of debt brought against the defendant as executor; it not being a debt in the testator, and consequently not in the executor: the testator has only covenanted

"that his executor shall pay." *Perrot v. Austin*, Cro. Eliz. 232, is express to this purport.

So in the present case, no action of debt could have been brought upon this covenant: and as an action of covenant only sounds in damages, this covenant can not be insisted upon by an executor or administrator, to be set off by way of retainer, against the specialty-debt for which he is now sued.

2dly. The ground of retainer, simply, as it stands here, is not sufficient; there ought to be some previous requisition made upon the executor, by the wife or her trustee: or some act of the co-trustee, to justify it. It does not appear that the covenant was or would be insisted upon, against the administrator. Besides, here, the sixth months after the intestate's death were not expired: and consequently, no right of action had accrued.

3dly. This retainer being attended with very special circumstances, it ought to have been pleaded: and if the truth of the case had been disclosed by pleading, the plaintiff might have then taken judgment of assets *quando acciderint*. But as "*plene administravit*" was pleaded; and as we knew we could shew assets, and did not nor could know any thing of this covenant, we are now deprived of this benefit.

[1383] 4thly. This plea is not substantially true, "that he has fully administered;" when the assets are covered only during the wife's life.

He therefore prayed, that the *postea* might be delivered to the plaintiff.

Mr. Cox, *contra*, for the defendant.

1st. This is a specialty debt. This administrator, if he had not been also a trustee as well as administrator, might have immediately paid it to the trustee as soon as the intestate was dead: for, the six months is only an enlargement of the time of payment, allowed to the defendant for his ease and benefit; but it is a debt, before that. Therefore he may retain it, against a demand of equal degree.

2dly. No requisition or other act was necessary. As he could not sue himself, but might retain.

3dly. It was not necessary to plead it: this has been long settled. *Gouch's case*, 5 Co. 60.\* The plaintiff suffers no inconvenience from not having judgment of assets *quando acciderint*: he may bring a fresh action, (if not have a *†* *scire facias*,) as soon as the wife dies. If he had immediately paid it, he might have given that in evidence.

Mr. Harvey, in reply—

3d. In this method, the plaintiff may lose her debt: another person may get judgment before her.

4th. This is not, in truth, a full administration; because these assets may become answerable for this debt, after the death of the testator's wife.

Lord Mansfield.—It is now settled, "that a retainer of a debt may be given in evidence."

And as to the case of *Perrott v. Austin*, in Cro. Eliz. 232, it seems to be an extraordinary one, in itself; and there is a query upon it, in the very book. Besides, the testator is here bound in a penalty.

[1384] The real justice of the case is, that the plaintiff should have judgment of assets, *quando acciderint*.

Mr. Justice Denison thought it the clearest case that could be, and not to differ from the common case. This is a real debt, and the assets are bound by it; and it is a debt by specialty; therefore it is of an equal nature with another debt by specialty. Consequently, the present action being brought upon a debt by specialty, the administrator has a right to retain against it.

This case is just the same as if there were two executors: for payment to one is payment to both. He may retain what he might have paid.

An action of covenant is as much a lien upon the assets, as an action of debt.

Judgment of assets, *quando acciderint*, would have admitted the debt.

I see no difference between this case and the common case: the special circumstances signify nothing, here.

Mr. Justice Wilmot had no doubt.

\* See Viner, p. 266, tit. Executors, ma. 2. "Administrator defendant may give retainer in evidence, or plead it, at his liberty." Brownl. 75, *Bond v. Green*.

† V. Bro. Executor, 18.

Wherever the executor might have been sued, he may retain. And this is a debt of equal nature with that for which the action is brought. Therefore he may retain.

The intestate was himself bound: and the lien falls upon his representatives, though he himself could not have been sued.

But without that, I think this is a debt for a sum certain, and secured by specialty. Therefore there is no distinction, whether the man himself was to pay it, or his representatives.

The assets are bound, so long as the woman lives. It may happen, (by the co-trustee's surviving the defendant,) that the money may, at her death, be out of this man's hands: in which case, no new action or scire facias could have effect against him.

Lord Mansfield now observed, that there might be difficulties in the method of taking judgment [1385] *de bonis quando acciderint*; (which had, before, appeared to him to be the right method;) and therefore

Per Lord Mansfield and \* both the other Judges, clearly and unanimously,  
Let there be judgment of nonsuit.

D'AYROLLES, ESQ. *versus* HOWARD. Wednes. 4th May, 1763. [S. C. Bull. 93.] In some issues between lord and tenant, the plaintiff cannot give in evidence that there was not a sufficiency of common left.

Upon shewing cause against a rule which had been obtained by Mr. Solicitor General (Norton) on behalf of the plaintiff, for a new trial, upon the foot of a misdirection by the Judge of Assize, it appeared that the action was an action of trespass brought by the lord of a manor against the commoner, for spoiling and destroying his peat, and filling up the holes out of which it was dug. To which, the commoner pleaded a justification under a right of common in and through the said waste appendant to his house, &c. And that the plaintiff had dug this peat in some parts of the common, and laid it up in other parts of it, whereby the defendant was hindered from enjoying his said right of common, in so large and beneficial a manner as he had used and had a right to do: and therefore he justifies the breaking and removing the said heaps, and filling up the holes, doing as little damage as was possible.

The plaintiff (the lord of the manor) replied, that the defendant did the trespasses *de injuriâ suâ propriâ, absque tali causa*. Upon which, issue was joined.

The principal question at the trial was, whether the plaintiff could, upon this issue, give in evidence "that there was a sufficiency of common left."

Mr. Serjeant Wynne (who went as Judge of Assize to the last Kingston Assizes) was of opinion, "that upon this issue, he could not." And

The Court now concurred in the same opinion.

But however, as it appeared, that the merits had never been fully tried, they thought, that the present verdict for the defendant should be set aside on payment of costs by the plaintiff; and a new action brought by the commoner, against the lord; in which action, all the matters [1386] insisted upon (which were various) might be given in evidence; for, both sides declared a desire to have the real merits fairly and fully tried; viz. whether the lord had or had not a right, and had always used, to dig peat upon this common, and lay it up there to dry.

V. 1 Siderfin, 106, *Goe v. Cother*: where the lord dug pitts upon the common.

REX *versus* CORPORATION OF WEST LOE. Friday, 6th May, 1763. Mandamus to go to election on judgment of ouster, cannot be moved for till judgment actually signed.

On Monday last (the second of May) Mr. Dunning moved for a mandamus to the corporation, to go to the election of a mayor; there being a judgment of ouster against Mr. Buller, the late mayor.

Mr. Webb, contra, then objected that they came too early with their motion: for, that judgment against Mr. Buller was not actually signed, but only a rule given on

\* Mr. J. Foster was absent.



the postea; which is a four-day rule, and not yet out, (being given but the day before;) so that no judgment can be yet signed; and non constat, whether it ever will be.

Mr. Dunning relied on a late case, which he said was in point, viz.\*<sup>1</sup> *Res v. Ollerhead*, in Easter term 1759, 32 G. 2, where the like mandamus was granted on Mr. Morton's motion the day after the giving the rule on the postea, and before the signing the judgment.

But the Court were clear, that if it was so done in that case; it was wrong.

Nothing was therefore taken by the motion of last Monday.

The four-day rule being now expired, the adverse parties had a trial of skill, "which of them should get the start of the other in moving for a mandamus;" conceiving that they should get some advantage, by being before-hand with their opponents.

The prosecutor's clerk in Court applied to me, in Court, to sign the judgment against Mr. Buller: which (as they were now become regularly and indisputably intitled to ask,) I immediately began to do. When I had written (upon the proper stamp parchment) the following words—"On a verdict, judgment is signed for our lord the King against the defendant;"—and before I had proceeded any further towards finishing it and awarding the capiat, ("let the defendant be taken");

[1387] Mr. Webb, having pre-audience of the prosecutor's counsel, moved, on behalf of another person, for a mandamus commanding the corporation to go to a new election; "judgment being signed against Mr. Buller the preceding acting mayor; whereby the office was become vacant:" and he appealed to me for the truth of his assertion, "that judgment was actually signed against Mr. Buller." Whereupon I informed the Court, exactly, of the above mentioned circumstances.

Mr. Dunning, on behalf of the prosecutor, objected to Mr. Webb's taking the advantage of his pre-audience, to get the start of him in this motion; which he assured the Court, he was prepared to have made, as soon as it should have come to his turn to move; and which he could not make till judgment was actually signed.

The Court were clear, that the prosecutor was entitled to the\*<sup>2</sup> priority of this motion for a mandamus; and accordingly

Granted it to the prosecutor,

(Upon Mr. Dunning's motion.)

REX versus THOMAS HAYDON. Saturday, 7th May, 1763. Indictment of witness for perjury, no reason why the judgment should be postponed against the person convicted.

Mr. Serjeant Nares, supported by Mr. Stowe and Mr. Ashurst, moved, a few days ago, on behalf of the defendant, to postpone the judgment of the Court upon him, till Michaelmas term; having been convicted (as was alledged) upon the single evidence of † John Burbage, "of having promised him to give him three guineas, at the election for members of Parliament for Evesham, &c." Which single witness, John Burbage, now stands indicted for perjury in giving that very evidence, and was indicted for it as early as was possible after committing the crime. They had an affidavit of all this matter, (made by this Thomas Haydon).

Mr. Solicitor General (Norton) and Mr. Morton, contra, for the prosecutor, premised, that as this defendant had been heretofore brought up to receive judgment which was only put off till it should be seen whether any action would be brought against him, the case ought to stand now as it did then; and no subsequent indictment ought to affect it.

[1388] And they asserted, that he was so far from being convicted upon the single evidence of Burbage, that even his own evidence would have convicted him; and particularly the evidence of one Penny, who was called by himself, would alone have been fully sufficient to ground the conviction upon, even if Burbage's had been totally out of the case.

And they observed that the assignments of Burbage's perjury do not go to the point that was in issue upon Haydon's trial, but to collateral instances.

But their grand objection was, that "this Thomas Haydon, the defendant, is the

\*<sup>1</sup> Or rather *Res v. Corporation of Wigan*.

\*<sup>2</sup> Vide ante, p. 782 to 785.

† V. ante, p. 1359, 24th Nov. 1762.

first witness upon the back of the bill of indictment ;" (which is a precedent of the most dangerous tendency :) and all or all but one of the other witnesses thereon, were examined at Haydon's trial.

Burbage also offered to take his trial at the last assizes : but this prosecutor did not comply with that offer.

N.B. On viewing the indictment and the names indorsed upon it, it appeared that Haydon himself was the first witness : and that all the rest of the witnesses, except one Clarke, were actually examined at Haydon's trial.

Lord Mansfield.—If the Court were to defer pronouncing judgment against Haydon, he could not be a witness upon the trial of this indictment for perjury against Burbage ; because he is so much interested in the event of it. And the other witnesses, all but Clarke, have already been examined upon Haydon's trial ; and it does not appear, but that Clarke might have been. Therefore there is no reason to defer our judgment.

Mr. Justice Wilmot entirely concurred with his Lordship.

And Mr. Justice Denison shewed no marks of dissent.

Whereupon, (the time for bringing an action being now elapsed,) the defendant Haydon came into Court : and

The Court committed him, and ordered him to be brought up again on this present Saturday, to receive judgment ; which was—

[1389] To pay a fine of 200*l.* and be imprisoned for three months and until the fine be paid.

V. post, pa. 1440, under 22d June 1763.

PALMER *versus* NEEDHAM. Monday, 9th May, 1763. [Contra, 4 Durn. 570.] Special bail-piece discharged, original debt being under ten pounds.

The original demand was only 3*l.* 13*s.* 6*d.* the plaintiff brought an action for it ; and obtained judgment, with costs. The debt and costs amounted to above 10*l.* The plaintiff then brought an action of debt upon this judgment ; and held the defendant to special bail.

Mr. Solicitor General had obtained a rule to shew cause why the bail-piece should not be discharged, and common bail be accepted.

Mr. Eliab Harvey now shewed cause ; and insisted that whether it was or was not necessary to give special bail in this case, yet as it was actually given, it ought not to be discharged.

But the Court were very clear, that as the original debt was under 10*l.* the inancement of it by adding the costs, and so raising the total to above 10*l.* was not sufficient to oblige the defendant to give special bail ; the intention of the Act being only "that special bail should be required where the original debt amounted to upwards of that sum." And they were equally clear, that as special bail ought not to have been at all required, the bail-piece must be discharged, (though actually taken,) and common bail accepted.

Note.—There was judgment by default ; and a writ of error brought ; and it was part of the motion, "to stay execution till four days should be expired after the determination of the writ of error."

Rule made absolute.

LE BRETON *versus* BRAHAM. Friday, 13th May, 1763. Plaintiff ought to give the defendant the particulars of his demand.

Upon the motion of Mr. Caldecott (made on Saturday last) on behalf of the defendant, the Court gave him a rule upon the plaintiff (who was by profession an attorney) to shew cause why proceedings should not be stayed till he should give the defendant an account of his demand ; [1390] and that the defendant have time to plead, till such account be given her by the plaintiff.

He moved it upon an affidavit "that the plaintiff refused to acquaint her with the nature or particulars of his demand ; and that she had offered to pay him, immediately, whatever was due to him from her."

It was an action for money lent, and monies laid out to her use.

Lord Mansfield thought it reasonable that in all cases, (as well where attorneys

were plaintiffs, as where other persons were plaintiffs,) the plaintiff ought to give the defendant an account of the particulars of his demand.

The present motion ended in a rule of reference to the Master (by consent,) to see what was due.

The end of Easter term, 1763, 3 G. 3.

Note.—Mr. Justice Foster was absent all this term.

[1391] TRINITY TERM,\* 3 GEO. 3, B. R. 1763.

REX *versus* SHOWLER AND ATTER. Friday, 3d June, 1763. [S. C. 1 Bl. 419.]

Appointment of overseers for a village or township order quashed, because the place was not so. [16 Vin. 418. 1 Wils. 138. Vin. Mand. (K) Str. 1004.]

Mr. Eliab Harvey shewed cause against quashing an order of sessions which confirmed an order of two justices of Lincolnshire-Lindsey, nominating and appointing Thomas Showler and John Atter, being substantial house-holders of the township or village of Haugh, in the said parts, to be overseers of the poor of the said township or village of Haugh, for the year next ensuing, according to the direction of the statute in that case made and provided; and also against quashing the said original order of the two justices. The case was as follows.

Thomas Showler, one of the said overseers so appointed, having appealed to the General Quarter-Sessions, from this warrant or order of appointment, the first sessions adjourned it to the next. They state, that it appears to them, that the said John Atter, in the said appointment named is a day-labourer; and that the said place called Haugh, consists of a capital messuage, in which, Thomas Showler in the said appointment named, with all his family, dwells; and of two small ancient cottages; and of one other small cottage, lately built; all which cottages are let along with the said capital messuage, and the farm thereunto belonging, to the said Thomas Showler; and of another tenement, part of the said capital messuage; and all of them inhabited by families; and that one of the cottages is inhabited by the said John Atter and his family; and another of the said cottages is inhabited by another day-labourer, and his family; and the other of the said cottages is inhabited by a shepherd and his family; and the tenement part of the said capital messuage is inhabited by a poor widow and her five chil-[1392]-dren: all which occupiers of the said cottages, and of the said tenement part of the said capital messuage, are under-tenants to the said Thomas Showler. The said Court of Sessions therefore orders and adjudges "that Haugh aforesaid is a village or township; and that the said warrant or order of appointment be confirmed."

Mr. Harvey and Mr. Kemp, in answer to the two objections that had been made to these orders, (viz. 1st. "That the facts stated shew that this place is neither a township nor a village;" 2dly. "That Atter appears to be only a labourer, not a substantial householder:") insisted,

1st. That the sessions have determined right in adjudging Haugh to be a village: for, it appears upon the state of the case, to be so.

1 Inst. 115, defines a village, as consisting ex pluribus mansionibus et pluribus vicinis. And here are five distinct mansions: which number answers to the term "plures."

And both Spelman's Villare Anglicanum, and Cambden's Britannia mentions this place as a village: which is, at least, a reason for sending the order back to the sessions, in order that the facts may be more fully stated.

They said, the two cases cited out of Sir John Strange's Reports, viz. 2 Sir J. S. 1004, *Denham v. Dalham*, and 2 Sir J. S. 1071, *Stoke-Prior and Grafton*, are not applicable to the present case. For, the § former was upon an order of removal: and Southwold Park, the extra-parochial place, consisted of only two houses and two families; which could not be called plures.† The latter was a nobleman's seat, converted within time

\* Mr. Justice Foster's health did not permit him to come to Westminster-Hall during this whole term.

§ See my Settlement Cases, No. 11, *Rex v. Inhabitants of Denham*.

† See my Settlement Cases, No. 31, *Rex v. Inhabitants of the Manor of Grafton*, [13 & 14 C. 2, c. 12, s. 21. 17 Geo. 2, c. 38, s. 15].



of memory into five houses and farms: but that case was never argued; and the rule was made absolute without defence.

The Court were clearly and unanimously of opinion "that both these orders ought to be discharged."

Lord Mansfield observed, that by this method, a place might be made into a village, which in fact was not so; and the inhabitants of it might by this contrivance withdraw themselves from contributing towards the support of the poor of their parish.

If it be really a vill, you may make another appointment.(a)

[1393] Mr. Justice Wilmot cited and laid a good deal of stress upon a case in M. 1740, 14 G. 2, B. R. \* *Re v. Inhabitants of Welbeck*: which Mr. Justice Denison also said he very well remembered. It was a mandamus to appoint overseers in and for the village of Welbeck: and the return was, "that it was extra-parochial, and is not nor was, nor is or ever was reputed to be a village or a township; and therefore they cannot appoint any persons to be overseers of the poor of it." And this return was allowed; upon the principle "that the Court have no power to issue such mandamus, but upon the supposition of its being a vill or township."

Both orders quashed.

Note.—Their answer to the 2d objection was, that the original order expressly called Atter "a substantial householder."

But, as the Court were so clear against the orders upon the first objection, as to allow it without even hearing the counsel who were to argue in support of it; this second objection was not discussed, nor even entered into.

BATES *versus* GAMBLE. Saturday, 4th June, 1763. When insolvent debtor ought to be brought up a second time.

Upon the application of an insolvent debtor, on 32 G. 2, c. 28, § 13, the Court ordered the petitioning debtor to be brought up again upon the last day of this term, (instead of the first day of the following term). For, this last Act † only directs, in general, "that the Court shall by order or rule cause the petitioning prisoner to be brought up on some other day to be appointed by such said Court, some time at furthest, within the first week of the term next following the time of such examination: but sooner, if any such Court shall so think fit." And as these persons live both in the same town, and the plaintiff has already had a copy of the schedule fourteen days at least (as the Act requires), it would be hard to keep the defendant in prison during the whole long vacation.

N.B. By 2 G. 2, c. 22, § 9, p. 424, if the creditor be not satisfied, but shall desire further time to inform himself, the Court shall remand the prisoner, and appoint another day some time within the first week of the term next following, (which was the former practice). But the present Act leaves the time of bringing the prisoner up again, to the discretion of the Court.

[1394] GLOVER *versus* BLACK. Tuesday, 7th June, 1763. [S. C. 1 Black. 396, 399, 405, 422.] Respondentia and bottomree interest must be expressly mentioned and specified in the policy; but special interest in goods may be given in evidence, if the circumstances of the case shall admit of it.

[Distinguished, *Simmonds v. Hodgson*, 1829, 6 Bing. 121; 3 Moo. & P. 397; *Mackenzie v. Wilkinson*, 1875, L. R. 10 Ex. 148; 1 Ex. D. 43.]

This was a case reserved at the sittings before Lord Mansfield, at Guildhall, after Michaelmas term 1762.

It was an action on the case upon a policy of insurance bearing date the 16th of

(a) It seems by what is stated, as if there were no other but Showler who was better than a labourer; if so, to what purpose should another appointment be made, if only to appoint Showler by himself; why not quash it only as to the other?—Note, it afterwards appeared to the annotator from a copy of the order of sessions, that the facts as above were conjectured.

\* V. 2 Sir J. S. 1143.

† P. 439, (part of s. 13).

December 1760, made on goods and merchandizes loaden or to be loaden on board the good ship or vessel called the "Denham," whereof was master Captain William Tryon, "at and from Bengal to any ports or places whatsoever in the East Indies, until her safe arrival in London:" which policy was under-written by the defendant for 200l. for a premium of 10l. per cent.

The plaintiff declared for a total loss.

The defendant pleaded the general issue.

The cause coming on to be tried at Guildhall, London, on 1st December 1762, before Lord Mansfield, it appeared in evidence,

That the defendant underwrote the policy and received the premium, as stated in the declaration.

That before the underwriting of the policy, the plaintiff had lent to William Tryon the master of the ship, upon the goods then loaden and to be loaden on board the said ship on account of the said William Tryon, the sum of 764l. at respondentia: for which, a respondentia-bond was executed by Captain Tryon, and one Joseph Bustoll to the plaintiff. The bond was in common form; and recited "that the above-named Alphonsus Glover had on the day of the date lent and advanced unto the above bounden William Tryon the sum of 764l. upon the merchandises and effects laden and to be laden upon the account of the said William Tryon, on board the good ship or vessel called the 'Denham,' of the burthen of 499 tons or thereabouts, now in the river of Thames, whereof he the said William Tryon is the commander." And the condition was, "that if the said ship should with all convenient speed proceed and sail from and out of the said river of Thames, on a voyage to any parts or places in the East Indies, China, Persia or elsewhere beyond the Cape of Good Hope, and from thence should sail and return into the said [1395] river of Thames, at or before the end or expiration of thirty-six calendar months, to be accounted from the day of the date of these presents; and that, without deviation (the dangers and casualties of the seas excepted;) and if the above-bounden William Tryon and Joseph Bustoll, or either of them, their or either of their heirs, executors or administrators should within thirty days next after the said ship or vessel should be arrived in the said river of Thames from the said voyage, or at the end and expiration of the said thirty-six months, to be accounted as aforesaid (which of the same times shall first and next happen) well and truly pay or cause to be paid unto the said Alphonsus Glover his executors, administrators or assigns, the sum of 1008l. and 9s. of lawful money of Great Britain, together with 12l. and 4s. of like lawful money by the month, and so in proportion for a greater or lesser time than a month, for all such time, and so many months as shall be elapsed and run out of the said thirty-six months, over and above twenty months to be accounted from the date of these presents; or if in the said voyage, and within the said thirty-six months to be accounted as aforesaid, an utter loss of the said ship by fire, enemy's men of war, or any other casualty, shall unavoidably happen, and the said William Tryon and Joseph Bustoll or either of them, their or either of their heirs, executors or administrators should within thirty-six calendar months next after such loss pay and satisfy unto the said Alphonsus Glover, his executors, administrators or assigns a just and proportionable average on all the goods and effects of the said William Tryon carried from England on board the said ship, and all other goods and effects which the said William Tryon shall acquire during the said voyage, and shall not be unavoidably lost; then the above-written obligation to be void; or else to be and stand in full force, virtue and effect."

That on the 31st of March 1760, the said ship "Denham" was at Fort Marlborough in the East Indies, within the limits insured; and had then and at the time of the loss hereafter mentioned, divers goods and merchandizes on board her, which were the property of the said William Tryon, and of greater value than all the money he had borrowed.

That on the said 31st of March 1760, the said ship, with her lading on board her, was burnt at Fort Marlborough aforesaid; and thereby all the goods and merchandizes aforesaid of the said William Tryon were totally consumed and lost.

This proof being given of the plaintiff's interest, [1396] the jury found a verdict for the plaintiff, subject to the opinion of the Court "whether, on this evidence, the plaintiff was intitled to recover on this policy."

See the statute of 19 G. 2, c. 37, § 5, whereby it is enacted "that all money to be lent on bottomree or at respondentia, upon any ship belonging to any of His

Majesty's subjects bound to or from the East Indies, shall be lent only on the ship, or on the merchandize or effects on board of such ship : and shall be so expressed in the condition of the bond ; and the benefit of salvage shall be allowed to the lender, his agents or assigns ; who alone shall have a right to make assurance on the money so lent. And no borrower of money on bottomree, or at respondentia shall recover more on any assurance, than the value of his interest on the ship, or in the merchandizes or effects on board ; exclusive of the money so borrowed. And in case it shall appear that the value of his share in the ship or in the effects on board doth not amount to the full sum or sums he hath borrowed, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, together with the assurance and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost."

This case was first argued on Tuesday 1st of February 1763, by Mr. Yates for the plaintiff, and Mr. Harvey for the defendant ; and again on Tuesday 26th of April, by Mr. Morton for the plaintiff, and Mr. Solicitor General (Norton) for the defendant.

The counsel for the plaintiff insisted that the lender of this money had an interest in the goods, though they were the property of the borrower : the lender is the trader, against the risque of the sea.

Respondentia is an interest that may be insured : and it is not necessary to specify in the policy, "that it is a respondentia interest only, which is insured." It appears by 19 G. 2, c. 37, § 5, that a respondentia interest may be insured as merchandize : and this insurance is upon goods and merchandize.

Here could be no fraud : nor is any pretence of fraud proved. If the insurer had had a double interest, both of goods and of respondentia, the insurance would have covered both.

[1397] They cited *Godin et Al' v. The London Assurance Company*,\* where Meibohm and Tamez had both of them consigned goods to Amyand ; and both insured : and it was holden that as each had a separate interest, each might insure.

The counsel for the defendant insisted, that the lender of money upon respondentia has no interest at all in the goods that the borrower either carries out or may acquire in India : and consequently, he can not insure them. The borrower had the whole disposal of them : he was only bound to allow for the salvage, if any happened upon the loss of them. The whole of the bond turns upon the ship's returning in safety. The lender has nothing to do with the goods.

This therefore differs greatly from a mortgage, where the thing mortgaged is bound to the payment of the debt ; and therefore a property in the thing mortgaged is vested in the mortgagee, and he may insure it : whereas the lender on respondentia has no sort of property or interest, either general or special, in the goods.

Upon East India voyages, five things may be insured ; viz. goods, respondentia, bottomree, freight, and the ship itself : but it is absolutely necessary that each be particularly specified in the policy : and the respondentia interest in this case ought to have been so. For, an insurance on a ship is no insurance of freight, though it be the same owner : much less is the general insurance on goods, the property of one person, an insurance of a respondentia-interest of another person.

An insurance on goods can only mean such interest as the proprietor of the goods had : and here the property and possession both remained in Captain Tryon only.

The under-writer ought to be apprized what it is, that he does insure : and it is extremely easy for the insured to specify this particular interest. But the insurer can not otherwise be apprized of it : and it would be most unreasonable that the insured should avail himself of a concealed particular interest, under a general expression, contrary to custom and usage.

There is a settled known form of insuring the respondentia and the bottomree interest specifically and nominatim. And this is the very first instance of such a claim as this, except that of one Mr. Edwards, of a loss founded [1398] upon a respondentia-bond : but there the insurers refused to pay it : and Edwards acquiesced and received back his premium.

The custom of all insurances is to mention the thing insured precisely : and a

\* Vide ante, vol. 1, p. 489.



strong reason why it ought to be ascertained, is, because the course of returning the premium, or part of it, differs according to the different nature of the thing insured. The under-writer returns to the insured so much of the premium as there was, in fact, no risque upon. But there would be an end of all chance of that, if the lender of money on respondentia could insure it as goods: for, if the ship came home safe, he might <sup>\*1</sup> receive his whole premium back, upon shewing "that he had no goods on board;" and yet might keep this his respondentia interest in petto, to claim upon it, in case the ship should be (as it was here in fact) lost.

Therefore proof of a respondentia-interest only is no evidence to subject the insurer to the payment of the money thus pretended to be insured by the lender without specifying it.

According to the latitude here taken, the insured might make his election after the event; and it would lie quite open to fraud and uncertainty, if he should be left to declare in future, what it was that he meant to insure, after the event has happened. This can not but be introductive of fraud.

Nay further, this is a fraud. This money lent is to be repaid on the return of the ship to the port of London; the risque is "at and from London to London:" whereas the present insurance is only "at and from Bengal to London;" which is enough to answer for the safe bringing home of Glover's goods from India; but was only an insurance of half his respondentia-interest; as an insurer on respondentia runs the risque of the whole voyage. Therefore it never was originally intended to include the respondentia interest in the present policy. So that here is an apparent fraud upon the face of the policy.

By 19 G. 2, c. 37 (which was made to prevent wagering policies,) the insured ought to have an interest on board, equal to the sum insured. In respondentia insurances there is always a clause "that the respondentia-bond shall of itself be a proof that there is such an interest on board:" and the premium is accordingly. Many insurers will not insure respondentia interest at all: and that very circumstance proves that it ought to be specifically named.

[1399] In case of a general average, the insurers of a respondentia-interest never contribute: the average is always contributed to by the insurers on the goods.

In *Godin's case*, both the insured had a property in the goods. But that case is by no means a proof "that a respondentia interest can be insured as goods."

Therefore they concluded that the plaintiff can not recover upon this policy, without shewing some interest in the goods.

The counsel for the plaintiff, in reply, said this was the plainest case possible.

Before 19 G. 2, c. 37, any man might have been insured, though he had no interest at all. Since that Act, it is necessary to prove an interest.\*<sup>2</sup>

A respondentia-interest is an interest: and there is no more reason for specifying this interest, than for specifying the particular sorts of goods insured. The plaintiff was a creditor upon the voyage: and he has proved his loss.

The under-writer could not have been in a better case, if he had known what sort of interest the plaintiff had, than if he did not know it; nor could he have expected a larger premium.

It may perhaps sometimes be the interest of the respondentia creditor, to name it in the policy; because it frees from average, and he is yet intitled to the benefit of salvage.

As to fraud—The lender might have been satisfied to stand his own insurer outwards; and might afterwards see reason to insure his interest homewards. But no fraud appears; nor was there the least attempt to prove any: therefore none shall be presumed or imagined.

The Court took some time to think of this case. And now

Lord Mansfield delivered their resolution: (which, he said, they had very fully considered).

He owned, that at the trial, and also since, upon the argument here, he did lean to support this insurance: and his reason for so doing was, that he was satisfied of its being a fair insurance: and that the doubt which had [1400] arisen upon it was only occasioned by a slip in omitting to specify (as it was intended to have been done) "that this was a respondentia interest."

[\*1 *Lege, recover.*]

\*<sup>2</sup> Sect. 5.

The ground of supporting this insurance, if it could have been supported, was a clause of the Act of 19 G. 2, c. 37, viz. the 5th section; which runs in these words—"that all and every sum and sums of money to be lent on bottomry or at respondentia upon any ship or ships belonging to any of His Majesty's subjects bound to or from the East Indies, shall be lent only on the ship, or on the merchandize or effects laden or to be laden on board of such ship; and shall be so expressed in condition of the bond; and the benefit of salvage shall be allowed to the lender his agents or assigns, who alone shall have a right to make assurance on the money so lent. And no borrower of money on bottomree or at respondentia as aforesaid shall recover more, on any assurance, than the value of his interest on the ship or in the merchandizes or effects laden on board of such ship; exclusive of the money so borrowed: and in case it shall appear that the value of his share in the ship or in the merchandizes or effects laden on board doth not amount to the full sum or sums he hath borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, together with the assurances and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost."

Now this Act, to the purpose of insurance, considers the borrower as having a right to insure only for the surplus value over and above the money he has borrowed on bottomree or at respondentia. And lenders at respondentia or on bottomree may, to many purposes, be said to have a lien.

Yet we are all very well satisfied, after a more particular consideration, "that this Act of Parliament never meant or intended to make any alteration in the manner of insurances. Its view was to prevent gaming or wagering policies, where the insurer had no interest at all. And if the lender of money at respondentia was to be at liberty to insure for more than his whole interest, it would be a gaming policy: for, it is obvious, that if he could insure all the goods, and insure his respondentia interest besides, this would amount to an insurance beyond his whole interest."

[1401] The Act considers the form of the policies just as they stood before the making of it; and provides,\* that on all actions brought on policies of assurance, the plaintiff or his attorney or agent shall, within fifteen days after he shall be required by the defendant or his attorney or agent, declare in writing "what sum or sums he hath assured or caused to be assured in the whole, and what sum he hath borrowed at respondentia or bottomry for the voyage or any part of the voyage in question in such suit or action." And in describing respondentia-interest, it gives the lender alone a right to make insurance on the money lent. So that this Act left it upon the practice.

His Lordship said, he had looked into the practice; and he found that bottomree and respondentia are a particular species of insurance in themselves, and have taken a particular denomination: and he could not find even a dictum, in any writer, foreign or domestic, "that the respondentia-creditor may insure upon the goods as goods." And in this very case, the respondentia-interest was intended to have been specified: but was omitted to be so, by mistake.

He declared, that he found, by talking with intelligent persons very conversant in the knowledge and practice of insurances, "that they always do mention respondentia interest whenever they mean to insure it."

This their present determination would not, he said, interfere with that of *Godin et Al'. v. London Assurance Company*, with regard to a lien on the goods; because this kind of interest has taken a particular denomination.

It might be greatly inconvenient, to introduce a practice contrary to general usage. And there may be some opening to fraud if it be not specified.

He declared the ground of the present resolution to be this—"that it is established now, as the law and practice of merchants, that respondentia and bottomree must be mentioned and specified in the policy of insurance." But he declared, at the same time, that they did not mean to determine generally, "that no special interest in goods may be given in evidence, in other cases than those of respondentia and bottomree, if the circumstances of the case shall admit of it."

Plaintiff to be nonsuited.

\* Vide s. 6.



[1402] MAYOR OF YARMOUTH *versus* EATON. Tuesday, 7th June, 1763. Toll thorough requires a consideration to be shewn, to support the demand of it; because it is against common right.

This was an action upon the case on assumpsit. The declaration contained ten counts; which, in substance, amounted to no more than this, that the plaintiffs and those whose estate they have, have had and received, and been used and accustomed, and have a right to have and receive a certain toll upon exportation of corn and grain from their port of Great Yarmouth to parts beyond sea: and that the defendant exported certain quantities of corn and grain, without paying the toll.

The defendant demurred specially to the six first counts, and also to the ninth: and to the 7th, 8th, and 10th he pleaded the general issue, "non assumpsit."

The plaintiffs joined in demurrer, upon the other seven counts.

The present argument turned singly upon the cause of demurrer to the first count, (which same cause was also assigned in the other six demurrers). So that it will be sufficient, if this first count be particularly stated, without meddling with the rest.

It was in these words—"Whereas the borough of Great Yarmouth in the county aforesaid now is, and from time whereof the memory of man is not to the contrary, hath been an ancient borough; and whereas the said Mayor, Aldermen, Burgesses and Commonalty of the Borough of Great Yarmouth aforesaid, on the first day of May in the year of our Lord 1752, and long before and ever since, had and received, and have used and been accustomed and of right ought to have had and received, and still of right ought to have and receive a certain duty or toll, called measurage, of and from every merchant exporting corn or grain, in any ship or vessel, from the port of Great Yarmouth aforesaid to parts beyond the seas, to wit, two pence by the last for every last of corn or grain measured and exported as aforesaid; the said mayor, aldermen, burgesses and commonalty in fact say, that the said Christopher Eaton, between the said first day of May in the year of our Lord 1752, and the first day of April in the year of our Lord 1762, being a merchant exporting as aforesaid, did export, in certain ships or vessels from the port of Great Yarmouth aforesaid to parts beyond [1403] the seas, divers lasts of corn and grain, to wit, 30,000 lasts of corn and 30,000 lasts of grain, measured: by reason of which said premises, the said Christopher Eaton became liable to pay to the said mayor, aldermen, burgesses and commonalty the sum of 500l. of lawful money of Great Britain, being two pence by the last for every last of the said corn and grain so exported by him as aforesaid, that is to say, at Great Yarmouth aforesaid; and being so liable, the said Christopher, in consideration thereof, afterwards, to wit, on the same first day of April in the year of our Lord 1762, at Great Yarmouth aforesaid, undertook, and to the said mayor, aldermen, burgesses and commonalty then and there faithfully promised to pay to them the said sum of 500l. when he should be thereunto afterwards required."

The special cause of demurrer was assigned by the defendant in the following words—"And for causes of this demurrer in law, the said Christopher, according to the statute in such case made and provided, assigns the following objections, that is to say, for that the said mayor, aldermen, burgesses and commonalty have not shewn or alledged, in the said first six counts of the above declaration, or in any of those counts, any benefit which the said corporation perform or are bound to perform to the public, or any cause or consideration whatsoever upon which their pretended prescription is founded: and for that the said six counts are and each of them is, in other respects, insufficient and defective in form, &c."

The single question upon this demurrer was, "whether it was incumbent upon the plaintiff, in this action on assumpsit, to set forth in his declaration a consideration for the toll which he demands."

It was argued, first, on Friday the 29th of April last, by Mr. Yates for the defendant, and Mr. Wallace for the plaintiff; and again now, by Mr. Willes for the defendant, and Mr. Solicitor General (Norton) for the plaintiff.

The counsel for the defendant argued that as this was not an action brought against a wrong-doer, for a tort; but an action grounded upon a demand of a right, it was necessary for the plaintiff to shew a consideration for the right he demands: and to prove the distinction between actions against wrong doers, for torts; and actions which demand a right; they cited Owen 109, *Escot against Laurenu*, in B. R. And it is more especially necessary in the present case, as this is a [1404] claim



against the general and common right of the subject, which is antecedent to every usage and prescription; and grounded upon a prescription which affects the public.

To support this manner of reasoning, they cited Cro. Jac. 213, *Buckingham v. Costendine*: where a declaration in assumpsit was holden to be ill, because it did not shew for what cause the debt became due.

And they observed that a man can not prescribe to have thorough-toll without alledging a special consideration.

They cited and argued from the cases in 2 Ro. Abr. 522, title Toll, letter B. pl. 1. Sir William Jones, 162, *Roy v. Corporation of Boston*. Moore, 574, *Smith v. Shepherd*. 1 Mod. 47, *Haspurt and Wills*. 1 Mod. 104, *Warren and Prideaux*. 2 Lev. 96, *Prideaux v. Warne*. S. C. 2 Lutw. 1519, *Wilkes v. Kirby*; and 2 Sir J. S. 1228, *Sarjent v. Reed*. And 4 Mod. 319, *Warrington v. Moseley*, proves, they said, that some reason ought to be shewn why this duty is claimed. So also does the case of *The Mayor of Nottingham v. Lambert*, 11, 12 G. 2, in C. B. on a special verdict: where, no consideration appearing, the Court would not intend any, and gave judgment against the plaintiff.

There is no difference, they said, between its being upon a declaration, and its being upon a plea; where the question turns upon a claim of right; especially, where the claim is against the general right of the subject.

They made a difference between prescriptions for private rights and prescriptions that affect the public. They admitted, that in the former, a consideration may be implied: but in the latter, a sufficient consideration must be shewn.

They admitted also, that even in this case, if it had appeared upon the declaration, "that the corporation were owners of the port," that would have been a sufficient consideration.

But it does not appear any where upon this declaration, even that the corporation are owners of the port: the public are the owners of it. And the implied consideration for a port-duty can only be where the plaintiff is owner of the port, 21 H. 7, 40. Hob. 175, *Topsall v. Ferrers*.

The counsel for the plaintiffs answered, that thorough toll has no similitude to the present case: that is for passing through a town, in the highway; which, by [1405] common law and common right, is free to every body. Therefore it may there be necessary to alledge a special consideration.

But the present case implies a consideration: it is a port granted to the corporation; and was made out of private property. The public therefore in this case enjoys a benefit which it had no pretence of claim to, by common law: and this alone is a sufficient consideration.

2 Lutw. 1519, *Wilkes v. Kirby* is the same point as the present: and though that case was not determined, yet the Court strongly inclined "that the owner of a port may have a toll by prescription, without alledging any consideration."

But 3 Lev. 37, *Mayor and Commonalty of London v. Hunt*, in the Exchequer Chamber, is in point. It was assumpsit for weighage of goods brought into the port of London: and objection was taken, "that there was no consideration for the duty." But it was resolved "that the defendant had the liberty of bringing them into port; which is a place of safety, and it therefore implies a consideration in itself."

And so also was a late case in C. B. *The Corporation of Exeter v. Trinlet*, Tr. 32, 33 G. 2: where the title to the toll was set out precisely as it is here; and the defendant demurred generally to the declaration. The case was twice or thrice argued upon this very objection now taken here, "that no consideration for the duty was set forth:" and all the objections there taken (which were the same as were now taken) were overruled: and it was holden, "that if it had gone to a trial, the plaintiff must have proved a title; and that a liberty to bring goods into a port is in itself a good consideration for the toll."

As to its not appearing upon the face of the declaration "that the corporation are owners of the port;"—we have shewn "that they have always been accustomed to receive the toll, and that they always have received it, and that they are intitled to receive it;" and all this must have been proved at the trial, if it had gone on to a trial: and if their being owners of the port was necessary, it must have been proved at the trial.

But, however, a person may be intitled to the toll, without being owner of the

port : for, the Crown may surely grant the duty, though they retain the port ; and the grantee may prescribe for it.

[1406] This is good enough, on demurrer : it is not assigned for cause of demurrer ; and it is therefore upon the same foot as if it was a general demurrer. In assumpsit, the debt is the consideration. *Hibbert v. Courthorpe*, Carth. 276.

The counsel for the defendant, in reply, admitted that if goods are brought into a port and unladed, a consideration for the duty to the owner of the port shall be implied. But here the plaintiffs do not shew that they had any sort of right to the port, or any thing to do with it. The cases, therefore, where the plaintiffs had a right to the port, do not apply to this case, where they have it not. But cases of thorough-toll are applicable to the present case ; as they prove "that a public right can not be abridged without a consideration." And though in private prescriptions, a consideration may be implied ; yet in those which go to the abridgment of public rights, it is not so.

The only case in point cited on their side is that of *The Mayor of Exeter v. Trinlet* : but it is a single case ; and is contrary to that of *The Mayor of Nottingham v. Lambert* ; and was on general demurrer, whereas this is on special demurrer, for this cause particularly assigned. Upon a general demurrer, the Court might not consider it as matter of substance.

If the Crown could grant the duty, reserving the port ; yet the plaintiffs must shew the grant.

Lord Mansfield.—This is a very plain case, indeed. The plaintiffs set out that they have a right, by prescription, to the port-duties of Yarmouth.

The question is, "whether they are obliged to set out a consideration."

The only cases like the present, are cases for port duties : the rest are all out of the case.

The making a port is itself a consideration. It is a self-evident convenience to the merchant : it speaks for itself. It may never require repair : therefore I do not know that it is necessary to shew repair.

The ownership of the soil is out of the case.

[1407] But here is a precedent in point, established by a judgment of a Court in Westminster-Hall, upon solemn argument, and after considering all the former cases and precedents : and this precedent is punctually followed in the present case.

This alone would be sufficient, if the reason of the thing was not so strong as it is. (a)

Mr. Justice Denison also thought it good, notwithstanding the special demurrer.

He thought the title sufficiently shewn. A port may not want repair in 200 years.

The declaration shews a prescriptive title time out of mind for these port-duties. The consideration is self-evident ; viz. the benefit to the subject. It is not necessary to shew that the corporation are owners of the soil, or repair it. It is not now necessary to shew repairs of a pew in a church ; because it may scarce ever want repairing.

And here is an established precedent, besides the self-evident consideration. This is not like the case of toll-thorough.

Mr. Justice Wilmot remembered the case of *The Mayor of Nottingham v. Lambert* ; and observed, that though that was said there, "that the plaintiffs could not have recovered, for want of shewing that the corporation were lords of the manor," yet it could not alter the judgment in that case.

As to the consideration.—It was most fully settled in the case of *The Mayor of Exeter v. Trinlet* : it was clearly held, "that in a toll thorough, a consideration must

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(a) Vide 2 Vez. 621, that petit customs are different from tolls, per Ld. Hardwicke ; and vide 4 Com. 408, acc. Note, that the case in 2 Wils. on which this was determined, arose upon a prescription for the former, and not for tolls, as in this case ; and it seems contrary to principles and all former authorities, that a title to the latter should be maintained with a consideration ; and it is also observable that the case in 2 Wils. was determined on a special and this on a general demurrer ; and N.B. the petit customs were confirmed by Act of Parliament. Forst. Dig. of Cust. 26.

be shewn, because against common right : but that a port-duty did of itself imply a consideration, to support it." This I take to be settled.

The next question is, "whether the corporation have shewn a title to receive it." And I think, there is such a title shewn.

The Crown has a right to create (b) the duty, and to grant (c) the duty to another. This prescription is equivalent to such a grant ; and pre-supposes it.

Per Cur'.—Judgment for the plaintiffs.

[1408] But Mr. Willes prayed leave to withdraw his demurrer, and to have leave to plead : which the Court thought reasonable : and Mr. Solicitor General consenting, (though it was asked late, and after a rule "to plead as they would stand by :") the Court granted.

Lord Mansfield.—Well ! I hope the precedent of this declaration is now sufficiently established.

STEPHEN AND ANOTHER *versus* COSTOR AND ANOTHER. Friday, 10th June 1763.

[S. C. 1 Black. Rep. 413, 423.] Wharfingers in London are not intitled to wharfage for goods unladed into lighters out of barges fastened to their wharfs.

This was a special case reserved at Nisi Prius before Lord Mansfield, at Guildhall.

It was an action upon the case on an assumpsit, for wharfage and cranage due to the plaintiffs as wharfingers and possessors of Brook's Wharf in London, for sundry parcels of malt brought to and unloaded at their wharf.

The declaration set forth, that the plaintiffs are wharfingers, and have been and are possessed of the wharf, &c. and are intitled to a toll of 6d. a score for all malt brought to and unloaded at their wharf : and it set forth the Act of Parliament of 22 C. 2, c. 11, § 21, which enacts that such rates and no other shall be taken for wharfage and cranage as by His Majesty, with the advice of the Privy Council, shall be assessed and allowed to be taken ; and obliges wharfingers, under a penalty, not to refuse to suffer any goods or merchandize to be landed or shipped at or from their wharf, at the rates aforesaid.

It likewise set out sections 44, 45, 46 of the said Act.

Then it shewed, that an Order of Council was made on the 1st of March 1674, pursuant to the said Act of Parliament of 22 C. 2, c. 11, § 21 : by which order, malt is rated at 6d. per score.

Then it averred, that the defendants were consignees of the cargo of a west-country barge, which came loaded with malt, to the plaintiff's said wharf, and was fastened at and lay there ; and that part of the said loading was there landed, and other part, though not actually landed upon the wharf, was put on board lighters, whilst the said barge remained fastened to their wharf. [1409] And therefore they demanded the duty of 6d. per score upon the whole cargo ; as well what was so put on board the lighters whilst the barge was fastened to their wharf, as what was actually landed upon it.

The case stated for the opinion of the Court was as follows :

That an order of assessment or allowance of rates to be taken at Brook's Wharf or Key, mentioned in the declaration, was, on the 1st of May, 1674, made by His late Majesty King Charles the Second, with the advice of his Privy Council, in the following words, viz.

Whereas by a late Act of this present Parliament made in the two and twentieth year of His now Majesty's reign, intitled "An Additional Act for Rebuilding of the City of London, Uniting of Parishes, and Rebuilding the Cathedral and Parochial Churches within the said City," it is by several clauses in the said Act contained (amongst other things) enacted, that there shall be left a convenient tract of ground all along from London Bridge to the Temple, of the breadth of forty feet of assize, from the north side of the river of Thames, to be converted to a key or public and open wharf ; and that no lighters, boats or other vessels shall lie before any of the said wharfs or keys between the places aforesaid, on the north side of the said river, longer than shall be necessary for the loading or unloading of goods, without the

(b) Contra, 2 Inst. 58, 220. 16 Vin. 590. 4 Com. 409. 5 Mod. 54.

(c) Contra, 12 Co. 34. 2 Wils. 95. 5 Mod. 55, acc. 2 Rol. Abr. 171. 16 Vin. 578.



consent and permission of the said wharfingers or proprietors thereof; and that it shall and may be lawful for any person or persons to load or unload any goods or merchandizes at any of the said wharfs or keys; for wharfage and cramage whereof, every proprietor, wharfinger or other person concerned shall and may demand and receive such rates and no other for the same, as shall from time to time be set out, appointed, assessed and allowed by His Majesty with the advice of his Privy Council; a table of which rates shall be hanged up at every of the said wharfs respectively; His Majesty, this day present in Council, having considered of the several rates in the schedule hereunto annexed, hath and doth hereby, with the advice of his Privy Council, assess and allow, set out and appoint the said several and respective rates therein contained, and doth order and appoint that the same shall and may be taken for the wharfage and cramage of all such goods in the said schedule also mentioned as shall at any time hereafter by any person whatsoever be brought unto, shipped off, loaden, or unloaden, at Brook's Wharf or Key, adjoining to Queenhithe in London: and that it shall and may be lawful for the present owner or proprietor of the said wharf, and his heirs and assigns, lessees, tenants or under-tenants, from [1410] time to time and at all times hereafter, to demand and receive from every person or persons that shall hereafter bring any goods unto, ship them off, or load or unload the same at the aforesaid key or wharf, the several rates for cramage and wharfage, which by the aforesaid schedule is appointed to be paid for the same, and no other: and to the intent that all persons concerned may know what they are to pay for the cramage and wharfage of their goods as aforesaid, and not to be imposed upon by the wharfinger, and made to pay more than their just due, it is further ordered that the same be printed and published; and that a copy of the said table and rates shall, according to the directions of the aforesaid Act of Parliament, be kept constantly hanging up in the most public part and place of the said wharf or key, and another at the Custom-House for all persons concerned to resort to and make use of, as they shall have occasion.

That in the schedule annexed to the said order, and thereby referred unto, malt is rated at sixpence the score.

That the plaintiffs were, during the time in the declaration mentioned, wharfingers, and possessed of Brook's Wharf or Key above mentioned; and intituled to the said rates.

That the defendants were consignees of a loading of malt, which was brought in a west-country barge; which west-country barge was fastened and lay at Brook's Wharf, and unloaded a small part of the said cargo, upon the said wharf; and whilst she lay fastened the other part of the cargo was taken out, and put on board lighters and never landed on the wharf.

The question is, "whether the defendants are liable to pay the wharfingers, according to the rates mentioned in the Order of Council, for such part of the cargo as was put on board the lighters and never landed on the wharf."

It was first argued on Friday, the 29th of April last, by Mr. Wallace for the plaintiffs, and Mr. Serjeant Burland for the defendants: and, being a question of great consequence and a new one, it was ordered to stand for further argument; which was made on Tuesday last the 7th of this present June, by Mr. Solicitor General (Norton) for the plaintiffs, and Mr. Blackstone for the defendants.

The counsel for the plaintiffs argued that the defendants are liable to pay the duty for those goods which were brought to the wharf, and carried away again else-[1411]-where, without being actually landed upon the wharf, where the barge was fastened. For, at common law, none could either unload at a wharf, or come to it, and fasten their barge at it, without the consent of its owner: but this Statute of 22 C. 2 impowers them to do it without the owner's consent, paying the toll. Therefore the owner of the soil, whose property or at least the dominion of it was taken away by the Act, ought to be intituled to all advantages.

They recited and argued from the 21st, 44th, 45th and 46th sections of the Act: and insisted that "at" the wharf must mean something different from "upon" the wharf: it must include all goods that are brought to the wharf for the purpose of unloading.

The Order of Council was, they said, a temporary explanation of the words of the Act, and uses equipollent words. And as the Act and order put it out of the power of the owner of the wharf to hinder the barge-master from coming to his wharf and fastening the barge there, it is but just that he should receive compensation for it, according to the rate settled by the Order of Council. And this is certainly

reasonable and just ; because no other craft can come to the wharf, whilst this barge lies there : and the barge-master has the whole benefit of the wharf, as fully as if the whole cargo was landed upon it. And the wharfinger is obliged to keep the wharf in repair, as well as servants to attend it.

They cited 2 Ro. Abr. 123, title, Market, Faire, B. Stallage, pl. 1, "that if a man has a fair, those who have houses adjoining to it cannot open their shops, to sell goods in the fair ; but stallage is \* due for it."

By this method, the barge-master may elude the payment of any duty at all ; for, he may afterwards land them at a private or a free wharf, or send them on board vessels lying below bridge. This is a fraud, upon the face of it.

Wharfage and cramage are to be understood reddendo singula singulis. Very few goods, or at least, only very heavy goods, require cramage. Here, the duty is payable for wharfage, though there was no cramage.

[1412] If this was an unlading at the wharf, (which we say it is,) then they had a right to come and stay there, and we had no right to treat them as tort-feasors. They might unload the whole thus, if they may do so by a part.

Ships are liable to pay anchorage, although they do not actually cast anchor.

The counsel for the defendant, admitted, that the Order of Council does indeed speak of all such goods and merchandizes as shall be brought to any such wharf ; but they answered, that that is carrying it further than the Act of Parliament authorises ; and is therefore of no validity, so far as it exceeds the power given by the Act itself.

The Act was professedly made for the benefit of the public, and to restrain the exactions and unreasonable demands of wharfingers : v. § 21, "Forasmuch as great exactions, &c."

The compensation is due for the use of the wharf by landing the goods upon it ; and for that use of it, only. And we have made a compensation to the owner of the soil, in proportion to the use that we have made of it. When the goods are landed, he knows what to demand : but he has no right to come on board the barge to see what else may be in it, besides what is so landed.

The rest of our goods were not unladed at the wharf, within the meaning of the 4th section ; and by the 45th section, we could not lie before the wharf longer than was necessary.

This question must depend upon the statute itself, only : it is not to be resembled to the cases of fairs and markets, which have no similitude to the present case.

Though the barge-master has a right to come to the wharf, yet if he only comes there colourably, or misbehaves there under that pretence, or exceeds his permission, he shall be considered as coming thither, with an ill intention ; and therefore shall be looked upon as a trespasser ab initio. Such a subterfuge would be for the consideration of a jury, in an action of trespass.

If the unladed goods were to be construed liable to the duty, they might pay it over and over again : for, they must certainly pay where they are landed at any [1413] other wharf : or if unloading overboard on lighters be an unlading at the wharf, it is also a lading at the wharf, and then a double duty will be payable. So

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\* I find by my notes of *Wigley v. Peachey, et Al*, Tr. 1732, 5, 6 G. 2, B. R. that Ld. Raymond there called this "a monstrous case, that a man should pay a toll for opening his windows and laying goods upon his own ground." (a)

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(a) S. C. Ld. Raym. 1589, et ib. 1591, where the above case is cited more fully than here ; for here the reason for it is dropped, but is there given for it thus ; viz. "For they cannot take benefit of the fair without giving the duties which appertain to him who has purchased it : and Ld. Raym. in his own report throws out no intimation against the case in Rolle, and the counsel on the other side did not deny the stallage to be due, but put their case on another point, viz. that if stallage was due, the defendants ought to have an action or proper remedy for that, and not distrain the goods damage feasant, and relied on these two cases, Cro. El. 75 and 628, as in point ; but note, those cases are that a distress damage feasant, cannot be taken of goods brought into an open market, but even as to that qu. Strange, 1129. And, supposing it so, yet it does not follow that stallage might not be due, or under circumstances that trespass might not be maintained, or that a special action on the case might not lie, if there was any fraud in the case."

likewise, if fresh goods should be thus loaded into the barge, out of lighters. But it is not pretended that the plaintiffs are intitled to both.

The counsel for the plaintiffs replied, to the following effect.

The original right which was in the wharfinger before the Act, is a reason for a liberal construction of it.

Without this Act, the barge could not have been fastened to our wharf. They have here unloaded a quantity of goods into lighters, under the security of our wharf, and by fastening their barge to it; and its lying there hindered other craft from coming to it.

The unloading and lading out of a barge into a lighter is only one act of unlading the barge: and there is only one single duty due for it. We are intitled to the same duty as if it had been landed on the wharf. As the defendants have had the benefit of the wharf, they ought to pay the duty.

And though the wharfinger may have no right to come on board the barge, to see what else is in it, besides what is landed at his wharf; yet he may, without going on board it, be able to make his charge upon such goods as are put out of it into lighters that come along-side of it.

The Court having taken a few days to consider this case;

Lord Mansfield now delivered their resolution.

This is an action for wharfage and cranage duty, payable to Brook's wharf in London.

The case stated mentions an Order of Council, which recites an Act of Parliament, made upon the rebuilding of the City of London after the fire: upon which Act of Parliament and Order of Council, the plaintiffs found their claim to this duty.

The question is, "whether the defendants are liable to pay the duty upon such part of the cargo of their barge as was brought to the wharf of the plaintiffs, and never landed on the wharf, but only put on board lighters and carried away, without being ever actually landed upon the said wharf at all."

[1414] To go by steps—In the first place, it is not contended on the part of the wharfingers, that any meaning is to be put upon the words "all such goods and merchandizes as shall be brought to any such wharf;" unless the goods and merchandizes be actually loaded or unloaded, when they are brought thither.

In the next place, it is agreed that if the vessel that comes to the wharf unloads only part of its lading upon the wharf, and goes forward with the remainder of its lading, in order to be unloaded elsewhere; the duty is only to be paid for such part as is unloaded there, and not for the remainder which is so carried forward.

Thirdly.—It is not contended, on the part of the wharfingers "that the owner of the vessel or goods is obliged to pay any duty for unloading the goods into lighters on the river, unless he has fastened the vessel to the wharf."

Fourthly.—The particular circumstance stated in the present case, is, that "whilst the vessel was and remained moored and fastened to the wharf, the goods and merchandizes were put on board of lighters brought to lie along-side of her, but never landed on the wharf."

Some propositions are so plain and clear in themselves, that nothing can render them more so: and one is therefore under a great deal of difficulty, in what manner to form any argument upon them.

If any duty of wharfage or cranage is payable to the plaintiffs upon these goods thus put on board lighters, it must arise upon this Act of Parliament; on which alone, their claim to any such duty is founded.

And a duty for wharfage and cranage can not be due where the party has not had the use of the wharf or the crane. Wharfage is due for landing on the wharf: and cranage, for the assistance of the crane. Anchorage or moorage are very different things.

If any injury has been done to the wharfingers, by lying before their wharf, or by fastening the vessel to it without right, or in any other way whatever, they may have their remedy in another method; but not under this Act of Parliament, which relates only to wharfage and cranage, and gives the duty for them only.

[1415] It has been urged, on the part of the wharfingers, that "at the wharf" must bear a different meaning from "upon the wharf:" and that every vessel coming to the wharf and landing some of its goods upon it, and putting other part on board



a lighter, is liable to the duty for that other part which is only put on board of the lighter.

But they might as well contend that a vessel coming and lying before the wharf, without even mooring or fastening to it, should be liable to wharfage.

Clearly, the present case was neither within the idea of the Act of Parliament or the Order of Council; nor would the Legislature have given the same duty for this, (if they had really meant to give any) as they gave for landing the goods upon the wharf: they would certainly have given a smaller duty for this alone: because the duty must still be paid again, whatever wharf they shall at last be landed upon. We can not suppose that they will be landed at private stairs or free wharfs: for, goods consumed in the port of London must, in general, be landed upon some wharf where such goods are usually landed; and it must be a very inconsiderable proportion that one can imagine to be landed elsewhere.

But it is said, "that the owner of the goods or vessel has the benefit of the wharf given him by the Act, even against the will of the wharfinger; that the wharfinger can not hinder him from coming to it; and lying at it, nor even from mooring and fastening to it; and that there is no reason why he should receive all these advantages, without making a compensation to the owner, who is obliged to repair and attend his wharf."

The answer to this is, that the wharfinger has his remedy for all this, just in the same manner as he had before the making of the Act; if the vessel should colourably come and lie before his wharf, or moor or fasten to it without intention of loading or unloading upon it; or if it stays there longer than the Act permits; which expressly prohibits the staying longer (without the consent and permission of the wharfingers)\* than is necessary to load and unload. And this colourable coming thither, with an unfair intention, must depend upon circumstances; and is a matter of fact, to be tried by a jury: an action upon the case will lie for it; and a jury will consider it in damages.

[1416] But if there were, in fact, such inconveniences as have been suggested, yet arguments ab inconvenienti will not hold against the express words and meaning of an Act of Parliament: and both the words and the meaning of this Act of Parliament are extremely plain and clear. This action seems to be a new experiment, attempted contrary to its sense and meaning.

It has been said, on the part of the wharfingers, "that the Order of Council is a contemporary explanation of the Act of Parliament."

But the council could not vary or extend the Act: they could only take it as they found it, and pursue it. It was not in their power to impose a duty.

We are all of us clear, that the plaintiffs are not intitled to recover the wharfage or crantage duty for such part of the goods as were not unloaded upon their wharf. And therefore

A nonsuit must be entered.

LADE, BART. *versus* HOLFORD, ESQ. ET UX. ET AL'. Tuesday, 14th June, 1763.

[S. C. 1 Black. 428. Ambler, 479.] Proviso to suspend possession of tenant in tail till age of 26. [See 1 Bosanq. 968. 4 Ves. 288. Fearne, 424. Vin. Perpetuity, 2 Atk. 473. 2 Ves. 521. 1 Co. 87 a. b. 3 Atk. 775. 3 Brown, 347. 2 Durn. 251. 2 Fearn. 498. 8 Durn. 122. 2 Fearn, 113.]

This was a case sent hither from the Court of Chancery, for the opinion of this Court.

Sir John Lade, Bart. by his will dated 17th August 1739, devised his manors, &c. to four trustees and their heirs; and likewise all his leaseholds and copyholds and personal estate, to be laid out in the purchase of land; upon trust, and to the use of his cousin John Inskip, in strict settlement; with divers remainders over, in strict settlement.

In 1740, the testator died.

After his death John Inskip took the surname of Lade. In February 1751, he attained his age of twenty-one. In 1756, the said John Lade (afterwards Sir John

\* V. s. 45.

Lade, Baronet,) attained his age of twenty-six; and married Ann Thrale. In 1759, he died; leaving his wife enceinte of the now plaintiff, Sir John Lade, Baronet.

In the will there is a proviso "that so often as, and during such time as the person who for the time being (in case the testator had not otherwise directed) would [1417] have been intitled in possession as tenant for life or tenant in tail, should be under the age of twenty-six years, then the trustees were to enter, and receive all the rents and profits of the real, and all the interest and produce of the personal estate: out of which, they were to allow, for the maintenance of such tenant for life or tenant in tail, sums particularly specified; and all the rest was to accumulate, and be laid out in the purchase of land, and settled to and upon the same trusts and uses."(a)

On the part of the infant, it was insisted, that he being tenant in tail, the proviso of limitation to the trustees "to take from him the profits of the estate, for the purpose of accumulation," was contrary to the policy of the law, and therefore void.

The defendants, who claimed under limitations in remainder, insisted, it was a good legal limitation; and that the trust for which it was created, ought not to make it void: therefore till his age of twenty-six, the infant could only be allowed, for maintenance, the sums specified in the will.

On the 14th of November 1763, the cause was heard before the Lord Chancellor Henley: who ordered a case to be made for the opinion of the Judges of this Court, upon the following question, viz.

"Whether the defendant Rose Fuller, the heir at law of the survivor of Anne Lade, John Fuller the Elder, Hugh Offley, and John Fuller the Younger, the trustees named in the will of the said Sir John Lade the testator, did upon the birth of the present plaintiff Sir John Lade (the infant,) take any and what estate in the premises devised, by virtue of the proviso in the said testator's will."

This case was twice argued; first, on Tuesday 26th of last April, by Mr. Serjeant Hewitt for the plaintiffs, and Mr. De Grey for the defendants; and now, by Mr. Morton for the plaintiffs, and Mr. Wedderburn for the defendants.

As it was a new case, and the matter of value, the defendants pressed for another argument; and said, counsel of eminence were retained to argue it.

But the Court said; the allowance of maintenance was suspended in the mean time, which was a hardship upon the mother; that a third argument would [1418] hang it up all the long vacation. If in considering the point, they had any doubt, they would order it to be argued again: if they had none, they ought, in justice, to make their certificate directly.

And on the 17th of June, they made the following certificate.

Question.—Whether the defendant Rose Fuller, the heir at law of the survivor of Anne Lade, John Fuller the Elder, Hugh Offley, and John Fuller the Younger, the trustees named in the will of the said Sir John Lade the testator, did, upon the birth of the present plaintiff Sir John Lade, take any and what estate in the premises devised, by virtue of the proviso in the will of the said testator.

Having heard counsel on both sides, and considered this case, we are of opinion that Rose Fuller, the heir at law of the surviving trustee in the will of Sir John Lade did not take any estate in the premises devised, by virtue of the proviso in the will of the said testator.(b)

MANSFIELD.

T. DENISON.

E. WILMOT.

17th June 1763.

(a) The limits set to executory devises, are not that they shall be confined to twenty-one years after the period of a life or lives in being or in case of a posthumous, to ten months further, which is the utmost limit, and was exceeded in the case at Bar: but if the proviso had been, that so often as and during such time as any son of John Inskip who should be intitled in possession, as tenant in tail, should be under the age of twenty-one years then, &c." it seems the proviso would have been good. Vid. Forrester, 44. 1 Atk. 581. 1 Vern. 208.

(b) The law seems to have been agreeable to the certificate of the Judges in this case, and also to the MS. note (a) supra; but if there had been then any doubt the same is removed by the stat. 39, 40 G. 3, c. 48, sec. 1, made to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited; which is so worded as to have removed all doubts about the

BROWN *versus* CHAPMAN. Tuesday, 17th June, 1763. [S. C. 1 Black. Rep. 427.]  
Action lies for maliciously suing forth a commission of bankruptcy. [2 Wils. 145, 382. 1 Atk. 144.]

This was a writ of error from the Common Pleas, brought upon a judgment for the plaintiff there, in an action upon the case, for falsely and maliciously suing out a commission of bankruptcy against him : to which, the defendant pleaded the general issue ; and a verdict was found there, and judgment given for the plaintiff. Upon which judgment, the defendant below brought this writ of error.

Mr. Serjeant Hewitt, for the plaintiff in error, objected to the action, and said it did not lie ; because the Statutes of Bankruptcy have provided a particular remedy : and the thing itself (bankruptcy) did not exist at common law.

If a statute makes a new offence, and prescribes a particular remedy, an indictment will not lie. Cro. Jac. 643, 644, pl. 4, *Castle's case*. Plowd. 206 a. *Stradling v. Morgan* ; on 34, 35 H. 8, c. 26. The Statute of Wales was considered as including a negative. When there is a [1419] particular remedy given by Act of Parliament in a particular case, the Act shall not be extended to overthrow and alter the common law, but in those particular cases. 11 Rep. 59, *Dr. Foster's case* ; and Carter, 36, *Cornwallis v. Hood*.

The bankrupt laws are to be considered as one system of laws, or as one statute ; like those concerning leases of ecclesiastical persons, in 1 Vent. 246, *Bayly v. Murin*. *Wallis v. Hodson*, 24th January 1740, before Lord Hardwicke.

The Bankrupt Acts are 34, 35 H. 8, c. 4. 13 Eliz. c. 7. 1 Jac. 1, c. 15, and 21 Jac. 1, c. 19. 5 Ann. c. 22, § 7, (the first material Act ;) 5 G. 1, c. 24, and 5 G. 2, c. 30, § 23, which is professedly calculated to answer the very case of maliciously suing out the commission. It begins, "and for preventing the taking out commissions of bankrupts maliciously, be it enacted, &c." And directs a bond in the penalty of 200l. conditioned to prove the bankruptcy : which bond is made assignable to the party grieved, who may sue for the penalty.

And the Parliament meant their provision to be an adequate provision. It would be unpolitic to make the suing out commissions of bankruptcy too dangerous.

Lord Mansfield.—There is no clause in that Act, that takes away the common law remedy ; nor that says, "that the party shall not recover more than 200l. damages."

It can never be for the benefit of trade, that a man should be at liberty to sue out commissions of bankruptcy maliciously.

Mr. Ashurst, *contra*, was beginning to speak : but

The Court were so clear, that without hearing him, they ruled the judgment to be affirmed.

WOOLMER AND ANOTHER *versus* MUILMAN. 1763. The same day. [S. C. 1 Black. 427.] False warranty will vitiate a policy of insurance.

This was a special case reserved, at Nisi Prius at Guildhall, before Lord Mansfield, for the opinion of the Court.

It was an action on the case brought for the recovery of a total loss on a policy of insurance made on goods and merchandizes on board the ship "Bona Fortuna," at and from [1420] North Bergen to any port or places whatsoever, until her safe arrival in London.

It was underwritten thus—"Warranted neutral ship and property."

The defendant underwrote the said policy for 150l. on the 23d day of September 1762.

The defendant having pleaded the general issue, and paid into Court the premium received by him for the said insurance, this cause came on to be tried at Guildhall, London, on the 21st day of May 1763, before Lord Mansfield : when it was admitted that the plaintiffs had interest on board the ship to a large value, to wit, to the amount of the sum insured.

The ship, with the goods and merchandizes so laden and being on board her, after her departure from North Bergen, and before her arrival at London, proceeding on

rules of law and equity, if there were any before, either as to the certificate, or the said MS. note in all cases not within any of the provisoes in the subsequent sections in the Act.



her voyage, was by the force of winds and stormy weather wrecked, cast away, and sunk in the seas; and the said goods and merchandize were thereby wholly lost.

It was expressly stated, "that the ship or vessel called the 'Bona Fortuna,' at and before the time she was lost, were not neutral property, as warranted by the said policy."

The question therefore was, "whether the plaintiffs can, under the circumstances of this case, recover in this action."

Mr. Wallace was for the plaintiff, and Mr. Yates for the defendant. But

Lord Mansfield stopped Mr. Yates; and said it was too plain to argue.

This was no contract: for, the man insured neutral property: and this was not neutral property. Therefore, we must give

Judgment for the defendant.

REX *versus* DOCTOR HARRIS. Saturday, 18th June, 1763. [S. C. 1 Bl. 430.]

Lis pendens not a good return to a mandamus.

(In the Crown paper.)

[Referred to, *R. v. Sowter* [1901], 1 K. B. 69, 396.]

Upon a mandamus to admit and swear churchwardens of St. Olave's Southwark.

The mandamus was directed to Dr. Harris, Commissary of the Consistorial and Episcopal Court of the [1421] Bishop of Winchester, for the parts of Surrey; setting forth that Henry Griffith and Thomas Garner were in Easter Week then last past duly nominated and elected churchwardens of the parish of St. Olave, Southwark, in Surrey, to serve for one whole year then next ensuing, according to the ancient usage and custom of the said parish; and that they had often offered themselves to the doctor, to take their corporal oath as churchwardens, and requested to be by him sworn and admitted into the said place and office: which oath the said doctor refuses to administer to them: the writ therefore commands him, without delay to swear and admit, or cause to be sworn and admitted the said Henry Griffith and Thomas Garner into the said place and office together with all the liberties and privileges thereto belonging and appertaining; or shew cause to the contrary.

A like mandamus was also directed to him, to swear and admit David Griffin, Philip Cox, Isaac Applebee and William Strickland into the same office.

He returned, that there were two causes depending before him, which had been afterwards consolidated into one; in which, it was disputed "who were elected churchwardens;" the former, on the promotion of Griffin, Cox, Applebee, and Strickland, asserting themselves to have been duly elected, and praying to be sworn; the latter, on the promotion of Griffith and Garner and two others, against Griffin, Cox, Applebee, and Strickland; and the parties on each side reciprocally denied the others to be duly elected.

By reason whereof he could not, consistently with his duty and the law and practice of the Episcopal Court, swear or admit or cause to be sworn and admitted the said Henry Griffith and Thomas Garner into the place or office of churchwardens of the parish of St. Olave, Southwark, until it shall have been judicially determined, in the cause then depending before him, according to allegations given and proofs made thereon, "that the said Henry Griffith and Thomas Garner were duly elected into such office." All and singular which said things he submitted to the judgment of the Court.

The return to the other writ of mandamus at the instance of David Griffin, Philip Cox, Isaac Applebee, and William Strickland, was the same (*mutatis mutandis*;) only [1422] that it added at the end, (after the words "were duly elected into such office,") "by a majority of legal votes."

Note.—Both the causes stood together, in the Crown-paper, for argument; and the like rule was made in both: but it was the former only that was actually argued; and the fate of this, of course, determined the other.

Mr. Yates, *pro Rege*, argued, that this is a bad return. The commissary is only ministerial, and is obliged to execute the act; whether it be of any validity, or not. The mandamus gives no right: only a legal possession, in order to try it. To prove which, he cited 1 Sir J. S. 609, 610, *Rex v. Simpson*; and 2 Sir J. S. 893, 894, 895, *see v. Dr. Ward*.

But this is a question which this very commissary himself is to determine: and it does not at all appear when he will determine it.

The defendant can bring no action, till admission.

A latter case in point is *Ree v. Reynell*, Tr.\*<sup>1</sup> 9 G. 2, B. R. Upon a mandamus commanding him to swear Lodge churchwarden of Temple Holy Cross in Bristol; he returned, "that in a suit depending in the Bishop's Court, he himself had decreed in favour of Whitechurch; and that an appeal was lodged, and was depending." This return was quashed; and a peremptory mandamus awarded.

Mr. Blackstone, for Dr. Harris.—The doctor is totally disinterested. It is his own return, arising from his own difficulties.

Lord Mansfield.—It is an indecent return. He has no right to try the question: he can not try the legality of the votes. The King's writ commands him to admit and swear: and he must obey it.

Mr. Blackstone cited 2 Ld. Raym. 1008, *The Queen v. Guise*, 3 Salk. 88, and 6 Mod. 189, (all S. C.) proving (he said) "that non fuit electus is a good return;" and likewise "that special matter may be returned, in some cases."

Here are two cross mandamuses: and the doctor does not know which to obey.

Lord Mansfield and Mr. Justice Wilmot.\*<sup>2</sup>—He ought to obey both. It is without prejudice to the right of either claimant.

[1423] Lord Mansfield. But he says, "he will determine it himself."

Mr. Blackstone.—In Sir T. Raym. 439, *Carpenter's case*, the return is very much like this return: and the reporter says—"We granted a writ to swear Carpenter; because the Ecclesiastical Court can not try the custom of choosing the churchwardens." Which case seems to imply, that though the Ecclesiastical Judge can not try a custom, yet he may try other matters which the parties have submitted to him.

Lord Mansfield.—All the cases cited on both sides, prove this return to be wrong. It would be so, even if he could try it; (which he can not do:) he can not try the legality of the votes.

Mr. Justice Wilmot.—These writs give no right: and he can not try the legality of the votes.

Per Cur'.—The return must be disallowed;

And a peremptory mandamus go.

The Court proposed, and the parties consented, to try the right in a feigned issue: and the execution of the peremptory mandamus to be suspended till after the trial: and then the peremptory mandamus to go, "to swear in the victors at the trial;" unless the Judge who tries it, shall declare himself dissatisfied with the verdict.

COMBE, ESQ. *versus* PITT. Monday, 20th June, 1763, and Tuesday 21st ditto. [S. C. Black. Rep. 437, 523.] Another action of the same term unless actually prior in point of time, cannot be pleaded in abatement. Vide ante, p. 1335, and post, 1586, and 3 Durn. 361.

[Applied, *Girdlestone v. Brighton Aquarium*, 1878-79, 3 Ex. D. 143; 4 Ex. D. 107; *Migotti v. Colvill*, 1878, 4 C. P. D. 234; *Clarke v. Bradlaugh*, 1881-83, 8 Q. B. D. 67; 8 App. Cas. 354.]

This was an action of debt for 1500l. brought by Richard Combe, Esq. one of the candidates for member of Parliament at the last \*<sup>3</sup> election for Ivelchester, against Benjamin Pitt, for unlawfully corrupting three several voters to give their votes for Mr. Lockyer and Lord Percival.

The declaration was of Michaelmas term, 3 G. 3, with a memorandum referring to Saturday next after the morrow of All Souls.

[1424] The defendant pleads, in abatement, that in this same term of St. Michael, before the King at Westminster came one George Lake and exhibited his bill against the defendant of a plea of debt for 400l. for the same cause of action, and for the same identical offences.

\*<sup>1</sup> It was Tr. 8, 9 G. 2.

\*<sup>2</sup> They were the only Judges that were in Court.

\*<sup>3</sup> V. 2 G. 2, c. 24, s. 7.

The plaintiff replies, that after the committing of the said several offences in his bill mentioned, and long before the day of exhibiting the same bill, and also before the day of exhibiting the said George Lake's bill, that is to say, on the 30th day of June 2 G. 3, he the said Richard Combe, for the recovery of his aforesaid debt, sued forth out of the Court of our lord the now King before the King himself a certain writ of our said lord the now King called a latitat, against the said Benjamin Pitt, directed to the then Sheriff of the county of Surry, by which said writ our said lord the now King, commanded, &c. so that he might have his body at Westminster on Saturday next after the morrow of All Souls then next coming, to answer to the said Richard Combe in a plea of trespass, and that the said sheriff should then have there that writ: which said writ he the said Richard Combe sued forth with intent, &c. And that the said Benjamin Pitt, afterwards and before the return of the said writ, to wit, on the 29th day of July in the second year aforesaid, was in due manner served with the copy of the said writ, according to the form of the statute in such case made and provided; and that he the said Benjamin Pitt afterwards at the return of the said writ, to wit, on Saturday next after the morrow of All Souls now last past, appeared in the said Court here to the writ aforesaid, &c. and that thereupon the said R. Combe, in this present Michaelmas term, to wit, on the said Saturday next after the morrow of All Souls, according to his intention aforesaid, exhibited his aforesaid bill against the said Benjamin, in form aforesaid, for the recovery of his aforesaid debt above demanded. And this he is ready to verify. Wherefore he prays judgment, and that his said bill may be adjudged good; and that the said Benjamin Pitt may answer over thereto, &c.

The defendant rejoins, that after the committing of the said supposed offences in the same bill mentioned, and long before the day of exhibiting the said respective bills of the said Richard Combe and George Lake, that is to say on the said 30th day of June, in the 2d year of the reign of our lord the now King, the said G. Lake sued forth out of the Court of our lord the King, before the King himself (the said Court being then and still at Westminster, in the county of Middlesex) a certain writ of our said lord the King called a latitat, against him the said Benjamin, directed to the then Sheriff of the county of Surry, by which said writ our said lord the now King commanded the then said sheriff, &c. so that he might have his body before our said lord the King at Westminster, on Saturday next after the morrow of All Souls then next coming, to answer to the said George Lake, in a plea of trespass, and that the said sheriff should then have there that writ. And that afterwards, and before the return of the said writ, and before the said Benjamin was served with a copy of the said writ so sued out by the said Richard, or had any notice of that writ being sued out or intended to be sued out, to wit, on the 7th day of July, in the 2d year aforesaid, he the said Benjamin was served with a copy of the said writ so sued by the said George Lake, with an English notice at the bottom thereof, according to the form of the statute in such case lately made and provided; and that in obedience to the said writ, he the said Benjamin, according to the course and practice of the said Court, at the return of the said writ so sued out by the said George Lake, to wit, on Saturday next after the morrow of All Souls now last past, appeared in the said Court here, to the said writ so sued out by the said George Lake; and that thereupon the said G. Lake, in the said term of St. Michael, to wit, on the Saturday next after the morrow of All Souls now last past, exhibited his aforesaid bill against the said Benjamin in form aforesaid, for the recovery of the supposed debt by him demanded as aforesaid. And this the said Benjamin is ready to verify. Wherefore, as before, he prays judgment of the said bill of the said R. Combe, and that the same may be quashed, &c.

The plaintiff surrejoins, that by the course and practice of this Court, writs of latitat sued out after the end of any term are tested as of the term next preceding the time of their being so sued out: but he avers that the said writ of latitat above alledged to have been sued forth out of the said Court here by the above-named George Lake, although the same was tested on the 30th day of June aforesaid, in the said 2d year of His present Majesty's reign, being the last day of Trinity term in that year, was really and in fact sued forth on the third day of July in the same year, and not before; and that the aforesaid writ of latitat which he the said Richard sued forth out of this Court as aforesaid, and which was tested on the 30th day of June aforesaid in the said second year of His present Majesty's reign was really and in fact sued out



by the said Richard against the said Benjamin for the cause aforesaid, long before the said writ of latitat in the aforesaid rejoinder mentioned, was really and truly sued out by the said George Lake, that is to say, on the first day of July in the said 2d year of His said Majes-[1426]-ty's reign, to wit, at Ivelchester aforesaid: and that he the said Richard afterwards with all convenient speed, to wit, on the day and year in the above replication for that purpose mentioned, did serve a copy of his said writ upon the said Benjamin Pitt, and on the appearance of the said Benjamin thereto exhibited his aforesaid bill, and declared thereupon against the said Benjamin for the cause and in the manner aforesaid: and this the said Richard is ready to verify. Therefore he prays judgment that his aforesaid bill may be adjudged good, and that the said Benjamin Pitt may answer over thereto.

To this surrejoinder the defendant demurs specially; and shews for cause, 1st. That it does not sustain the above replication of the said Richard; but it is a departure therefrom, in this, that by the said replication the said Richard, in order to maintain a priority of suit, hath pleaded and insisted, "that he sued out a writ of latitat in this cause against the said Benjamin Pitt on the 30th day of June in the 2d year of the reign of His present Majesty;" and yet by his said surrejoinder he hath insisted "that such writ of latitat was sued out at a different time, to wit, on the first day of July, in the 2d year aforesaid;" and also for that the said Richard hath not traversed or denied the service of the said writ of latitat sued out by the said George Lake, to be before the service of the said writ of latitat sued out by the said Richard, as he the said Benjamin hath by his said rejoinder above alledged: and the said surrejoinder is in other respects improper and insufficient.

The plaintiff joins in demurrer.

Mr. Dunning argued it for the defendant.

This is an action (laid in Somersetshire) for corrupting voters at the election of members of Parliament for Ivelchester. The declaration is of Michaelmas term, and begins with a memorandum referring to Saturday next after the morrow of All Souls.

The defendant pleads, in abatement, an action brought for the very same matter and offence, by one George Lake, in the same term.

The plaintiff replies, that before the day of exhibiting Lake's bill, that is to say, on the 30th of June, he the plaintiff sued out a latitat against the defendant, returnable on Saturday next after the morrow of All Souls, and that the defendant was duly served with a copy of it, and appeared, &c. and thereupon, the plaintiff exhibited his bill against him, &c.

[1427] The defendant rejoins, that on the said 30th of June, Lake sued out a latitat against him, returnable on the same Saturday next after the morrow of All Souls; and that before the defendant was served with a copy of the plaintiff's writ, or had any notice of it, to wit, on the 7th of July, he was served with a copy of Lake's writ; and that Lake, upon the defendant's appearing at the return of it, exhibited his bill on the Saturday next after the morrow of All Souls.

The plaintiff surrejoins, that by the course and practice of this Court, latitats sued out after the end of a term are tested as of the preceding term: but that Lake's latitat was in fact sued out on the third of July and not before: and that his the plaintiff's latitat was in fact sued out on the first of July, and with all convenient speed served upon the defendant, and proceeded upon as soon as the defendant appeared to it as aforesaid.

To this surrejoinder we demur: and shew for cause, "that the surrejoinder does not sustain the replication, but is a departure from it;" and "that the plaintiff has not therein traversed or denied the service of Lake's latitat to be prior to the service of his own."

First.—Here does not appear such a priority of suit, on the part of the plaintiff, as is necessary to attach the right of action in him. Both writs are tested on the same day, and returnable on the same day: and both declarations are supposed to be of the first day of the term; which is to be taken as only one day.

In *qui tam* informations for the same offence, where both are exhibited upon the same day, there is no precedency of suit, to attach the right of suit in either informer: and therefore the Court can give judgment for neither; but both shall be barred.

This is expressly resolved in the case of *Pye v. Cooke*, 14 Jac. 1, reported in Moore, 864, and Hobart, 128. And the former report resembles it to the case of two replevins by two persons at one time, for one taking: the defendant shall answer neither.

It is true, that in a case of *Hutchinson* against *Thomas*, Tr. 27 Car. 2, as reported in 2 Lev. 141, in an information for usury, the memorandum was of Michaelmas term, and the defendant pleaded "quod ante exhibitionem hujus [1428] informationis, scilicet termino sci Michaelis (the same term) another person exhibited an information also against him for the same usury, and obtained judgment against him." Upon which, the informer demurred, and had judgment; for, both informations, as there pleaded, refer to the first instant of the same term: but if another information was exhibited before, in the same term, he should have pleaded "that this information was exhibited such a day in the term; and that at another day, before, in the same term, another information was exhibited, and judgment thereupon obtained." And there is also a case (very ill reported) in 2 Sir J. S. 1169, *Jackson qui tam, &c. v. Gisling*, Tr.\*1 15 G. 2. In debt on the statute of 15 C. 2, c. 8, for selling fat lambs alive, the defendant pleaded, "that in the same term another informed against him and recovered:" and on demurrer, it was held ill, according to 2 Lev. 141, "because he did not set out the days on which each bill was exhibited, that so the Court might judge of the priority." This is the whole of Sir John Strange's report of the case.

But there is a distinction between pleas in abatement, and pleas in bar. Pleas in bar must shew the priority; because the right of action attaches by the priority: but in pleas in abatement, it is sufficient to shew, "that the two suits were commenced upon the same day.

And it appears by a fuller and more accurate MS. report of the case of *Jackson v. Gisling* (which he read verbatim) than that of Sir John Strange's, and which may (as he vouched) be depended upon for its correctness, that this distinction between "pleas in bar and pleas in abatement was† established in that case."

Therefore when both actions are commenced at the same time, each may be pleaded in abatement of the other.

And here, both writs have the same teste and the same return; and both declarations refer to the same day.

We have therefore pleaded in abatement, not "that Lake's action was prior to the plaintiff's;" but "that both were commenced at the same time:" in which case, we were not obliged to answer to either.

[1429] Their replication indeed alledges, "that their latitat was sued out on the 30th of June." But

Our rejoinder alledges the very same thing concerning our latitat.

So that the case is brought back, just to what it was before, as to priority.

Then they surrejoin "that their's was in fact sued out on the first of July: and our's, not till the third:" which gives them a priority of two days.

And I own, that it is now settled "that the true time of suing out the latitat may be shewn, whenever it is material, in answer to a plea of the Statute of Limitations, notwithstanding the teste:" so was the determination in the case of \*2 *Johnson v. Smith*, P. 33 G. 2, B. R.

And in cases of pleas of tender, I admit, likewise, "that the day of the tender may be shewn."

But neither of these cases, (on pleas of the Statute of Limitation or pleas of tender,) apply to the present case; which is a penal action brought by a popular informer.

Such a construction was very right in those cases; because it tended to support solid justice, and to prevent a wrong which would there have arisen from legal fiction.

But though remedial laws are to be construed liberally, yet penal laws are always construed strictly. A common informer shall not be at liberty to quit the teste, and avail himself of the real time: even forms shall not be dispensed with, to aid popular prosecutors.

\*1 N.B. It was Tr. 16 G. 2. See the note just below.

† It may be going too far to say, that "this distinction was established in that case." But it was taken or at least hinted at, by Lee Lord Chief Justice, Chapple, and Denison. And that case was a plea in bar; though it is not directly so expressed by Sir J. S.

N.B. Sir J. S. or rather his editor, has mistaken the year: for it was determined in Tr. 1742, 16 G. 2, not 15 (as he reports it).

\*2 Vide ante, p. 950 to 968.

In the case of *Culliford v. Blandford*, Pasch. 4 W. & M. B. R. Carthew, 234, Holt Chief Justice differed from the other three Judges, and took this distinction between a civil action and an action for a penalty given by a statute, "that in the former case, the suing out a latitat within the time and continuing it afterwards will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within time, that it may appear so to be upon the record itself." The plaintiff indeed had judgment: but afterwards a writ of error was brought, in that case.

[1430] It appears upon the pleadings in the present case,\* that our writ was served on the 7th of July, and their's was not served till the 29th." So that we have three weeks priority of service: which shall take place of the two days priority of their pocket-writ, which they only took out, but did not serve. It would be hard if this pocket-priority should be a ground for our paying the penalty twice over.

It may perhaps be objected, "that both writs were returnable at the same time."

They were so. And supposing the return of the writ to be the commencement of the action, yet † (as it was said in the case of *Jackson v. Gisling*), if both are at the same time, the Court can not give priority to either: but either defendant may plead in abatement.

Secondly.—As it appears upon the replication and rejoinder both, "that the plaintiff had no priority of suit; but that both writs were sued out on the very same day, viz. on the 30th of June." The plaintiff's surrejoinder is repugnant to the replication, and a departure from it, in alledging "that his latitat was in fact sued out on the first of July." And we have shewn this for a cause of demurrer.

Where the time is material, (as in this case it is,) a departure from the time before alledged is a defect in substance.

This was solemnly determined in the case of *Cole v. Hawkins*, H. 3 G. 1, B. R. Stra. 21.

(Of this case I have a MS. note (taken before my own time:) and the determination was "that in an action upon the case on a parol promise, the time of the promise, laid in the declaration, is not material: but when the defendant by his plea makes it so, the plaintiff may answer the plea, and it shall not be a departure." The same thing was determined in a later case, of which I have a note of my own, in Tr. 1, 2 G. 2, *Matthews v. Spicer*, 2 Stra. 806, upon a tender: and a distinction was taken between the case of a common assumpsit, where the day is alledged only for form; and a note, where the day is material, and an essential part of the agreement, from which the plaintiff can not vary.)

Mr. Yates, contra, for the plaintiff.

[1431] The material question is, "whether our action, or Lake's friendly one, be prior."

It is incumbent on the defendant, to shew that the action he pleads is prior to the plaintiff's.

The case of *Jackson, qui tam, v. Gisling*, shews this; and so does 2 Hawkins's P. C. 275, § 63.

And there is no reason for any distinction between pleas in bar and pleas in abatement: the same reasons equally hold in both cases.

The case of *Johnson v. Smith* proves, that the true time of suing out the latitat may be shewn by the plaintiff: and we have shewn that both writs were tested on the same day; both returnable on the same day; both declarations on the same day; and that our's was in fact sued out two days before Lake's. And the suing out the process is the commencement of the suit, and is equally so, and with equal effect, in a *qui tam* action by a common informer, as it is upon a plea of the Statute of Limitations, or a plea of tender. This appears by the opinion of the three Judges (against Lord Chief J. Holt) in the case of *Culliford qui tam, v. Blandford*, Carthew, 233, 234. So that we have the priority of suit, and are guilty of no laches; for, we served it with all convenient speed, and proceeded upon it as soon as the defendant appeared. Consequently, our's is not to be called a pocket latitat; nor does their priority of service make any difference in their favour.

If Mr. Dunning's argument should prevail, it would be impossible to prevent such collusion between defendants and their friendly prosecutors, as must baffle all real prosecutions upon this statute.

\* Vide ante, p. 1424, 1425, in the replication and rejoinder.

† This was expressly said, both by Lord Ch. J. Lee, and by Mr. J. Chapple.



Perhaps, if both were commenced upon the very same day, one might be pleadable to the other.

Secondly. As to the departure.

The notion of a departure is where a man shews and relies upon another matter differing from and contrary to his former allegation. But here is no repugnancy or departure; for, we adhere to our former allegation, as to the teste of the writ, pursuant to the course and practice of the Court; and then specify the day when we really [1432] and in fact sued it out. And this is no departure, when it is in answer to the defendant's plea, which has made the time material, when it was not so before.

Mr. Dunning, in reply.

Mr. Yates disputes the distinction which I make between pleas in abatement, and pleas in bar. But it is a just one; and I had the report of the case of *\* Jackson v. Gisling*, where it was established, from the † gentleman who argued that case.

It cannot be right or reasonable, that each plaintiff should recover against the defendant, for the very same offence; and yet, that is the consequence of Mr. Yates's argument.

He says indeed, "that Lake is a friendly informer." But how does that appear? Or how can the Court take judicial notice of that? Both informers appear in an equal light to the Court; and they will aid neither of them.

Secondly.—"That this surrejoinder is a departure from the replication," is manifest upon the face of it: it is quite repugnant to it.

The replication does not say one word about the teste of the latitat: it does not mention the teste at all, but only alledges "that it was sued forth on the 30th of June." The surrejoinder avers it to have been "sued forth on the 3d of July, and not before." Can any thing be more repugnant?

A second argument being proposed,

Lord Mansfield said, that it had been extremely well argued by the gentlemen on both sides: who had both of them argued like lawyers, and had not said a word too much or too little.

Cur. advis. till to-morrow morning.

And the next day, Tuesday the 21st,

Lord Mansfield delivered their opinion.

He said it was unnecessary to go into any of the pleadings subsequent to the plea, if the plea itself was bad: and they were all of opinion, "that this plea is a bad one."

It is a plea in abatement, shewing "that another action was brought against the defendant, in the same term, by [1433] another person for the same offence:" and this is all, without any thing more. Whereas he ought to have shewn, "that the right of action was attached in some other person, before the present plaintiff's action was commenced." And Mr. Dunning's own two cases prove this doctrine.

That of *Hutchinson v. Thomas*, in 2 Lev. 141, was an information for usury. The memorandum was of Michaelmas term. The defendant pleaded "that ante exhibitionem informationis, scilicet the same term, another person exhibited an information also against him for the same usury, and obtained judgment against him." Upon which, the informer demurred, and had judgment: for, both informations, as there pleaded, refer to the first instant of the same term. But if another information was exhibited before, in the same term, the defendant should have pleaded, "that the information pleaded to was exhibited such a day of the term; and that at another day before, in the same term, another information was exhibited, and judgment thereupon obtained."

And *Jackson, qui tam, v. Gisling*, was a plea, "that in the same term, another informed against him and recovered:" and, on demurrer, it was holden ill, according to 2 Lev. 141, because he did not set out the days on which each bill was exhibited, that so the Court might judge of the priority.

Therefore, notwithstanding the general fiction "of the whole term's being but one day," yet when the priority of action becomes essential and necessary to be ascertained, the particular day must be shewn.

Mr. Dunning has fairly stated these two cases, which are against him: but he

\* V. ante, p. 1428.

† Norton argued it pro quer: Gundry, pro def.

distinguishes between pleas in bar, and pleas in abatement: and he admits these cases, as being pleas in bar; but says, that where both actions are brought at the same time, it ought to be (as it is here) pleaded in abatement, and that such a plea in abatement is good. And he has cited a manuscript note of the case of *Jackson v. Gissing*, by which (he says) it appears that \*<sup>1</sup> that case really turned upon such a distinction between pleas in bar and pleas in abatement.

But there can be no reason or foundation for such a distinction: for, in both cases, it is equally necessary to set out the particular day. If the particular day be not specified, the whole term will be considered but as one day.

[1434] The case is intelligible, as it is reported by Sir J. S. and my brother Denison says, it is \*<sup>2</sup> rightly taken.

A case was cited from Hobart and from Moore, *Pye v. Coke*, 14 Jac. 1, to prove, that "where two informations are exhibited on the same day, the defendant needs not to answer either:" and Mr. Yates seemed to † concede, "that if both were, in fact, brought upon the very same day, one might be pleaded to the other."

But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done: for, it is not like a mathematical point, which cannot be divided. However, this is not necessary to be determined in the present case.

Upon the whole, we think the plea bad, on the authority of the two cases in Levinz and Strange: and therefore there is no need to go into any of the subsequent pleadings.

Let the defendant answer over.

V. post, 1586, (under Monday 19th November 1764).

REX versus SIR FRANCIS-BLAKE DELAVAL, WILLIAM BATES, AND JOHN FRAINE.  
Wednes. 22d June 1763. [S. C. 1 Black. 410, 439.] Information for fraudulently assigning a female apprentice for the purpose of prostitution.

[Referred to, *In re Andrews*, 1873, L. R. 8 Q. B. 158; *Thomasset v. Thomasset*, [1894], P. 298.]

On shewing cause (in the last term, viz. on Monday 16th May) why an information or informations should not be exhibited against the defendants, for certain misdemeanors;

And also upon Sir Francis's producing Anne Catley in Court, in obedience to an habeas corpus directed to him for that purpose;

The charge against them was, that the defendants had joined in an unlawful combination and conspiracy, to remove this girl, an infant of about eighteen, out of the hands of the defendant Bates (a musician) to whom she was bound an apprentice by her father, (a gentleman's coachman,) without the knowledge or approbation of the said Catley her father, and to place her in the hands of Sir Francis, for the purpose of prostitution.

[1435] For which purpose (as it was insisted,) she was discharged by Bates, her master, from the indentures of her apprenticeship to him, in consideration of 200l. (the penalty of them,) paid to him by Sir Francis; and was then bound, by the usual indentures of apprenticeship, to Sir Francis: and Mr. Fraine was the attorney who was concerned in the transaction, so far as to make all these several indentures, and also to draw up an agreement between Sir Francis and Bates, "that Bates should have the profits of an engagement or contract he had entered into for her singing at Marybone, and be secured against the non-performance of that contract." The girl was now notoriously kept by Sir Francis Delaval; and actually resided in his house, and publicly rode out on his horses, attended by his servants.

As to the information—

\*<sup>1</sup> V. ante, p. 1428.

\*<sup>2</sup> If it is rightly taken, I am sure it is not fully taken: at least, I know that my own note of it, employs twice as many pages as his does lines.

† V. ante, p. 1431.

The Court adjourned the consideration of the matter till the first of the present term. For

Lord Mansfield said, that if here really has been a conspiracy to seduce this girl, (which is the foot upon which this Court are to take it up,) he and his brethren had some doubt "whether the father and mother were not concerned in it, as well as the rest." Therefore let the rule be enlarged till the first day of next term: and let the father and mother, in the mean time, give an answer to the matters which are charged upon them in the affidavits that have been read on the part of the defendants.

As to the habeas corpus—

His Lordship said, that the three principal cases that have occurred since Queen Ann.'s time that are applicable to the present case, were

*Mrs. Turberville's case* (*Rex v. Clarkson et Al.*, 1 Sir J. S. 444,) in Trin. 7 G. 1, in this Court;

*Frances Howland's case* (*Rex v. Mary Johnson*, 1 Sir J. S. 579, and 2 Ld. Raym. 1334) in Hil. 10 G. 1, B. R. and

*James Smith's case* (*Rex v. Penelope Smith*, 2 Sir J. S. 982) in Trin. 7, 8 G. 2, B. R.

[1436] And he thought that what was done by the Court, in every one of them, was right: though he did not agree with the sayings that were reported in the books to have been made use of in determining them.

In cases of writs of habeas corpus directed to private persons, "to bring up infants," the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them.

There is a privilege *redeundo*; unless the Court should see ground to declare the contrary.

In the three particular cases which he had mentioned, all that was actually done, he said, was right: though he did not agree with all that was said.

In the first of these cases (*Rex v. Clarkson et Al.*) the infant was a marriageable young lady, who lived with her guardian. A man claimed her as his wife: she denied the marriage. The Court could not try the marriage by affidavit: and they could not deliver her to the man as her husband, without allowing the marriage. She chose to remain with her guardian: and the Court, upon being informed "that the man had a design to seize her," sent a tipstaff home with her, to protect her.

In the second case (*Rex v. Mary Johnson*), the child was too young to judge for itself: she was not more than nine or ten, or, as some accounts say,\* six years old; but certainly not old enough to exercise any judgment of her own. And there was a legal guardian appointed by the will of her father: and therefore it was right to let the legal guardian take her, as she was too young to judge for herself. The guardian appointed, in that case, by the Spiritual Court was nothing at all: for they appoint any body guardian in that Court; for the mere purpose of appearing.

In the third case (*Rex v. Penelope Smith*), the child wanted but six weeks of fourteen. And that case was determined right, (barring the dictums that were used in it:) for the Court were certainly right in refusing to deliver the infant to the father; of whose design in applying for the custody of his child, they had a bad opinion.

[1437] The true rule is, "that the Court are to judge upon the circumstances of the particular case; and to give their directions accordingly."

In the present case, there is no reason for the Court to deliver her to her father. She has sworn "to have received ill usage from him, before she was at all put out apprentice:" and whilst she was with Bates her master, it appears that her father seldom or ever came near her, or ever gave her either advice or reprimand. It is even suspicious "whether the father and mother were not parties to the conspiracy;" and "whether the father does not carry on this prosecution in hopes of extorting money from the defendants."

Let the girl therefore be discharged from all restraint, and be at liberty to go where she will.

And whoever shall offer to meddle with her *redeundo*, let them take notice "that they do it at their peril."

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\* My own note, (and I was in Court and saw her) says "about six."



But I see no reason, in this case, to send an officer with her, to protect her: upon a mere apprehension or supposition "any body will behave improperly upon the occasion."

The affidavits of the girl's father and mother having been read yesterday, Lord Mansfield took them home to revise and consider them, (together with the rest of the affidavits formerly read,) till this morning: by which affidavits now read, the father seemed to me to have very fully exculpated himself from all suspicion of blame; but the mother was acquainted with the amour between Sir Francis and her daughter, whilst she and her daughter lodged together in or near Covent-Garden, and before her daughter's going to Bath, as well as after her return, though she never acquainted her husband at all with her knowledge or suspicion of it.

Lord Mansfield now delivered the opinion of the Court.

This is a motion for an information against the defendants for a conspiracy to put this young girl, (an apprentice to one of them,) into the hands of a gentleman of rank and fortune, for the purpose of prostitution; contrary to decency and morality, and without the knowledge or approbation of her father; who prosecutes them for it, and has now cleared himself of all imputation, and appears to be an innocent and an injured man.

The fact, uncontroverted, is this—

A female infant, then about fifteen, was bound appren-[1438]-tice by her father to the defendant Bates, a music-master; the girl appearing to have natural talents for music. The father became bound to the master in the penalty of 200l. for his daughter's performance of the covenants contained in the indenture. She became eminent for vocal music; and thereby gained a great profit to Bates her master. During her apprenticeship, being then about seventeen, she is debauched by Sir Francis Delaval, whilst she resided in the house of Bates's father; as Bates himself was a single man and no house-keeper. In April last, Bates her master indirectly assigns her to Sir Francis, as much as it was in his power to assign her over: and this is done, plainly and manifestly, for bad purposes. Bates at the same time releases the penalty to the father, but without the father's application or even privity; and receives the 200l. from Sir Francis, by the hands of his taylor; who is employed to pay it to Bates, and also enters into a bond to Bates, to secure to him the profits arising from the girl's singing this summer at Marybone. And then she is indentured to Sir Francis Delaval, to learn music of him: and she covenants with him, both in the usual covenants of indentures of apprenticeship, and likewise in several others, (as "not to quit even his apartments,") &c. These articles between the parties are signed by all but the father: and a bond is drawn from him, in the penalty of 200l. for his daughter's performance of these covenants (which he never executed). And the girl goes and lives and still does live with Sir Francis, notoriously, as a kept mistress.

Thus she has been played over, by Bates, into his hands, for this purpose. No man can avoid seeing all this; let him wink ever so much.

I remember a cause in the Court of Chancery, wherein it appeared, that a man had formally assigned his wife over to another man: and Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so is the present case.

It is true that many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court, and are appropriated to it. But, if you except those appropriated cases, this Court is the *custos morum* of the people, and has the superintendency of offences contra [1439] *bonos mores*: and upon this ground, both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here.

However, besides this, there is, in the present case, a conspiracy and confederacy amongst the defendants: which are clearly and indisputably within the proper jurisdiction of this Court.

And in the conspiracy they were all three concerned.

Bates, the master, clearly knew of the connection between Sir Francis and his apprentice, in February: but he gave no notice at all about it, to her father, till a considerable time after he knew it himself; and at last, neither tells nor hints to him any thing further than that she had been seen riding in the park attended by a servant of Sir Francis Delaval's, and that she neglected her business and his instructions; and recommended her mother's taking a lodging for her and lodging with her. In April,

he enters into this transaction with Sir Francis; who is to pay him the penalty of the original indentures, and then to have the girl. Yet of all this, he gives no notice to her father. Bates's own affidavit is highly improbable: and though the girl swears, in her's, to exculpate Bates as well as Sir Francis Delaval, yet it is plainly discoverable from what she swears, "that Bates's account is not a true one." Bates therefore ought clearly to be included in the rule for an information.

Then as to Fraine, the attorney.—Though I never heard any imputation upon him before, yet in this instance he has certainly acted inconsistently with the duty of his profession, and that chastity of character which it is incumbent upon an attorney always to support. He has drawn and prepared all these instruments; and the indentures whereby this girl, already bound to Bates, binds herself apprentice to Sir Francis Delaval, to be taught music by him; and all the covenants contained in it; and was privy to the compensation that Bates received from Sir Francis. So that it was impossible for him to be ignorant of the real intention of this transaction: he could not imagine that she really bound herself to Sir Francis to be taught music by him; but must undoubtedly have been conscious of the true purpose for which these deeds and writings were calculated. He therefore ought likewise to be included in the absolute rule for an information.

[1440] Then as to Sir Francis himself, there can remain no doubt. Therefore let the rule be absolute against all \*<sup>1</sup> three.

REX *versus* BURBAGE. Same 22d June, 1763. Habeas cor. to remove a prisoner ad test. refused under special circumstances.

Mr. Ashhurst, on behalf of the prosecutor, moved for a habeas corpus ad testificandum, to carry Thomas Haydon, a prisoner in execution in the King's Bench prison for a misdemeanor, down to the next assizes for the county of Worcester, against the defendant; upon an affidavit of his being a material witness.

But Lord Mansfield, though he agreed, "that (in general) a habeas corpus ad testificandum will lie, to remove a person in execution, to be a witness," yet thought the present application to be a mere contrivance.

This Burbage is indicted for perjury in swearing the very oath upon which this † Thomas Haydon was convicted of the offence for which he is now imprisoned: so that it seems difficult to account for his being a material witness in the cause. But even admitting him to be so, there is no great inconvenience in trying it at the next following assizes: at which time this man's imprisonment will be at an end.

Per Cur'.—Take nothing by the motion.

The end of Trinity term, 1763, 3 G. 3.

 Mr. Just. Foster was absent all this term; and died on the first day of the following term, viz. Monday, the 7th of November 1763.

[1441] MICHAELMAS TERM, 4 GEO. III. B. R. Monday 7th Nov. 1763.

In the evening this Monday the first day of this term, about nine o'clock,\*<sup>2</sup> died Mr. Justice Foster, third Judge of this Court, aged about 74.

RIGHT, ON THE DEMISE OF FRANCIS BASSET, ESQ. *versus* THOMAS AND ANOTHER. Tuesday, 15th Nov. 1763. [S. C. 1 Bl. 446.] Power to make leases to be liberally construed.

This was a case reserved upon an ejectment tried at the Western Summer-Circuit in 1761. It turned upon the construction of a power: and the question was, "whether the power was or was not well executed."

\*<sup>1</sup> Note.—The counsel for the prosecutor did not, upon the original motion, pray any rule against the taylor; suspecting that he had acted rather under a kind of compulsion, than ill intention or design.

† V. ante, p. 1387, *Rec v. Thomas Haydon*, Saturday 7th May, 1763.

\*<sup>2</sup> Memorandum.—There were only three Judges of this Court during the whole term.



At the assizes, there was a verdict for the plaintiff, subject to the opinion of the Court, on the following case.

John Pendarvis Basset, being seised in fee, in consideration of an intended marriage between him and Mrs. Anne Prideaux, conveyed to trustees and their heirs, to the use of himself and his heirs till the marriage; then, of himself for life; remainder to the trustees, to preserve contingent remainders; and after his own death, then remainder to secure a rent-charge to his intended wife for her life; remainder, to the first and other sons of the marriage, in tail male; remainder, to such uses as he should by deed or will appoint; remainder, for want of such appointment, to the heirs of his body, in tail male; [1442] remainder to his brother Francis Basset, the lessor of the plaintiff, for life; remainder to the first and other sons of the said Francis Basset, in tail male: remainder to himself, his heirs and assigns for ever: which several estates and limitations aforesaid are subject to a proviso "that it should be lawful for himself and Francis Basset, during their respective lives, and the son and sons of their respective bodies, and the heirs male of such son and sons, and his own heirs male, as they should be severally and successively in the possession of the freehold, by virtue of the limitations aforesaid; and for the said trustees and the survivors and survivor of them, and the heirs of such survivor, during the minority of any such son or sons or issue male; at any time or times, by any deed or deeds to be signed and sealed by him or them respectively, in the presence of two or more credible witnesses, to demise, lease, or grant to any person or persons, either in possession or reversion, for one life, or for two or three lives, or for any number of years determinable on the death of any one, two, or three person or persons to be named in every such lease, all or any part of the said premises which had been usually so demised and letten; so as there should be no more than three lives in being at any one time, of or on any one lease or demise so to be made and granted; and so as upon every such lease or demise so to be made, there should be reserved so much or more yearly rent as then was or had been given or received for the same premises, within twenty years then last past; or a proportionable rent, where a greater or lesser part of any farms or tenements, either separately or apart, or together with any other part or parcel of the said premises or other lands, should be demised or be payable quarterly or otherwise; and to continue during the estate and term thereby granted, and to be incident and go along with the reversion and remainder expectant on such leases respectively, with usual covenants on the lessee's part; and so as no such lease should be dispunishable of waste; and so as in every such lease, there should be a condition of re-entry for non-payment of rent, and for waste; and so as every lessee should execute a counterpart of such lease. And it was by the said indenture declared and agreed, that all such leases, grants and setts as should be made by virtue thereof should be good, valid and effectual in the law, to all intents and purposes: and that the respective lessees, their executors, &c. should and might hold and enjoy the several, &c. to them respectively demised, for the respective terms and estate for which such lease should be made."

The marriage was solemnized in 1737.

[1443] The said John Pendarves Basset died on 19th September 1739, without making any appointment of the premises; leaving his wife enseinte with a son, who was born on 22d May 1740, and was baptized John Prideaux, and became intitled to an estate tail in the premises, subject to the said rent-charge to his mother, and such other incumbrances as then affected the premises.

By an order of the Court of Chancery, Christopher Hawkins, Esq. was appointed receiver, and was empowered to make contracts for leases for one, two, or three life or lives, or years determinable thereon, of all such parts of the said estates as have been usually so granted, and to fill up and renew the lives in the said leases, and to receive the fines payable thereon.

In pursuance of which order, the said Mr. Hawkins contracted with Nicholas Tresidder, for a lease of four fields, &c. parcel of the premises in question, which by the death of Henry Pendarves, were then fallen into possession; for ninety-nine years, if Mary the wife of the said Nicholas Tresidder, his son, and Ann his daughter, or either of them, should so long live; in consideration of a fine of 175l. to be paid as hereinafter mentioned, and the yearly rent of 13s. and 4d. and 13s. and 4d. for a heriot.

Accordingly, by an indenture of lease, bearing date on the 24th June 1742, and made between the surviving trustees in the said settlement on the one part, and the



said Nicholas Tresidder on the other part, reciting the said proviso and power of leasing in the said settlement contained, and the appointment of Mr. Hawkins as above-mentioned, and the said contract made by him with the said Tresidder, with the approbation of the Master in Chancery, the said surviving trustees, in pursuance of the said power, and in consideration of 87l. 10s. then paid to Mr. Hawkins by Tresidder, and of 87l. 10s. more, to be paid in six months, and of the rents and covenants therein aftermentioned, and with the approbation of the said Master, demised, leased, and granted to the said Nicholas Tresidder, his executors, administrators and assigns, all those four fields, &c. to hold for ninety-nine years, if Mary the wife of the said N. T. Nicholas his son, and Ann his daughter, or any of them should so long live; yielding and paying therefore yearly the rent of 13s. 4d. payable quarterly during the said term, and 13s. 4d. in lieu of a heriot or farlief, at or after the several respective deaths of the said Mary, Nicholas, and Ann; and also repairing, &c. And in the said indenture is contained a proviso, that if the 87l. 10s. should not be paid within the [1444] stipulated time; or if the yearly sum of 13s. 4d. or any other the said reservations and agreements should be behind and unpaid and unperformed in part or in all, one year after the same ought to be paid or performed; or if the said N. T. his executors, &c. shall do or suffer any waste on the said premises; then it should be lawful to all and every person or persons, who for the time being shall be intitled to the reversion of the said premises, to re-enter, and the same to have again as in his and their former right and estate. And the said Nicholas Tresidder executed a counterpart of the said lease: and the last mentioned 87l. 10s. was duly paid at the stipulated time. And N. T. and Nicholas his son are still living.

On 17th May 1756, the said John Prideaux Basset died an infant under seventeen, intestate, without issue, and unmarried; whereupon, the lessor of the plaintiff, who is remainder-man under the limitations in the settlement, and also heir at law to his nephew the said John Prideaux Basset, and heir general to the said John Pendarves Basset, claims the premises in question, by virtue of the said remainder to him limited as aforesaid.

Then the case states, that there were contained in the deed of settlement, several tenements other than the Barton of Pendarves, which were enjoyed by the said John Pendarves Basset and his ancestors, at and before the said 11th of April 1737, by leasing the same from time to time respectively for terms of ninety-nine years; each of such terms being determinable respectively on the expiration of three lives: and that there were several other tenements in the said deed of settlement likewise contained, which were on the said 11th day of April, and had been before that time, holden of the said John Pendarves Basset and his ancestors, to farm by leases at a rack-rent.

Then there are stated several old leases of the Barton of Pendarves, &c. as far back as Queen Elizabeth's time, and reciting others in H. 8th's time; some for terms of years, and some for ninety-nine years determinable on three lives, at different rents; and that on 15th September 1631, the fee-simple of the said Barton of Pendarves was conveyed to William Pendarves; and, by him, afterwards (in 1738) to Samuel Pendarves; and in 1738, on the death of Thomas Pendarves, came into the possession of the said John Pendarves Basset. And an indenture tripartite is stated, bearing date 15th December 1738, whereby the said Samuel Pendarves, in consideration of natural love and fatherly affection to his second son Thomas Pendarves, and for his better advancement, livelihood and maintenance, covenanted to stand seised (*b*) to the use of the said Samuel, for life; then of the said Thomas Pendarves, his executors, &c. for ninety-nine years, if the said Thomas, [1445] or any woman he should marry, or any issue of his body should so long live; paying yearly unto the heirs and assigns of the said Samuel the yearly rent of 4l. payable quarterly; with covenants on the part of Thomas, "to pay the rent, and repair the premises."

It was stated, (*c*) that the rent reserved on the said lease of the 24th of June 1742,

(*b*) *I.e.* of the whole Barton of Pendarvis, of which the premises in the lease of the 24th of June 1742, were part.

(*c*) Co. Lit. 44 b. 5 Co. 5 b. b. a. Vide also in 3 Danv. 245, several points on a power in a private Act of Parliament.

to Nicholas Tresidder, is more than a proportionable part of the rent reserved for the whole Barton in the deed of 15th December 1638.

The said Francis Basset demised the premises to the plaintiff; under which demise, the plaintiff entered, and was possessed: and, being so possessed, the defendants entered, and ejected him.

The question submitted to the opinion of the Court, was, "whether the lease bearing date on the 24th of June 1742, and made to the said Nicholas Tresidder, be a good and effectual lease, by virtue of the power herein before mentioned as part of the deed of settlement made 12th April 1737;" and thereupon, "whether the plaintiff ought to recover."

This case was argued by Mr. Thurlow, for the plaintiff; and Mr. Serjeant Burland, for the defendants.

Mr. Thurlow argued, that this lease was not of the kind intended by the power: nor was the usual rent reserved, nor the usual covenants contained on the lessee's part. That the intention of Mr. John Pendarves Basset was to continue the estate in his name and blood; and that the trustees had only a naked power, without any interest; and could not deviate from the literal terms of the power. And that the word "usual" can not be satisfied by a single instance, or even by two instances.(c)

Serjeant Burland said, that the only question at the trial was, "whether a covenant to stand seised could be considered as an evidence of the usual manner of demising." And he argued, "that it might;" and insisted, that a lease may be made by a covenant to stand seised, upon good consideration, as of marriage or blood. A covenant "to stand seised," is a conveyance of the land, since the Statute of 27 H. 8. These lands have been usually demised for years, determinable upon lives: and the power is, "to demise for any number of years, determinable upon the death of one, two or three persons named." And the present lease is within the terms and intention of the power.

[1446] The Court thought this as plain a case as possibly could be, on the part of the defendant.

Here is an estate settled, on a marriage, in strict settlement; and a power reserved to the guardians and trustees for infants, "to demise, lease and grant for one, two or three lives, or for any number of years determinable on three lives in being, any part, &c. usually so demised, and reserving the usual rent."

Now there is no doubt but these lands had been usually leased for lives; and the usual profit made by fines.

But it is objected, "that the last lease was made by covenant to stand seised, &c."

A covenant "to stand seised," entered into by the owner, is a lease.(d)

(c) There are several leases mentioned to have been stated in this case, and some of the same kind with that in question of the Barton of Pendarves, of which the premises in question seem to have been parcel.

(d) The lease to which the objection was made, was not made by the owner; for the question submitted to the opinion of the Court, is expressly stated in page 1445, to have been, "whether the lease bearing date on the 24th June, 1742, and made to the said Nicholas Tresidder be a good and effectual lease by virtue of the power therein before mentioned." The objection to this lease was, that the deed of covenant to stand seised of the 15th December 1638, was the last deed on which any rent was reserved; and being by covenant to stand seised, was not a lease; and therefore, that the lands demised by the lease of the 24th June, 1742, had not been usually so demised and letten as the lands over which the power was to be exercised, are by the terms of the power required to be. And it seems very clear that they were not; for by the express terms of the power, the lands which are the subject of it must be lands usually letten for one, two, or three lives or for years determinable on one, two, or three lives; and it appears by the state of the case here, though something confused, and more clearly from the state of it in 1 Black. Rep. 447, that from the 13th December 1638, down to the expiration of the lease, if it can be called a lease as it is here adjudged to be, of that date, to the making the settlement in April 1737, in which the power was contained, the lands in question, with other lands, had been enjoyed, under the deed of covenants or lease of 15th December 1638; which, if it be allowed to be a lease, yet it certainly was not a lease for one, two, or three lives, or for years determinable on one, two, or three lives, as the lands to be leased by virtue of the power ought to be; but

But it is said, "that this is by way of provision for a younger child."

Answer.—This is every day's experience: nothing is so common, as making these leases for the benefit of younger children.<sup>(e)</sup> And it would be very inconvenient, were it otherwise. For if the trustees were obliged to let the lands at a rack-rent, it might be quite inconsistent with the nature of these estates.

Powers are derived from equity: and ought, even at law, to be construed equitably. And this is the case of an infant tenant in tail; who shall have all advantages of enjoying his estate.

And these lands have been usually so demised, even from the time of Queen Elizabeth.

Per Cur. (Lord Mansfield and Mr. Justice Wilmot)—

Judgment for the defendants.

[1447] REX *versus* INHABITANTS OF TITCHFIELD. Saturday 26th Nov. 1763.

This case is already published in the quarto edition of my Settlement Cases, No. 164, page, 511.

JENNINGS *versus* MARTIN. Monday, 28th Nov. 1763. Defendant to be discharged on common bail if affidavit not positive.

On Mr. Recorder's motion, a rule was made absolute for discharging the defendant on common bail, for defect of the plaintiff's affidavit to hold him to bail: which was only "that the defendant was indebted to him in such a sum, as appears by agreement bearing date such a day."

This was alledged to be a settled fatal objection, and always allowed; the affidavit not being positive as the \* Act requires it to be.

Lord Mansfield said, that if this was a settled point, it must be adhered to: but he owned, he was not satisfied with the reason of it. For, if the party had sworn positively, "that the defendant was indebted to him in such a sum," his adding the words of reference would not excuse him from perjury, if the fact should be untrue.

But Mr. Justice Denison observed, that vast numbers of such affidavits had been held insufficient; and the defendants had always been discharged on common bail, where the affidavits were only couched in terms of reference: for, that the Act of Parliament required positive oath of the debt; whereas such affidavits cannot be said to be positive oaths of it; being only expressed in words of reference to somewhat else, and not in terms of absolute assertion.

Rule made absolute for discharging the defendant on common bail.

See before, p. 655, *Pomp v. Ludrygon*, M. 1758, 32 G. 2, B. R. where this point

it was a lease or term granted to the lessee or grantee for ninety-nine years, if he, or any wife he should marry, or any issue he might have, should so long live; and in fact the grantee or lessee had issue living to the expiration of the term: therefore these lands could not be the object of the power, not having been usually so letten as the lands described by the power, which by the words and intention was clearly confined to lands leased for one, two, or three lives, or for a term of years determinable on one, two, or three lives, which is the usual manner of leasing lands, and not to lands leased for ninety-nine years, or other long term determinable on failure of issue, as the lands in question had been leased.

There is also another very old objection, often taken and allowed, viz. that where uses are raised by covenant in consideration of paternal love, &c. to his sons and daughters, or for the advancement of any of his blood; and after, in the same indenture, a proviso is added that the covenantor, for divers good considerations may make leases for years to his son or daughter, or any other of his blood, (much less to any other person;) because the power to make leases for years was void, when the indenture was sealed and delivered: for the covenant upon such general consideration cannot raise the use for the cause above mentioned. Resolved, 1 Co. 176 b.

<sup>(e)</sup> This is not the true reason: the right ground for the judgment, is, that the lease is warranted by the words and intent of the power.

\* 12 G. 1, c. 29, s. 2.



was fully settled, agreeably to Mr. Justice Denison's opinion, though not to Mr. Justice Foster's. I have there collected all the cases on this head.\*

[1448] REX *versus* INHABITANTS OF ST. PETER'S IN DORCHESTER.  
Monday, 28th Nov. 1763.

This case is already published, in my Settlement Cases in quarto, No. 165, page 513.

PULLEN *versus* WHITE. The same, 28th Nov. 1763. Defendant to be discharged if no declaration within two terms.

The question was, "whether the defendant was or was not intitled to be discharged upon common bail, on 4, 5 W. & M. c. 21, and the rules of Court made subsequent to it; upon these facts, viz."

The defendant had been arrested by virtue of a writ taken out four days before the end of Easter term last, returnable on the last day of the then next (and now last) Trinity term. The arrest was within two days of the end of the same Easter term, wherein the writ issued. The defendant remained a prisoner in custody of the sheriff till after the end of Trinity term following, without being charged with any declaration. And then he applied to a Judge, to be discharged upon common bail: but the Judge, having some doubt, ordered it to be moved in Court.

Accordingly, Mr. Solicitor General (Norton) did move the Court on behalf of the defendant, and prayed that he might be discharged on common bail; and had a rule to shew cause why he should not be so.

Mr. Walker now shewed cause against this rule.

The question depends upon these words of the second clause of 4, 5 W. & M. c. 21, ("that if any defendant be taken or charged in custody upon any writ out of the Courts at Westminster, and detained in prison for want of sureties for his appearance thereto, the plaintiff may before the end of the next term after such writ or process shall be returnable, declare against such prisoner, &c.") and upon the 6th clause of a rule of this Court, made in Easter term, 5 W. & M. ("that if the declaration be not filed before the end of the next term after the writ or process by which the prisoner was taken [1449] or charged in custody is returnable; and affidavit made and filed thereof before the end of twenty days next after such term, the prisoner shall be discharged on common bail signed by a Judge;") together with the under-mentioned rule of Tr. 2 G. 1.

Mr. Solicitor General cited and relied on a case of *Long v. Murrel*, M. 14 G. 2, 1740, in this Court, as a case directly in point for him, and determined unanimously by the Court, after solemn discussion and deliberation.

(But that was a case where the defendant was not in custody of a sheriff (as this defendant is,) but of the marshal, (to whom he was committed by virtue of a habeas corpus brought by him, to remove himself from C. B. where the plaintiff's action was originally brought:) and the Court determined it upon a rule made in Trin. 2 G. 1, 1716, "that if a defendant be committed to the marshal, or charged in custody of the marshal; or charged or committed by virtue of the process of this Court, to the custody of any sheriff or other officer whatsoever, at the suit of any plaintiff; and shall so remain in custody for two terms; and the plaintiff shall not declare against the defendant within that time; that then such defendant after the end of the second term after such imprisonment, shall be discharged out of the prison where he shall be detained, on filing common bail signed by one of the justices of this Court, without giving notice to the plaintiff or his attorney." In other respects, the case cited was the same with the present: for, that writ was taken out in Easter term 1740, and was returnable on the last day of Trinity term following, (as this is;) and that defendant was taken in Easter term, (as the present defendant was,) and removed himself by habeas corpus before the writ upon which he was taken was returnable. The Court, in that case, grounded their opinion upon the words of that rule of Trin. 2 G. 1, "And shall remain in custody for two terms:" and in virtue of those words they ordered the defendant to be discharged.)

\* V. post, 1992, *Barclay et Al. v. Hunt*, M. 1766, 7 G. 3.

The Court were of opinion, in the present case, likewise, that the defendant should be discharged on filing common bail; Lord Mansfield saying, that there was no difference (in this respect) between the man's being in the custody of the sheriff, and his being in the custody of the marshal.

[1450] Ordered that the defendant be discharged out of custody of the sheriff, on filing common bail.

The end of Michaelmas term, 1763, 4 G. 3.

Memorandum.—There were only three Judges of this Court during this whole term.

[1451] HILARY TERM, 4 GEO. III. B. R. 1764.

Monday, 23d Jan. 1764. Sir Joseph Yates, (being appointed a Judge of this Court,) went out Serjeant, this day.

Tuesday, 24th Jan. 1764. Sir Joseph Yates took his place as Judge of this Court.

HARRIS, Executor, *versus* JONES. Thursd. 26th Jan. 1764. [S. C. 1 Black. 451. Buller, 332.] Executor on discontinuing to pay costs.

On a question, "whether an executor should be permitted to discontinue, without payment of costs."

Mr. Ashhurst, for the plaintiff-executor urged that an executor should not pay costs in any instance excepting one: viz. where he had brought an action as executor, which he might have brought in his own name: for which, he cited Sir J. S. 682, *Portman v. Came*.

But the Court were clear, that the giving an executor leave to discontinue, was a matter of discretion in the Court; and that they ought not to give him such leave, in any case where he had knowingly brought his action wrong, unless he would consent to pay costs.\*<sup>1</sup>

Whereupon Mr. Ashhurst agreed to take his rule for leave to discontinue upon payment of costs.\*<sup>1</sup>

A rule was granted accordingly.

[1452] WEST *versus* RADFORD. 1764. Notice to plead, when to be given.

The declaration was filed on the last day of the second term after the return of the writ: but the notice to plead was only given a little before the essoign-day of the following term.

The defendant had objected that this was irregular; for that the notice "to plead" ought to have been given before the end of the second term, as well as the declaration filed before that time: and the defendant had obtained a rule to shew cause why the proceedings should not be set aside for irregularity, with costs.

But it was holden to be well enough: Mr. Owen certifying it to be the practice. And

The Court discharged this rule, with costs.

REX *versus* INHABITANTS OF SALFORD. Tuesday, 31st Jan. 1764.

This case is already in print, in the quarto-edition of my Settlement Cases, No. 166, page 516; where it may be seen at large.

REX *versus* BANKES, ESQ. ET AL'. Wednes. 1st Feb. 1764. [S. C. 1 Black. 445, 452.] In rule for a mandamus to elect a mayor, a subsisting mayor de facto must always be a party.

Upon Monday, the last day of last Michaelmas term, Mr. Morton shewed cause against a rule, made upon John Bankes, Esq. lord of the \*<sup>2</sup>leet for the borough manor or lordship of Corfe Castle in the isle of Purbeck in the county of Dorset, and also

\*<sup>1</sup> V. post, p. 1584, *Hawkes, Executrix v. Saunders*, 17th Nov. 1764, B. R.

\*<sup>2</sup> V. 11 G. 1, c. 4, § 3.

upon Robert Hann, steward of the said leet, and also upon Henry Bankes, Esq. the bailiff of the said leet and borough, and also upon David Hibbs, the deputy bailiff of the said leet and borough; and also upon John Bishop, John Welsh, George Burgess, Christopher Summers, James Hayward, George Clarke Butler, William Havelland, George Best, John Briggs, Thomas Edmunds, Robert Cole, George Osmond, William Butler, Thomas Osmond, David Ralls, John Stockley, Thomas Caish, William Norman, Thomas Norman, William Ralls, John Roe, John Roe, [1453] Jun. Henry Moss, and Robert Beere, the jury summoned and ready to be returned to the said court of the said leet on the 25th day of October last; to shew cause why a writ or writs of mandamus should not issue, directed to them, requiring them the said lord of the borough and his said steward to hold a court leet in and for the said borough, manor or lordship of Corfe-Castle; and requiring the said Henry Bankes, or in his absence the said David Hibbs, to return and deliver unto the said court-leet the pannel or list of the jury by him the said David Hibbs summoned on the 24th day of October last; and requiring him the said Robert Hann, at the said court so to be holden, in the usual manner to swear the said jury; and also requiring them the aforesaid jurors so impanelled and ready to be returned as aforesaid to be sworn in due form at the said court, and then and there to proceed to the election of a mayor of the said borough of Corfe-Castle for this present year, and to do every act necessary to be done by them or any of them respectively for that purpose, according to the form of the statute in such case made and provided.

The cause then shewn by Mr. Morton was not upon the merits: (for which see the cases of *Tintagel*, Hil. 8 G. 2, B. R. and *Rex v. Newsham, et Al*, *Common-Council Men of Carmarthen*, P. 1755, 28 G. 2, B. R.). He only objected to the want of notice to the mayor de facto; who ought (he said) to have been made a party to this rule, being in possession of the office already; and ought, in common justice, therefore, to be heard in defence of his right, before the issuing of a mandamus to proceed to the election of another in his stead.<sup>(a)</sup>

And he cited the case of *St. Michel, Rex v. \* Scawen*, in Michaelmas term 1753, 27 G. 2. (See the rule-book of Monday next after fifteen days of St Martin, 27 G. 2,) where this matter was settled upon long argument and solemn determination, as he said. But I doubt of the solemnity of it; because, though I was in Court upon that day, I took no note of it. Lord Chief Justice Lee was then absent.

The Court were of the same opinion, in the present case; and ordered that the rule should be amended by inserting the name of Mr. Price the mayor de facto: and that he should be served with it.

Afterwards, (viz. on Saturday last, 28th January,) Mr. Morton, on behalf of the defendants, shewed cause against making the rule absolute.

[1454] He insisted (1st.) That this election of the mayor de facto was not apparently and clearly such a one as was merely colourable only and void: (2dly.) That if it was, yet the prosecutors would not be entitled to this special mandamus, but only to a general one.

To prove the first point, "that only such an election can be a sufficient foundation for the Court's granting a mandamus," he cited the above-mentioned case of *Tintagel*, H. 8 G. 2, B. R. where Paskow Hoskins and Robins, were the contenders for the mayoralty; and Robins was the mayor de facto; and the other applied for the mandamus, which was in that case granted; but the Court declared against granting such a mandamus, if they should conceive the least doubt in the world concerning the lawfulness of the pretended election, and unless it was the clearest case imaginable; and professed, that they would not grant the writ, previous to an information, but where it should appear to be a very clear case "that there had not been a due election." For if there was any doubt concerning the lawfulness of the election that was set up, the truth of it ought to be left to be tried in an information in the nature of a quo warranto.

Lord Mansfield proposed, that the counsel for the defendants should file their affidavits; that the prosecutor's counsel might be able to judge, whether, upon the

(a) Sayer's Rep. 211, S. C. and in Black. Rep. the objection is stated to have been that his name was not in the rule. See also post, 2009, 2010, Sayer's Rep. 140, and 2 Durn. 260.

\* Or rather *Rex v. Lord Arundel of Warblour*, who was lord of the manor.



affidavits on both sides compared together, it was a \*<sup>1</sup> doubtful election, and fit to be tried upon an information in nature of a quo warranto; or whether it was a \*<sup>1</sup> mere colourable election and clearly void. For, \*<sup>1</sup> if the former should prove to be the case, the Court ought not to grant a mandamus: in the latter case, they ought. But still, he said, this special mandamus, which confined it to the very individuals who were summoned on the 24th of October, was certainly wrong: so that the rule can not be made absolute in its present form.

Whereupon Mr. Morton consented to file his affidavits:

And Mr. Serjeant Davy, who was for the prosecutor, intimated that if he should find it to have been only a doubtful or questionable election, he would not pursue the rule any further.\*<sup>2</sup>

Adjourned, for a few days.

[1455] Four days afterwards—Mr. Serjeant Davy, having read over the affidavits filed on the part of the defendants, was content to give up his rule, in case the defendants would not insist upon costs.

But Mr. Bankes not being willing to quit his claim to costs on the rule being discharged, that point was litigated.

The Court, having heard both sides, thought it reasonable, upon the circumstances disclosed to them, to discharge the rule without costs.

Rule discharged.

TULLET *versus* LINFIELD. Friday, 3d Feb. 1764. A month's time to plead, is a lunar month.

Upon Master Owen's report concerning the regularity of a judgment, the question was, "whether a month's time to plead, (which had been given to the defendant by a Judge's order,) should be understood a calendar month, or a lunar one."

The attorney for the plaintiff, understanding it in the latter sense had signed judgment after four weeks were expired, but within the calendar month: which the defendant complained of, as an irregularity: and it was, of course, referred to the Master.

The Court were unanimously and clearly of opinion, "that it was to be understood a lunar month, or four weeks."

They said that in all legal proceedings, a month means four weeks.

On quare impeditis indeed, six months are understood to be six calendar months. But that is (as Mr. Justice Wilmot observed) because it is manifest by the words of the statute of 13 E. 1 (W. 2), c. 5, that by six months, half a year is there meant. The words are—"If he recovers his presentation within six months, damages shall be given to half a year's value only."

And Mr. Justice Denison said, there was a dis-[1456]-tinction between the temporal and ecclesiastical law, in interpreting this term "month:" the former understands it to be lunar; the latter to be calendar.

Per Cur' unanimously, rule discharged.

REX *versus* JUSTICES OF THE PEACE FOR THE CITY OF LONDON. 1764. Justices cannot adjourn their proceedings to a day subsequent to the expiration of an Act.

Mr. Dunning, supported by Mr. Attorney General (Norton) moved for a mandamus to be directed to the justices, to proceed upon a matter depending before them, upon an application regularly made to them before the repeal of the 46th clause \*<sup>2</sup> of the Act of 1 G. 3, c. 17, by the Act of 2 G. 3, c. 2, which application had been duly and in due time made by Jane Lawry against William Milner, a debtor in their prison, upon the compulsory clause, in the former Act, then subsisting in its full force; and

\*<sup>1</sup> V. post, 2008, *Ree v. Mayor, Bailiffs, and Burgesses of Cambridge*, 27th January, 1767, accord.

\*<sup>2</sup> N.B. In a case of *Ree v. Holmes*, H. 9 G. 2. B. R. Lord Hardwicke mentioned the case of *Tintagel* as the only case where such a mandamus had been granted; and he said, the reason of it was because it was a quite clear case; and the corporation was without a mayor. Otherwise, he said, it would not have been granted.

\*<sup>3</sup> P. 345, of this Act "for the Relief of Insolvent Debtors."

upon such application, all the requisites had been complied with by all the parties concerned; and Milner had appeared, and given in a schedule of his effects on oath, and had assigned them over for the benefit of his creditors; but the Court of Quarter-Sessions, in whom jurisdiction was thus properly attached before the repeal of the clause, voluntarily and without necessity or sufficient reason, and without the desire or consent of any of the parties, adjourned the matter till a day which was subsequent to the time when the repeal of the said compulsory clause took place.

They urged, that as the jurisdiction was fully attached in the justices, whilst the clause subsisted; and as the parties concerned had exactly complied with all requisites; and as the prisoner had sworn to his schedule, and actually assigned his effects for the benefit of his creditors, and thereby divested himself of his all, and rendered himself subject to felony if foresworn; it would be hard upon all the parties, if the repeal should be construed as meant or intended to include this case: but particularly hard upon and exceedingly injurious and cruel to the prisoner, if he should not, after all this, be intitled to his discharge out of prison. Therefor they insisted, that the repeal did not extend to this case,<sup>(a)</sup> according to the true intention of the Legislature. And it would be contrary to law and justice, that the act of a Court should work a wrong to the party. The jurisdiction was fully attached in the Court of Quarter-Sessions, upon the appearance of all the parties, on the 26th of September, [1457] and their complying with all requisites. Then the said sessions adjourned it to the 19th of October, which was still within time; for the repeal takes place only from and after the 19th of November (1761:) and all the parties then attended, and had done every thing incumbent upon them. But on this 19th of October 1761, the lord mayor declared, that he had promised one Webster, an attorney concerned against Milner, "that Milner should not be discharged that day." Whereupon the Court of Sessions remanded Milner: and then the repeal took place. But as this was the act of the Court, they ought to proceed to do all subsequent acts, and complete the jurisdiction once attached in them.

But Lord Mansfield was very clear, and all the rest of the Court concurred with him, "that no jurisdiction now remained in the sessions."

Great inconveniences were found to arise from this compulsory cause. The Legislature had the whole affair under their consideration: and they have not thought fit to reserve any jurisdiction to the justices, after the 19th of November 1761. Their words are, "that from and after that day, so much of the former Act as relates to creditors compelling prisoners charged in execution to deliver up their estates, and to such prisoners being thereupon discharged, shall be and the same is hereby repealed to all intents and purposes whatsoever."

And it is plain, that they doubted "whether those words would not have extended so far as to render the prisoner free from a prosecution for any perjury committed upon that clause; prior to the repeal:" for they add an express proviso, "that this Act shall not extend or be construed to extend to pardon, indemnify, or discharge any person who hath incurred, or before the said 19th day of November 1761 shall incur, any penalty or forfeiture by committing any offence against the said Act of the first year of His present Majesty's reign; but that every such offender shall be liable to the forfeitures and penalties incurred, or before the said 19th of November 1761 to be incurred, under the said Act, as if the said Act had not been repealed, and had continued in full force."

Therefore, whatever may be the hardship of this particular case, we have no foundation to support our issuing such a mandamus as is prayed.

Nothing taken by the motion.

(a) If the sessions had proceeded, qu. whether the act done at an adjourned sessions, would not in this (as in other cases) have related to the first day of the sessions, and then the Act was in force? It seems it would not, because the adjournment would appear on record.

By the stat. 7 & 8 W. 3, c. 3, several regulations were made in favour of persons indicted for high treason: that Act was made to take effect after the 25th March 1696. Sir W. Perkins was tried on the 24th March 1695, which was but two days before the Act took effect, and the Court refused to adjourn till the Act took effect, a behaviour directly contrary to that of the justices of the peace, in the present case; but though the defendant in that case was guilty, yet Jefferies behaved with great severity throughout the trial.

[1458] REX *versus* INHABITANTS OF WINTERBOURN. Monday, 6th Feb. 1764.

This case is already printed and published in the quarto edition of my Settlement Cases, No. 167, page 520, 521. But there is a small error, in saying, "that Mr. Selwyn and Mr. Vernon had obtained the rule:" it should be, "Mr. Selwyn and Sir Fletcher Norton."

REX *versus* INHABITANTS OF ST. ANDREW'S HOLBOURN, AND ST. GEORGE THE MARTYR. Saturday, 11th Feb. 1764. On an appeal from a poor rate, the session must quash the rate, not make a new rate.

On Friday 11th November 1763, Mr. Solicitor-General (Norton) moved for a certiorari, to be directed to the justices of peace for the county of Middlesex, to remove into this Court an order of sessions, made by them at their last Hick's-Hall Sessions, quashing a scavenger's rate, and making a new one. And he prayed this certiorari, notwithstanding the clause in the Act of 2 W. & M. st. 2, c. 8, § 12, which says, "that persons aggrieved may have recourse to the General Quarter-Sessions of the Peace to be holden for the place wherein the matter of grievance doth arise; and that their determination and order therein shall be final, without any appeal to any other Court whatsoever." And, to justify his application for it, he cited *Rex v. The Inhabitants of St. Leonard's Shoreditch*, Tr. 11 G. 1, B. R. (reported in 1 Sir J. S. 630). And also a case between *St. John's Parish and St. James's Clerkenwell*; (without mentioning when it was determined, or where to be found).

A rule was then made to shew cause:

And on the 21st of the same month, that rule was made absolute (without defence).

The order, being accordingly now removed hither by certiorari, appeared to be an order made by the justices of peace for the county of Middlesex, at a General Quarter-Session of the Peace holden by adjournment at Hicks's-Hall upon the 18th of October in the third year of King George the Third, upon the appeal of several of the inhabitants and householders of the parishes of St. Andrew, Holbourn, above the Bars, and St. George the Martyr, against a scavenger's rate made upon the inhabitants of the said parishes for the year 1763, according to a pound-rate at four pence in the pound, and confirmed by two [1459] justices of peace for the said county; which appeal set forth, "that the said rate or assessment of four pence in the pound was too high, and that a rate of three pence in the pound, together with the surplus in hand, would raise a sufficient sum; and that the imposing a higher rate was therefore prejudicial to the appellants, and illegal, and that they were thereby aggrieved:" on hearing which appeal, and counsel on both sides, and examining witnesses on oath, and duly considering all circumstances, the Court of Sessions quash the said rate of assessment, and thereupon make, settle, impose and set a new rate or assessment according to a pound rate at three pence in the pound for the said year, upon the inhabitants of the said parishes: and appoint, empower and require the scavengers to demand, gather and collect such new rate or assessment of and from all and every the said inhabitants of the said parishes, in the manner therein particularly expressed.

The exception taken to this order, by Sir Fletcher Norton, now Attorney-General, and Mr. Coxe, was, "that the justices at the Quarter-Sessions have exceeded their jurisdiction, in taking upon themselves to make a new rate;" whereas they have no power to do any thing more than to quash that which was appealed from, if they should find that the appellants were really aggrieved by it.

Mr. Stowe, on the other side, endeavoured to support the order of sessions, by comparing it to the case of an appeal from a poor's rate; upon which the justices at sessions have it in their discretion (as he alledged,) either to make a new rate themselves at sessions, or to remand it to the churchwardens and overseers for them to make a new one: in proof of which assertion, he cited the case of *The Parish of St. Leonard's Shoreditch*, in 2 Salk. 483, in point.

And observed and urged, that by the 12th section of 2 W. & M. st. 2, c. 8, the justices in their Quarter-Sessions are empowered to hear and determine all matters to them complained of; and their determination and order therein is made final.

However, if this part of their order which settles a new rate should be esteemed



going a step further than their jurisdiction extends, yet their order is at least good so far as relates to the quashing of the former rate.

But Mr. Attorney-General and Mr. Coxe replied, that a poor's rate differed very much from a scavenger's rate: [1460] for, the former is by the 43 Eliz. c. 2, to be made by the churchwardens and overseers; the latter, by the before-mentioned Act 2 W. & M. c. 8, § 10, is directed to be made and settled by the constables, churchwardens and overseers and surveyors of the highways, and such other ancient inhabitants as according to custom are usually present at the election of parish-officers, or the greater number of them present.

They alledged also, that the case of *St. Leonard's Shoreditch*, in Salk. 483, had been always complained of; and is referred to and expressly contradicted by the 17 G. 2, c. 38, § 6.

Besides, the Quarter-Sessions have power given them by 43 Eliz. c. 2, "to take such order, upon an appeal from a poor's rate, as to them shall be thought convenient: and the same is to conclude all the parties." (See sect. 6.)

But no such power is given to them by this statute of 2 W. & M. c. 8. Even the 12th section of it only impowers them "to hear and determine all matters to them complained of," concerning grievances by such scavengers rates, &c. And such their determinations and orders are to be "final and without appeal." But in the present case they have gone beyond their boundary; and have themselves made a new rate, which they had no pretence of authority to make; for, it is to be made by the parish-officers and the body of the inhabitants, who are charged with the payment of it: whereas this new rate of theirs, would, upon the supposition of its being a good one finally and without appeal bind all the inhabitants, without their being even consulted in it.

This order is therefore a bad one, and must be quashed in toto, and not for the latter part only. And there is no harm in this: for, if there be an overplus, it will go in aid of the next year's expence. But, on the other hand, if the old rate was to be vacated, after the scavengers have made their contracts for the whole year under it; that might be attended with great inconvenience.

The Court being perfectly satisfied by what had been urged by Mr. Attorney-General and Mr. Coxe, were clear in their opinion, "that the justices at their Quarter-Sessions had no power to make this new rate;" and quashed their order in toto. (a)

[1461] REX *versus* LYON. Monday, 13th Feb. 1764. Bail cannot get their recognizance discharged without payment of costs.

On Thursday last (the 9th instant,) Mr. Clayton, on behalf of the prosecutor, shewed cause why the recognizance of the bail should not be discharged.\*

The case was this—Lyon was indicted at Hicks's-Hall, for perjury: and removed the indictment hither by certiorari; previous to the issuing whereof, he entered into recognizance with two sureties, as usual, "to appear and plead in the next term, and to give notice of trial and go to trial in or at the sittings after such next term, unless the Court shall otherwise direct;" which condition this man was so far from performing, that he neither gave notice of trial, nor went to trial either in or at the sittings after the then next term; and, in the subsequent term, though he did then indeed give notice of trial, yet, instead of going to trial, he withdrew his record: so that this recognizance was clearly and indisputably become forfeited; and was agreed by Mr. Stowe, of counsel for the bail, to be so. But after this, the prosecutor had moved for costs against the defendant Lyon, for not going on to trial after he had given notice that he would do so: which costs had been actually taxed, and then regularly and duly demanded of Lyon; and upon non-payment of them by him, the prosecutor had obtained and executed an attachment against him; and he was now in custody upon this attachment for his contempt in not paying them.

But, with regard to the merits of the prosecution, the defendant had given notice

(a) No reason is given for this; and it is contrary to 1 Burr. 246, and 4 Burr. 2102, and former cases, for the Court to suppose the first rate good; therefore only the latter part of the order ought to have been quashed, as appears from 19 Vin. 354.

\* Vide ante, p. 10.

of trial in the following term, and went to trial according to such notice; and was acquitted.

Mr. Stowe, on behalf of the bail, insisted that the prosecutor could have but one satisfaction for these costs; though he might have either required them of the bail, or taken the principal in execution: but having made his election to proceed against the person of the principal, and gotten his body in execution, he was not afterwards still at liberty to proceed against the bail; who remained no longer liable, after such election made by the prosecutor, to proceed against the person of the principal; notwithstanding the recognizance being (as he confessed it was) actually forfeited.

Mr. Clayton very strongly urged, that, as the recognizance was acknowledged to be actually forfeited, the bail ought not, in point of law or reason, to be discharged from [1462] it, till these costs, which were solely owing to their principal's own wilful default, should be paid to the prosecutor.

The Court, as then advised, were inclined to think that the prosecutor, having made his election to proceed against the person of the principal, and having taken his body in execution, could not, after that, take further remedy against the bail.

However, they gave Mr. Clayton a day or two, to look into it.

Adjourned.

Mr. Clayton, now, again insisted, that the recognizance ought not to be discharged, till the prosecutor be paid the costs which he incurred by the defendant's not proceeding to trial according to his notice.

And he urged, in particular, that by the statute of 5, 6 W. & M. c. 11, § 3, "if the defendant prosecuting the writ of certiorari be convicted of the offence for which he was indicted, the Court shall give reasonable costs to the prosecutor, &c. which costs shall be taxed according to the course of the Court: and the prosecutor, for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment, on oath, have an attachment granted against the defendant, by the said Court, for such his contempt; and the said recognizance shall not be discharged till the costs so taxed shall be paid."

Therefore this recognizance ought not, he said, to be discharged till these costs should be paid.

Mr. Stowe, for the bail, alledged that this Act of Parliament, made "to prevent delays of proceedings at the Quarter-Sessions of the Peace," relates only to Quarter-Sessions, not to indictments for perjury found at Hicks's Hall; which is before the justices as Justices of Oyer and Terminer.\*

Besides, this clause, now insisted upon by Mr. Clayton, begins thus—"If the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party injured, or a justice, &c. or other civil officer [1463] prosecuting as an officer:" whereas this defendant was not convicted; but, on the contrary, was acquitted.

Moreover, the costs at present in question are not costs within the Act of Parliament, even if the defendant had been convicted: these are costs for not going on to trial; and the attachment and execution are all exclusive of this Act of Parliament, and not within the terms or meaning of the recognizance.

But the Court held, that as the recognizance was actually forfeited; and the prosecutor had had costs taxed to him for the defendant's neglecting to go on to trial; and as he had received no satisfaction for these costs, (for the man's body being in custody is no real satisfaction to him for the costs;) there was no reason for their discharging the recognizance: for there is no pretence for persons to apply for a favour, without first doing justice.(b)

Wherefore per Cur.—The rule "to shew cause why the recognizance should not be discharged," was itself discharged.

\* And so it was determined in *Sidney's case*, *Rev v. Sidney*, P. 15 G. 2, 1742, B. R. [S. C. Str. 1165, determined on another point.]

(b) Qu. For it does not appear that the prosecutor had given rules without which the recognizance was not forfeited. 2 Salk. 370, pl. 4. 2 Hawk. P. C. 293, chap. 27, sec. 58.

REX *versus* SIR EDWARD SIMPSON. Monday, 13th Feb. 1764. [S. C. 1 Black. 456.]  
Executors being insolvent, administration should be granted to some solvent person.

On Friday last (the 10th instant) Dr. Collier, in consequence of a rule of "leave for a civilian to attend," shewed cause against a rule made upon the Judge of the Prerogative Court of the Archbishop of Canterbury, to shew cause why a writ of mandamus should not issue, directed to him, requiring him "to admit of the retraction of Edmund Browne, one of the executors named in the last will and testament of Sarah Elizabeth Angelica Latour widow deceased, of his renunciation of the said will; and to grant a probate thereof with the codicils annexed, to the said Edmund Browne and Anne Layton, being the surviving executors named in the said will."

The doctor stated the facts to have been as follows—

The testatrix by her will made three executors, two of whom were his clients, Anne Layton, and this Edmund Browne: which Edmund Browne was also a legatee in the will, and a witness to it; and so also was Mrs. Long, whom this Edmund Browne afterwards married. There were several caveats entered, and many litigations about the probate, and likewise about the validity of this will and the codicils to it; in the course of which litigations, [1464] this Browne was two or three times examined as a witness to prove it: and, in order to render him a good and unexceptionable witness to prove the will, he had no less than three times formerly renounced the executorship, as well as released his and his wife's legacies under the will.

There were several sentences in the Prerogative Court in favour of the will and codicils; and affirmations of them by the Delegates upon appeal; and the cause remitted to the prerogative Judge: and at length, after several caveats, sentences, and appeals, the Delegates had decreed "that probate should be immediately granted to the said Anne Layton, under seal:" and the Judge of the Prerogative Court, being ready to give his opinion (after the last litigation of all,) was served with the present rule: against which, the doctor now came to shew cause. (So that, in fact, no probate under seal was yet actually granted.)

The doctor insisted that the Judge of the Prerogative Court was, after this decree of the Delegates, merely ministerial, and had nothing to do but to carry the sentence of the Delegates into execution.

He asserted, that by the ecclesiastical law and by the practice of the Ecclesiastical Courts, it is the constant and established rule "never to allow a retraction of a renunciation made upon oath:" which the renunciation at present in question was. He has sworn "that he has not intermeddled nor will intermeddle with the effects of the testatrix: but renounces all right of execution of the will: so help him God." This the doctor alledged to be the settled form of the oath: and this oath this man took; and is consequently bound to keep. It would be totally against good conscience, to dispense with this oath, in any case but where a man has been drawn into it by fraud and imposition.

He insisted that by both canon and civil law, it was irrevocable.

By the canon law, a renunciation sponte facta devests the right. (To prove which point, he cited the Decretals and Linwood.)

By the civil law, any renunciation shall bind.

And he declared, that he had examined their books, and could not find any instance of a retraction of a renunciation upon oath.

Where an executor does not renounce, but reserves a power to come in and prove; there indeed he may come in at any time.

[1465] He mentioned likewise a common-law case, *Broker v. Charter*, in C. B. Cro. Eliz. 92: to prove "that qui semel repudiaverit, shall not be afterwards executor." There the renunciation was only by letter; whereas in the present case, it was upon oath.

He acknowledged, that in a case of *Hayward and Day*, a retraction of a renunciation was suffered: but that, he said, was upon the foot of fraud and imposition; which he allowed to be a cause sufficient.

Mr. Leigh, on the same side, (viz. for Mrs. Layton, and against the mandamus) cited *Hensloe's case*, 9 Co. 37, 38, and *Hardress*, 111, *Paulet v. Freak*: which shews that by our law, if one of several executors proves the will, this makes them all executors even though the rest refuse. Therefore (he said) a joint-probate would not at all



alter the law : it will still be exactly the same, as upon this single probate. Why then should this Court oblige the Spiritual Judge, who ought not, by their law, to grant it after renunciation, to violate the rules of his Court, to no purpose ?

Besides, it may be attended with mischievous consequences : for the grant of probate to this Edmund Browne will invalidate his and his wife's testimony given in evidence to prove the will ; which may be overturned, perhaps, upon some future contest about it. And many other inconveniences may attend it.

Mr. Attorney General (Norton) contra, enforced the rule for a mandamus, by arguing to the following effect.

Here is no probate at all, yet granted to any body. Therefore the only question is "whether a renouncing executor has a right to come in and demand probate, at any time before probate is at all granted to any one."

This question is not to be governed by the canon or civil, but by the common law.

And by the common law, an executor who has renounced, has yet a right to come in and demand probate, whenever he pleases, notwithstanding such his renunciation.

9 Co. 36 b. *Hensloe's case*, is most explicitly so. [V. p. 37, 38, of that case.]

[1466] Dyer, 160 b. pl. 42, Brooke Ch.J. admits it.

Hardress, 111, *Pawlet v. Freak* in point.

The same doctrine is laid down by the Lord Chancellor, in 3 Peere Williams, 249. *Robinson v. Pett*, in Chancery, before Lord Talbot, 1734 (p. 251 of that case).

Agreeable to which, is the case at a Court of Delegates, reported in 1 Salk. 311, *House and Downs v. Lord Petre* ; (by which case it appears that the Common Law Courts and the Spiritual totally differ on this point ; the civilians, contrary to the opinion of the common lawyers, holding a renunciation to be peremptory).

The Temporal Courts formerly had, and many of them still have power of granting probate. (See *Hensloe's case*, 37 b. 38 a. b.)

The statute of 31 E. 3, c. 11, did indeed put this matter upon a different foot.

But even now, the Ecclesiastical Courts have only a naked power : after they have done their duty, they have no further power left in them. (See *Hensloe's case*, 38 a.)

An executor appointed by a will is to all intents and purposes an executor, as soon as any one of the executors therein named, shall have proved the will.

It is a temporal right : and the jurisdiction of the Spiritual Court, beyond what is founded upon the statute, is mere usurpation.

The executor is vested with all the property of his testator, before probate : and he can do every thing before probate, but bring an action.

The Spiritual Court therefore have no business to interfere, to prevent his obtaining probate, which he has a right to have.

The oath upon renunciation is extrajudicial, and was imposed without any right or authority : and the doctor admits that their Courts may absolve the party from it, for \* good cause ; (though, I own, I have no notion of such a power of absolution, if the oath was really binding).

[1467] The testatrix has constituted both these persons her executors ; and the Spiritual Court has no right to separate them : and in fact, Mrs. Layton is poor, has pawned the effects, and has even been in prison ; and we come, before any grant of probate to her, and demand only to be joined with her in it.

If the matter was doubtful, yet the mandamus ought to issue, and the Judge of the Spiritual Court be put to make a return to it : and then it will come solemnly before the Court, upon record.

To all which, Mr. Attorney added a very material observation, "that both these persons were executors in trust only, and had no personal interest in the effects of the testatrix."

N.B. The charge of insolvency was retorted upon Browne.

Lord Mansfield—As neither of these two persons have any interest of their own, in the effects ; and each charges the other with insolvency ; and here is no counsel at all on behalf of the cestuy qui trusts : it would be much the best method, and most agreeable to reason and prudence, that administration should be, by consent of all parties, granted to some third solvent person.

Therefore let the cestuy-qui-trusts have notice of this proposal: and let them, as well as Mrs. Layton and Mr. Browne, give their answer to it.

For which purpose, it was then adjourned.

This motion now coming on again, it appeared, that the cestuy-qui-trusts supported Browne; and that though he had no interest of his own, yet he acted on behalf of those who were concerned in interest.

Whereupon the parties came into a

Rule by consent;

The substance of which was, "that probate should be granted to both; but that Mrs. Layton should not receive any more money nor meddle any more: and Browne was to indemnify her; and to pay her her own legacies, and all such costs as she had been fairly out of pocket."

The end of Hilary term 1764, 4 G. 3.

#### EASTER TERM, 4 GEO. III. B. R. 1764.

[1468] THE KING *versus* PHILIP CARTERET WEBB, ESQ. THE SAME *against* THE SAME. Thurs. 10th May, 1764. [S. C. 1 Black. 460.] Terms imposed on a prosecutor on quashing an indictment.

The defendant having been indicted for perjury, at Hicks's-Hall, in January last, and that indictment removed into this Court by certiorari, he pleaded "not guilty" to it; and the cause was at issue, and a special jury nominated: after which, the prosecutor countermanded his notice of trial; but the defendant chose to bring it on by proviso, and it stood for trial at the first sittings in this term. In the interim, viz. at the sessions next preceding this present term, the prosecutor got a new indictment found at Hicks's-Hall: and yesterday (the first day of this term) the prosecutor's counsel moved for leave to quash their own indictment, being (as they said) insufficient and defective; and having, as they conceived, supplied those insufficiencies and defects in their new indictment; upon which, they declared, that they intended to proceed as fast as they could; but should not proceed upon the old one, as it would be quite fruitless to do so when they knew it to be defective.

And they cited *Sir William Withipole's case* in Cro. Car. 134, 147, and the case of *The King against John Swan and Elizabeth Jefferys* in Mr. Justice Foster's Book of Crown Law, p. 104.

This motion was opposed by the counsel for the defendant; who endeavoured to represent it as a mere artful scheme to keep up a frivolous prosecution hanging over an innocent man's head, without any real foundation, and with intention to slur his character and credit.

[1469] The motion was adjourned to this day: and being now taken up again, and the point discussed, it ended in a rule by consent, that the new indictment should in all respects stand in the place of the old, and all things whatsoever remain in statu quo, exactly as if it had been the case of an amendment. The rule was drawn up in these words—"By consent of the defendant in these causes, now present in Court; and of Mr. Serjeant Glynn, Mr. Recorder of London, Mr. Stow and Mr. Dunning, counsel for the prosecutors of the two indictments; it is ordered that the first indictment be quashed; and that the second indictment shall be substituted and put in the place of the first; and stand in the same condition, to all intents and purposes whatsoever. And the said counsel for the prosecutors, being called upon to name the prosecutor or prosecutors of the said indictments, declared, that they were authorized by Mr. James Philips the attorney concerned in carrying on these prosecutions, to say, that John Wilkes late of Great George Street, Westminster, Esq; is the prosecutor of the said two indictments."

"By consent of Mr. Serjeant Glynn, for the prosecutor. By consent of Mr. Attorney General, for defendant."

"By the Court."

But the Court declared their opinion, that a motion on behalf of a prosecutor; "for leave to quash his own indictment," was by no means a motion of course; more especially, after having put the defendant to expence, or having been guilty of

unnecessary or affected delay : and Mr. Justice Wilmot cited the case of *The King v. Moore* in 2 Sir J. S. 946, where an indictment for perjury having been removed by certiorari, and the defendant having paid costs for not going on to trial, the prosecutor afterwards moved to quash it ; which the Court refused unless he would submit to pay costs.

MARDER ET UX. *versus* LEE. Saturday, 12th May, 1764. Judgment entered up by husband and wife, upon a warrant of attorney given wife whilst a feme sole irregular without leave, and set aside without costs.

Upon the last day of Hilary term last, Mr. Thurlow, on behalf of the plaintiffs, shewed cause against a rule which had been obtained upon the motion of Sir Fletcher Norton, "for the plaintiffs to shew cause why the judgment and writ of fieri facias executed thereon should not be set aside, with costs ; and the sum of 172l. 2s. 6d. levied by the Sheriff of Devon, be paid to the assignees of the defendant under a commission of [1470] bankruptcy issued against him on the 12th day of May last."

The case appeared to be, that Lee the defendant had entered into this warrant of attorney "to confess a judgment to the woman-plaintiff, dum sola ;" and she afterwards married Marder the man-plaintiff : after which marriage, the judgment was entered up by the husband and wife.

The particular dates of these several transactions were as follow—The warrant of attorney "to confess the judgment" bore date in December 1762. The plaintiffs intermarried in February 1763. The judgment was entered up in May 1763. Soon after, the execution was taken out, and executed : and the money levied remains in the hands of the sheriff.

The question was, "whether this judgment thus entered up by the husband and wife, be regular, or not."

Sir Fletcher Norton's objection to it was, that the warrant of attorney did not justify this entry in the name of the husband and wife. For the warrant is a naked power not coupled with an interest : which power is determined by the woman's marriage.

But at least, the plaintiffs ought to have applied to the Court, and done this under their sanction.

If a warrant be given "to enter up judgment at the suit of two persons ;" and one dies ; the survivor of them can not enter it up.

Mr. Thurlow, on the contrary, insisted that the judgment was regular.

The warrant "to confess a judgment" is not a naked power ; but a power coupled with an interest : and the marriage of the woman to whom it was to be confessed, can be no revocation of it ; whatever might have been the case, if she had \* given such a warrant "to confess judgment to another person," and then married.

(\* See 1 Shower, 91, and 1 Salk. 117, which differ on this head. The former says, "that in such case you may file a bill, and enter judgment against both : " the latter, "that it would be a revocation of her warrant.")

1 Salk. 117, p. 9, H. 1 Ann. B. R. is in point. "A [1471] warrant of attorney was given to confess judgment to a feme sole ; who afterwards married. The Court gave leave, notwithstanding the marriage, to enter judgment ; for that the authority shall not be deemed to be revoked or countermanded ; because it is for the husband's advantage : like a grant of a reversion to a feme sole, who marries before attornment ; yet the tenant may attorn afterwards."

Mr. Justice Denison thought the marriage to be no revocation of this authority. He only doubted whether the judgment could be thus entered up, without leave of the Court.

Mr. Justice Wilmot thought, that the case of the survivor (mentioned by Sir Fletcher Norton) almost governed the present case. And he observed, that the better way, in the case now before the Court, would have been, to have entered up the judgment, as before the marriage.

Lord Mansfield thought it would be hard, that this judgment should be set aside ; if the plaintiffs might, upon a previous application, have had leave to enter it up in this manner.



The rule was then enlarged, that the Court might advise.\*1

The Court now declared their opinion to be "that the judgment was irregular, for want of a previous leave of the Court to enter it up." They held, that in order to warrant this entry of the judgment, there ought to have been an application to the Court for leave to enter it up thus, founded upon a proper affidavit proving the marriage between the plaintiffs: upon which, a rule of Court should have been obtained, giving leave to enter up judgment accordingly. But as this previous step was not taken, the judgment was irregular, for want of it: the consequence of which was, that the rule must be made absolute. But they did not think it reasonable to make the plaintiffs pay costs.

Therefore per Cur'.—Let the rule be absolute, but without costs.

[1472] REX *versus* ROBOTHAM. Monday, 14th May, 1764. Hawker's licences.

This was a conviction upon the Hawkers and Pedlars Act, 9, 10 W. 3, c. 27, § 1 and 3, removed into this Court by certiorari.

Upon its coming on in the Crown-paper, the conviction was quashed, for a manifest mistake of the justice of peace who convicted the defendant. For, though the defendant had a regular licence for travelling &c. with a horse (commonly termed by those people a horse-licence;) yet the justice had convicted him, because he travelled with two horses, and had not a licence to produce for each horse with which he so travelled: (which the statute as it appears by the printed statutes, doth \*2 not require).

On Saturday 11th February last, Mr. Serjeant Hewitt took the exception: and

Mr. Serjeant Nares owned it to be fatal; but proposed to refer it to me, to award full satisfaction to the defendant, both for his costs and damages: for the justice, he said, had been drawn into this, by an \*3 error in Mr. Burn's Justice, (p. 348, in the third edition in folio;) title "Hawkers and Pedlars;" where the word "horse" is (by mistake) put for "year."

Lord Mansfield supposed it to be only a slip of the press, rather than a mistake of the author; and desired that Mr. Burn might have notice of it, in order to set it right in his next edition.

The conviction was quashed: and a rule of reference to me made as above proposed.

Memorandum—Upon my having taken the liberty, this morning, privately, to acquaint the Judges, that I had the curiosity to search the Parliament-roll, (on finding the words of the Act to be nonsense, in saying "for each year he or she shall so travel with;") and that I had discovered a blunder in this original Act of 9, 10 W. 3, c. 27, in omitting several essential words which ought to have been inserted therein, and which were inserted in the annual Act of the preceding year, (namely, "for each [1473] horse, ass or mule or other beast bearing or drawing burthen he or she shall so travel with;") which mistake manifestly arose from changing the annual duty before given, into a triennial duty, (as may be most clearly seen by comparing the annual Act of 8, 9 W. 3, c. 25, § 1, with the triennial one of 9, 10 W. 3, c. 27, § 1,) and that Dr. Burn's book was certainly agreeable to the true intent and meaning of the latter Act, whatever it might be to its words: and that the mistake was in the statute itself of 9, 10 W. 3, which gives the duty for three years;—

Lord Mansfield, Mr. Justice Wilmot, and Mr. Justice Yates (Mr. Justice Denison not being present) were extremely clear "that the Act of Parliament was so intended;" and they thought it ought to be so construed. And Lord Mansfield desired me to speak to the two serjeants, to come together to the Court of King's Bench this morning, in order to have the rule set right.

They accordingly came up; and his Lordship explained the whole matter to them.

But Mr. Serjeant Nares saying that he had two reasons for giving it up; one,

\*1 V. 12 Mod. 383, *Reignolds v. Davis*, S. P. left undetermined. Note, that case is wrong stated in the table of that book. It states, "that the feme sole gave the letter of attorney;" whereas it was given to her.

\*2 See sect. 1, and sect. 4.

\*3 N.B. The error is not in Dr. Burn, but in the Act of Parliament itself. See Dr. Burn's History of the Poor Laws, with observations; p. 275, title "Hawkers and Pedlars."

that there was another fatal objection, viz. "that the informer himself was the only witness;" and the other, that he had sent to the Hawkers and Pedlars Office, and was there informed "that it was their practice and usage ever since this Act of 9, 10 W. 3, to require only one horse-licence to be taken out for travelling with several beasts of burthen;" and Mr. Wallace also (as *amicus curiæ*) informing the Court that the late Lord Hardwicke had (when at the Bar) given his opinion "that though the intention of the Legislature could not well be doubted, and there certainly was a mistake in the Act of Parliament; yet, as it is worded, the commissioners could not oblige a hawker or pedlar to take out more than one horse-licence for travelling with several beasts of burthen;" and that, accordingly, the commissioners never required more than one single horse-licence for several horses;—

The Court declared, that they only desired it might be understood, that nothing had been determined by them upon the construction of this Act; and that they should not determine any thing upon it, without hearing the point argued; since the usage appeared to have been to require only a single licence for a number of horses.

[1474] And Lord Mansfield wished that the commissioners of hawkers and pedlars might have notice of what had now passed.

Upon the whole, no alteration was made in the rule of last term: but it stands as it did: viz.

"By consent of counsel on both sides, it is further ordered, that it shall be referred to James Burrow, Esq. coroner and attorney of this Court, to fix and assess what costs and damages the defendant has been put to and has really sustained; and that the sum so to be allowed by the said Master, for costs and damages, shall be paid by Francis Turner Blithe, Esq. the justice of the peace before whom the said defendant was convicted. And it is lastly ordered, that no action shall be brought touching this matter."

[N.B. *Holdfast on the demise of Barker v. Chapman*, 5 MS. 149, was adjudged this term in B. R. May 18th, 1764, omitted by Blackstone as well as Burrow.]

SOULSBY *versus* HODGSON. Tuesday, 22d May, 1764. [S. C. 1 Black. 463.]

Arbitrators and umpire may join in making an award. [4 Burr. 2136.]

This was an action of debt upon an arbitration-bond. The arbitrators were to choose an umpire in case they themselves should not agree within a limited time. They did not agree within the limited time; but chose an umpire. The umpire accordingly made an umpirage: and they joined in it.

The only question was, "whether the umpirage was duly made according to the powers given to the umpire:" or "whether it was vitiated and rendered void by the arbitrators joining in it."

Mr. Wedderburne argued it, for the plaintiff: Mr. Wallace, for the defendant. And Mr. Wallace cited an *Anonymous case*, out of 1 Bulstr. 184, where Williams Justice says, "that such an umpirage would be bad." Notwithstanding which,

The Court were unanimous and clear, that this was the umpirage of the umpire only. He was at liberty to take what advice, or opinion, or assessors he pleased.

[1475] The \* case which was cited at the Bar is certainly a mistake, an error of the reporter. No such thing could be said, as is there reported: at least, there could be no determination founded upon it. It is a distinction in words, without any real difference in sense and meaning.

Per Cur'.—Judgment for the plaintiff.

REX *versus* SMITH. Wednes. 23d May, 1764. Conviction on the Hawkers Act.

A conviction of the defendant for trading as a hawker, pedlar and petty chapman, without having a licence, having been removed by certiorari into this Court, and now standing in the Crown-paper,—

Mr. Harrison, on behalf of the defendant, took this objection to it (amongst others,) viz. that the evidence which the justice had stated in his conviction, was

\* V. 1 Bulstr. 184, where the umpire joined with the arbitrators, in the original award.

not sufficient to support his adjudication "that the defendant had no licence." The charge was "that the man had traded as a hawker, pedlar, or petty chapman, in selling a piece of muslin, &c. without having a licence:" the evidence stated by the justice, in the conviction, is only, "that the man refused to produce any licence." Whereas the trading without having any licence, and the refusing to produce his licence (in case he really has one,) are quite distinct offences; and are so considered by the Act of 9, 10 W. 3, c. 27, which gives quite distinct and different penalties for them, viz. 12l. for the former, and 5l. for the latter. Refusing to produce a licence which a man has, is, in its own nature, a very different thing from not having one to produce. And the man's having confessed "that he traded as a hawker, pedlar and petty chapman," is no ground for convicting him "for trading as such without a licence;" notwithstanding his refusal to produce it. And though the 8th section of this Act (as well as the Act of 3, 4 Ann. c. 4, § 5,) gives the same forfeiture for not producing as for not having one; yet that cannot alter the nature of the offence.

Mr. Griffith Price argued on the other side, in support of the conviction. It was founded, he said, on 9, 10 W. 3, c. 27, § 8, which authorizes and strictly requires the justices of peace, either upon confession of the party offending, or due proof of witnesses upon oath, "that the person so brought before him had so traded as aforesaid," and that no such licence shall be produced by such offender before the said justice; by warrant under his hand and seal, to cause the said sum of 12l. to be forthwith levied by distress and sale of the offender's goods, &c.

[1476] The only two facts requisite to ground a conviction upon, under this clause, he said, were, 1st. The trading in the manner described by the Act of Parliament; and 2dly. The refusing or declining to produce a licence. And both these facts are here charged. It is alledged in this conviction, "that he was apprehended for trading as a hawker, pedlar, and petty chapman without a licence; and was charged upon oath, before the justice, with having sold a piece of muslin, &c. as a hawker, pedlar and petty chapman: which fact he confessed. That the justice demanded his authority for having done so: and required him to produce his licence: which he did not produce. Whereupon, the justice convicted him in the penalty of 12l. for having traded as aforesaid without a licence."

This is all exactly agreeable to this clause, (sect. 8th).

There is indeed a penalty of 5l. given by the third clause, for such a trader's refusing to produce his licence to any justice of the peace, mayor, constable, or other officer of the peace of any town corporate or borough where he shall so trade, demanding it ex officio: which penalty of 5l. is given to the poor of the parish where the demand shall be made: whereas the 12l. penalty given by that same third clause is half to the informer, and half to the poor of the parish where the offender shall be discovered. But this is a conviction upon a charge proved by oath, under a power given to justices of the county or place (in general) where the offence shall be committed, pursuant to another clause of this Act, (sect. 8) in the 12l. penalty for not having or (which is just the same thing) not producing any licence.

Mr. Harrison, in reply, denied, that the conviction does pursue the Act of Parliament: for, he insisted, that not having any licence, and not producing one, are quite different things; and that the conviction ought to have been "for not producing one."

But Lord Mansfield said he could see no doubt of this conviction's being a good one upon the 8th clause.

\* Mr. Justice Wilmot declared himself to be clearly of the same opinion.

Upon the whole—Notwithstanding this (and some other objections that were taken and over-ruled,)

The Court affirmed the conviction.

[1477] N.B. Upon comparing the 8th section with the 3d, it is clear, that the 8th section means the 12l. penalty to be for the same offence, and to be the very same penalty with the 12l. given by the 3d section: and it seems to consider not producing to be the same offence and the same thing as not having.

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\* Mr. Justice Denison was not in Court.



HODSON *versus* RICHARDSON. Monday, 28th May, 1764. [S. C. 1 Black. 463.]  
Consent to be bound by a verdict means a legal one.

Several insurance-causes standing upon the same circumstances, it was agreed "that all should be bound by the verdict given in one:" and a verdict was given in that one, for the plaintiff. But the defendant gave notice of a motion for a new trial; which he afterwards obtained.

Sir Fletcher Norton moved, on behalf of the plaintiff in the other causes, that the respective defendants should pay their money to the plaintiff pursuant to their agreement; he having obtained a verdict in the cause already tried.

But the Court were clearly and unanimously of opinion, that a consent "to be bound by a verdict in one of many causes upon the same question," means such a verdict as the Court thinks ought to stand as a final determination of the matter.

That in the present case, a material circumstance was concealed from the insurer, by the insured; and therefore the whole contract was void: and there ought to be a new trial; and the Court had made a rule for that purpose.

Nothing taken by the motion.

REX *versus* THE INHABITANTS OF OPENSHAW. Monday, 28th May, 1764.

This case is already published, in my Settlement-Cases in quarto, No. 168, p. 522.

[1478] TRIQUET AND OTHERS, *versus* BATH. PEACH AND ANOTHER, *versus* BATH. Saturday, 2d May, 1764. [S. C. 1 Black. 471.] English secretary to a foreign minister protected from arrest. [3 Durn. 80.]

[Referred to, *The Charkieh*, 1873, L. R. 4 Ad. & E. 89; *R. v. Keyn*, 1876, 2 Ex. D. 130; *West Rand Central Gold-Mining Company v. R.* [1905], 2 K. B. 407.]

Mr. Blackstone, Mr. Thurlow, and Mr. Dunning, on behalf of the plaintiffs, shewed cause why the bill of Middlesex in each of these causes should not be set aside, and the bail-bond be cancelled.

The rule was made upon affidavits "of the defendant's being a domestic servant of a foreign minister; and having taken all the proper steps to intitle him to the privilege of such domestics."

The only question was, "whether the defendant (Christopher Bath) was really and truly and bonâ fide a domestic servant of Count Haslang, the Bavarian minister:" or, "whether his service was only colourable, and a mere sham and pretence calculated to protect him from the just demands of his creditors."

On the part of the defendant, it was sworn, "that he was regularly appointed by Count Haslang, to be one of his English secretaries, at 30l. per ann. for board and lodging, &c." And he swore to actual attendance and actual service, at several times, at the count's house; and writing, copying and carrying several letters and memorials: in short, the defendant's affidavits were so framed, that every thing was sworn that in absolute strictness could be required, to bring him within the description of a domestic servant to this minister.

On the part of the plaintiffs, it appeared, that Bath was a mercer in Dublin, about seven or eight years ago; that he had afterwards been a commissary of stores abroad, and was now upon half-pay as such, at 15s. per day: that he speaks only English: that he had never eat nor lodged in the count's house, nor received any wages: (but as to the wages, it appeared that there were not yet so much as half a year's wages become due). It was also sworn, very generally "that whilst he carried on trade in Ireland, he bought goods in England, and sold them in Ireland."

Mr. Blackstone observed that the Act of Parliament of 7 Ann. c. 12, was not any alteration of the law from what [1479] it was before; for that ambassadors and their attendants were, by the general law of nations, intitled to the same privilege.

The 4th clause (which gives the summary proceeding against the infractors of it,) was added, he said, by the Lords, as an amendment; and afterwards agreed to by the Commons.

In the like manner, summary remedy was given against the violators of the law

of nations with regard to safe conduct, by an old Act of 31 H. 6, c. 4, which gave the summary power to the Chancellor, calling to him any one Judge of either Bench.

And he mentioned Grotius, de Jure Belli et Pacis; and Binkershoek, de Foro Legatorum, c. 15, de Comitibus Legatorum: from both which writers he inferred, that the exclusion of traders from this privilege was agreeable to the law of nations; and that the hanging up the nomenclatura comitum was also taken from that law.

He likewise cited several cases in this Court, to shew that the nature of the service must be specified, and that no one could have a right to claim this privilege, who was not expressly and circumstantially shewn to be fairly, really and bona fide a domestic servant in the actual service of the foreign minister, and actually performing the service to him, without collusion; and who is not a trader of any sort, or liable to be described as such.

Under the former head, he cited

*Widmore v. Alvarez*, H. 4 G. 2, B. R. Sir J. S. 797, and Fitz-Gib. 200, S. C. *Poitier v. Croza*, Tr. 23 G. 2, B. R. *Martin v. Gurdon*. (It was *Holmes v. Gurdon*, M. 7 G. 2, B. R.) and *Britwell v. Carolino*. (It was *Brettel v. Carolino*, Tr. 17, 18 G. 2, B. R. where both points now in question were fully discussed and settled.) He also cited a case of a gardener to a foreign minister who had no garden; and likewise the case of the Reverend Mr. Shorthose, who claimed the privilege as chaplain to the Morocco Ambassador, a Mahometan; and also a case of *Johnston v. Stewart*, M. 1750, 24 G. 2, B. R. S. P. with the case of *Poitier v. Croza*.

Which cases prove that the nature of the service must be particularly shewn.

Under the latter head, he cited

*Dodsworth v. Anderson*, Sir T. Raym. 375, and Sir T. Jones, 141, where Grice, who bought goods in England and sold them in Ireland, was holden to be a bankrupt in England.

[1480] Which case he would have applied to a fact here sworn on the part of the plaintiffs, viz. "that whilst the defendant was a trader in Ireland, he had bought silk in England, and sold it in Ireland." (But it was not shewn by the plaintiffs, when (in particular) they were bought and sold; or that the goods bought here and sold there, were the same goods: and the defendant swore, in his affidavit, "that he had not traded since the year 1756.")

Lord Mansfield—This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament of 7 Ann. c. 12, is declaratory of it. All that is new in this Act, is the clause \* which gives a summary jurisdiction for the punishment of the infractors of this law.

The Act of Parliament was made upon occasion of the Czar's Ambassador being arrested. If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made. An information was filed by the then Attorney General against the persons who were thus concerned, as infractors of the law of nations: and they were found guilty; but never brought up to judgment.

The Czar took the matter up, highly. No punishment would have been thought, by him, an adequate reparation. Such a sentence as the Court could have given, he might have thought a fresh insult.

Another expedient was fallen upon and agreed to: this Act of Parliament passed, as an apology and humiliation from the whole nation. It was sent to the Czar, finely illuminated by an ambassador extraordinary, who made excuses in a solemn oration.

A great deal relative to this transaction and negotiation, appears in the annals of that time; and from a correspondence of the Secretary of State there printed.

But the Act was not occasioned by any doubt "whether the law of nations, particularly the part relative to public ministers, was not § part of the law of England; and the infraction, criminal; nor intended to vary, an iota from it."

I remember in a case before Lord Talbot, of *Buvot v. Barbut*,† upon a motion to discharge the defendant, (who was in execution for not performing a decree,) "because he was agent of commerce, commissioned by the King [1481] of Prussia, and received here as such;" the matter was very elaborately argued at the Bar; and a solemn

\* S. 4.

§ V. post, p. 2015, *Heathfield v. Chilton*, 5th Feb. 1767.

† In Canc. 16th July, 1736. [4 Burr. 2016.]

deliberate opinion given by the Court. These questions arose and were discussed. —“Whether a minister could, by any Act or Acts, waive his privilege.”—“Whether being a trader was any objection against allowing privilege to a minister, personally.” —“Whether an agent of commerce, or even a consul, was intitled to the privileges of a public minister.”—“What was the rule of decision: the Act of Parliament; or, the law of nations.” Lord Talbot declared a clear opinion—“That the law of nations, in its full extent was part of the law of England.”—“That the Act of Parliament was declaratory; and occasioned by a particular incident.”—“That the law of nations was to be collected from the practice of different nations, and the authority of writers.” Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c. there being no English writer of eminence, upon the subject.(e)

I was counsel in this case; and have a full note of it.

I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian Ambassador.

Mr. Blackstone's principles are right: but as to the facts in the present case, the affidavits on the part of the defendant have out-sworn those on the part of the plaintiffs. (And his Lordship, as well as Mr. Justice Wilmot took notice, that the person who drew the affidavits on the part of the defendant, had very exactly pursued the course of the cases that had been determined upon questions of this kind; and had taken care to meet and answer all objections that might arise from them.) Lord Mansfield observed also, that the defendant was employed in the service of Monsieur Hasling, before the plaintiff took out his writ.

It was not to be expected, he said, that every particular act of the service should be particularly specified: it is enough, if an actual *bonâ fide* service be proved. And if such a service be sufficiently proved by affidavit, we must not, upon bare suspicion only, suppose it to have been merely colourable and collusive.

[1482] As to the latter point, “of his being a trader”—his having been so in Ireland, (and even that seven years ago,) will not bring him within the exception of the 5th clause of this Act, which provides “that no merchant or other trader whatsoever within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by that Act.”

And there is no colour for bringing this case within that of *Dodsworth v. Anderson*: \* for here is no connexion between the goods bought in England, and those sold in Ireland. It does not appear that they were the same goods; neither is any time specified, when they were bought, or when they were sold.

Per Cur'.—Both rules were made absolute; but without costs, by reason of the suspicious circumstances of this case.

CRACRAFT *versus* GLEDOWE. Saturday, 3d June, 1764. Bail must be put in to reverse an outlawry.

Upon Tuesday the 15th of last month, Mr. Eyre, Recorder of London, shewed cause, on behalf of the Sheriff of Middlesex, why an attachment should not issue against him, for discharging out of his custody, the defendant in this cause, who had been taken upon a *capias utlagatum*, on his attorney's engaging, under his hand, “to appear for the defendant and reverse the outlawry,” without taking security by bond in double the sum for which bail was required, pursuant to the Act of 4, 5 W. & M. c. 18, § 5, which directs him to do so in all cases where special bail is required by the Court.

The cause shewn by the recorder and Mr. Wallace was, that the sheriff neither did nor could know that it was a case where special bail was required; nor had he any reason to imagine it, as the *capias utlagatum* was not marked for bail; and they produced an affidavit of Mr. Benson who acted as under-sheriff, “that he had no ill

(e) Qu. 4 Inst. 152, and a celebrated treatise by Dr. Zouch “*De Legati Delinquentis Judice Competente*,” which has undergone several editions.

\* Sir T. Raym. 375. Sir T. Jones, 141.



intention or thought of collusion : but had acted agreeably to his duty, to the best of his understanding and judgment."

They urged the Act of 12 G. 1, c. 29, "to prevent frivolous and vexatious arrests : " which, in its 2d section, directs "that if the debt exceeds the sum of ten pounds, there shall be an affidavit of it : and the [1483] sum for which bail is to be taken, shall be marked upon the process." So that, unless there be such an affidavit of the debt and marking of the process, it is not, as they insisted, a case where special bail is required by the Court.

But if it were a case where special bail is required by the Court, how is the sheriff to know this, unless the process be marked? It is extremely easy to mark the process; and in the present case, the exigent is in fact marked : but the *capias utlagatum* is not. Why did they mark the one, and not the other? It now appears too, that there was an affidavit filed before the filacer. But the sheriff was a stranger to all this : he received the writ of *capias*, unmarked. And it cannot be supposed that he was obliged to go and look after the filacer, to procure information. It may be said, "that it would be no great difficulty put upon the Sheriff of Middlesex, to require this of him." But the case of all sheriffs must be under the same rule of determination : and this might as well have been the case of a Sheriff of Cumberland or Westmoreland. And in this case of a distant sheriff, is he to appoint an agent for this purpose? Or is he to trust to the post? And is the defendant to lie a week or ten days in gaol till the sheriff can receive information from the filacer?

Mr. Harvey, Mr. Morton, and Mr. Stowe, contra, urged, on behalf of the plaintiff, that this is a proceeding by original, in an action for money lent; and it appears that the plaintiff was intitled to bail upon the original process, the cause of action being expressed in the writ; and that special bail was required before the statute of 4, 5 W. & M. c. 18.

Process of outlawry is not within the statute of 12 G. 1, c. 29, "to prevent frivolous and vexatious arrests:" and so it was determined in a case in Lord Hardwicke's time, *M. 10 G. 2, Fownes v. Allen*, in this Court. A *capias utlagatum* is not like an arrest upon mesne process : nor is the bond required by 4, 5 W. & M. c. 18, like the alternative bail upon mesne process, (*viz.* "to pay the money or surrender the principal;") but a bond with one or more sufficient surety or sureties, "for appearance by attorney at the return of the writ, and to do and perform such things as shall be required by the Court."

As the cause of action was expressed in the special writ original; and as there was an affidavit of the debt, and the exigent marked; it was certainly the sheriff's duty, to have made further inquiry from the filacer into the quantum of the debt, (if he was not already satisfied about it,) before he discharged the defendant out of custody upon the mere undertaking of his attorney "to appear for him and reverse the outlawry." Therefore the rule ought to be absolute.

[1484] If the sheriff can meet with the defendant, he may take him up again; but the plaintiff cannot sue out a fresh writ of *capias utlagatum*, against the defendant, after he has been taken on the former.

The Court were then clear, that this was not a case within the 12 G. 1, c. 29. And

Mr. Justice Denison (who was then in Court, though now absent,) thought the point in question had been settled. It had been determined,\* he said, "that a defendant cannot reverse an outlawry without giving such bail as the law requires."

It was then adjourned.

This matter being now mentioned again,

Mr. Justice Yates observed, that by the 13 Car. 2, stat. 2, c. 2, § 4, no sheriff can discharge any person taken upon a *capias utlagatum*, without a supersedeas first had : (the words are "without a lawful supersedeas first had and received for the same.") And by 5 G. 2, c. 27, § 5, no special writ nor process, specially expressing the cause of action, shall be issued, where the cause of action (in a Superior Court) shall not amount to 10l. but here the *capias utlagatum* recites a special original specially expressing the cause of action.

The Court (Mr. Justice Denison being absent,) were very strongly inclined to be

\* It was so determined after long litigation, in Hilary term 1742, 16 G. 2, in this Court, between *Sir Geo. Hampson and Serocold*. [See Carth. 459, and post, 1920.]

of opinion "that the sheriff had acted improperly;" and told his counsel, that the better way would be, to put in bail: and in order to give opportunity for it, they

Enlarged the rule till Monday.

And afterwards,

The sheriff undertook to pay the debt and costs.

REX *versus* THE INHABITANTS OF LEEDS. Saturday, 2d June 1764.

This case is already published, in my quarto-edition of Settlement-Cases, No. 169, p. 524.

[1485] REX *versus* LATHAM, ET AL', Six of the In-Burgesses of Wigan. Monday, 4th June 1764. [S. C. 1 Bl. 468.] Information quo warranto granted to try a doubtful right.

Upon shewing cause why informations in nature of quo warranto should not be granted against these six, whose right depended upon that of thirteen other persons (who had voted in the election of them into their offices;) to shew by what right they claimed their franchise of in-burgesses of this corporation; it appeared to be incumbent upon the prosecutors to invalidate the right of three out of the thirteen, in order to turn the scale of the election. They had voted as being resident in-burgesses; but two of the thirteen were objected to by the prosecutor's affidavits, as being aldermen, and thereby disqualified to vote as in-burgesses; five, as having been legally disfranchised, and never legally restored; and six, as not being actually and bonâ fide resident in Wigan at the time of the election. So that it was pretended, that even all the thirteen were illegal votes; however, it was agreed, "that the election would not hold good, if only three of these thirteen votes could be proved bad ones." It was therefore insisted, on the part of the prosecutors, that the election was bad.

But besides this, there was another general objection to the validity of the election; namely, that the Court, at which the election was made, was improperly holden: and therefore all that was done at it, was totally void and an absolute nullity. For the prosecutors alledged and swore (to the best of their information and belief,) that it was essentially necessary to the competency of the corporate Court, "that at least one of the bailiffs should be present at it;" whereas there was no bailiff present (as was very positively sworn) at the original Court which was adjourned to the subsequent day; upon which subsequent day of adjournment the defendants were elected, at the adjourned Court. Consequently, the adjourned Court was (as the prosecutors alledged) an incompetent one, and just the same as no Court at all; and every thing transacted at it must be nugatory, ineffectual and void.

They also insisted (and their opponents agreed) that it was necessary for the in-burgesses who voted, to be resident in Wigan at the time of their voting: and the only dispute was, "whether six of those who voted for these six defendants were actually and fairly so in fact, or only colourable and fallaciously so."

The affidavits were very long; and the several ques-[1486]-tions that arose being much litigated at the Bar, the Court took time to consider.

Cur. advis.

Lord Mansfield now declared their opinion; and said that Mr. Justice Denison (who was now absent,) had also been consulted by them; and they were all of opinion, "that the rules should be made absolute, in order to try the rights in dispute."

The first question, "whether the presence of a bailiff be or be not essentially necessary to the holding of a Court," is general, and goes directly to the validity of the election of the defendants: and the affirmation of this on one side, and the denial of it on the other are both sworn exactly in the same manner: both sides swear to their apprehension and belief. The bailiffs are not indeed named in the stile of the Court: but yet they may, by the constitution of the borough, be an essential part of the Court. Therefore, as it does not appear, "whether the Court at which the defendants were elected, was a competent one or not," an information must go upon this ground alone; unless there has been such an acquiescence as ought to prevent it.

2dly. Though an acquiescence for a great length of time may be a sufficient reason why the Court should not interpose, *quieta movere*; yet here is no length of time.

It is only three or four years. No certain rule is fixed for the particular and exact length of time that shall be considered as an acquiescence: and perhaps it is better, that none should be absolutely fixed; for, circumstances may very much vary the case, in this respect.

3dly. As to the residence too of the electing in-burgesses.—The facts are disputed, and therefore must be tried.

4thly. The disfranchised in-burgesses have been restored by the mayor alone, upon a mandamus: \* but it is alledged, “that he alone has no right to restore them, and that he did it contrary to the consent and opinion of the body.” Therefore their right appears to be doubtful.

5thly. The two that have been chosen aldermen are said to have refused accepting that office: and their rights are said to have been twice tried already, and settled by two verdicts; and therefore ought not to be now thus disputed and litigated over again.

[1487] 6thly. It is urged, that the right of persons elected ought not to be sent down to trial, upon a supposition of a deficiency of right in their electors, until the right of such electors has been first tried and disallowed: and it has been questioned and debated, “how far the right of an elector who is in office and holds a franchise *de facto*, can be attacked upon an information granted and tried against a person elected by him;” or “whether his right must then and upon that occasion be taken for granted, as he was a corporator *de facto* when he gave his vote.”

But, as we are of opinion “that these rules must be made absolute on the first point,” which is a general, and, if true, a fatal objection to the validity of the election; the information will be “for usurping the office upon the Crown:” and the Crown may take what issues they think proper, to shew such usurpation. There is no instance of precluding the Crown from insisting upon any objections that they shall be advised to take issue upon, in order to shew the defendant to have usurped the franchise.

Therefore we neither need to give, nor should give any opinion upon the other points: nor does the line seem to be fully and clearly drawn and fixed, “where the rights of the electors can be gone into at all, or how far they can be gone into, on the trial of the right of the elected.”

Rules made absolute for informations.

The end of Easter term 1764, 4 G. 3.

#### TRINITY TERM, 4 GEO. 3, B. R. 1764.

[1488] SWIFT, EX DIMISS. NEALE, ET UX. *versus* ROBERTS. Tuesday, 26th June, 1764. [S. C. 1 Black. 476. Ambler, 617.] Will of a joint tenant bad. [See Cowp. 50, 51. 7 Durn. 406. 1 Bosanq. 581.] [Eq. Abr. 172. Cas. 8.]

An ejectment for a house, &c. in Well-Close Square in Middlesex, coming on to be tried before Lord Mansfield, at the sittings after last term; the following case was specially stated, and reserved for the opinion of the Court.

Richard Gilbert and Frances Sophia Gilbert, (now Neale) were upon the 20th of January 1754, seised as joint-tenants in fee, of the premises in question. Richard Gilbert, on the 20th of January 1754, made his will, duly executed; and thereby devised, in these words—“Imprimis, I give and bequeath all my part, right, title and interest which I have in an estate jointly with my sister Frances Sophia Gilbert, situate and lying in Well-Close Square, &c. to my beloved wife Jane Gilbert.”

By indentures of lease and release, dated on the 9th and 10th of October 1754, they made partition: and the messuages in question were conveyed to the said Richard in fee.

Richard died in August 1757, without issue; leaving the lessor of the plaintiff his sister and heir; who claimed as heir at law to him. The defendant claimed under his will.

The question was, “whether the plaintiff, under the circumstances of this case, is intitled to recover the premises in question in this ejectment.”

\* V. post, p. 1641, *Res v. Holmes, Mayor of Wigan*, 7th Feb. 1765, B. R.



It was argued, for the first time, on Tuesday, the 22d of May last, by Mr. Ashhurst for the plaintiff, and Mr. [1489] Serjeant Hewitt for the defendant: and the two questions proposed by Mr. Ashhurst, and disputed between them, were—

1st. Whether the devise made to the defendant by Richard Gilbert, who at the time of making the devise was a joint-tenant, though he afterwards made partition, and had the premises for his purparty, was a good devise, abstracted from the consideration of the subsequent partition.

2d. Whether the subsequent partition could make the preceding devise good.

Mr. Ashhurst argued—

First—that a joint-tenant can not devise, (though a co-parcener may :) for the right of survivorship takes place of a joint-tenant's devise. This is settled established law.

For this, he relied on Littleton, sect. 287, and Co. Litt. 185 a. b. both express in point.

Secondly—the deed of partition, made subsequent to the time of making the devise, cannot effectuate and make good a prior devise, which was a bad one when made.

For, upon the Statutes of Wills, a will must be good at the time when it was made: it can not be made good by any subsequent event.

By the statute of 34, 35 H. 8, c. 5, § 4, (which is explanatory of the former Act of 32 H. 8, c. 1, § 1) persons having a sole estate in fee-simple, or seised in fee-simple in co-parcenary or in common, have power to devise as much as in them of right is, at their pleasure. But as the power is only given to persons sole seised, or seised in co-parcenary or in common, it is clear, “that joint-tenants are excluded;” and joint-tenancy is a personal disqualification.

Upon these statutes, it is also clear, “that no future event can supply a defect of qualification which was wanting at the time of making the will:” as an infant testator's coming to full age, or a feme-covert testatrix becoming sole, or an insane person's recovering sanity of mind. In all such cases, the will is void unless it be republished after the person becomes capable of devising.

[1490] 1 Siderf. 162, *Herbert v. Torball*, was so determined, upon a will made by an infant.

To make a will good, the seisin which the testator had at the time of making, must continue: otherwise, there must be a re-publication.

3 Co. 30 b. 31 a. *Butler and Baker's case*.

*Dister v. Dister*, 3 Lev. 108, where the testator made a bargain and sale, in order to make a tenant to the præcipe; and suffered a recovery to his own use.

*Ashby v. Laver*, Goldesborough, 93, where a renewed lease did not pass, (the former being surrendered).

*Yelverton v. Yelverton*, Cro. Eliz. 401. A man can not grant or charge what he hath not.

*Bunter v. Coke*, 1 Salk. 237. After-purchased lands shall not pass by a prior devise.

So, in the present case, there ought to have been a re-publication: for, at the time of making this will, the joint-tenant had not the estate, in the mode that was necessary to qualify him to devise it.

In pleading, it is incumbent to alledge, “that at the time of making the devise, the deviser was seised in his demesne as of fee.” But if it had been so alledged here, the adverse party might have alledged a joint-seisure, and traversed the sole seisure.

He added further, that supposing this devise to have been good in its original creation, yet the subsequent partition, which was made by deed of lease and release, would amount to a revocation of it.

And he endeavoured to shew this, by citing 1 Ro. Abr. 614, title Devise, letter O. (which does not prove it,) and the case of *Le Strange v. Sir Richard Temple*, 1 Keb. 357, and 1 Siderf. 90, and a case in Shower's P. C.

But as to this point, he was over-ruled immediately by Lord Mansfield and Mr. Justice Wilmot, who both agreed, that it had been determined “that a [1491] partition by deed, between tenants in common, did not amount to a revocation;” and they particularized two cases in point, viz. *Luther v. Kidby*, 3 Peere Wms. 169, 170. 9th April 1730, (mentioned there in a note) and *Risley v. Lady Baltinglass*, Sir T. Raymond, 240. Each of these two cases being the unanimous opinion of four Judges. And Lord Mansfield added an observation, “that constructive revocations, contrary

to the intention of the testator ought not to be indulged; and that some over-strained resolutions of that sort had brought a scandal upon the law.”(a)

Mr. Serjeant Hewitt for the defendant.

As to the last point, he thought it needless to say any thing at all about it; as the two cases last above mentioned were a full proof, “that a partition between tenants in common was no revocation of a prior will:” and there was no difference (in this respect) between tenants in common and joint-tenants.

As to the 1st point—A joint-tenant has such an estate as he may devise, under these two statutes concerning wills.

He cannot indeed devise, so as to defeat the survivor, so long as survivorship continues: but if the survivorship be put out of the case, then there is nothing to hinder him from devising.

Now a partition discharges, destroys, and extinguishes this incident or incumbrance of survivorship. If one joint-tenant releases to the other, (as he may do,) this extinguishes his estate.

All this is consistent with Littleton, § 288, and Co. Litt. 186.

And Perkins (section 500) is express, that “if a joint-tenant makes his will and survives, the will shall stand good.”

2d point. After partition, the joint-tenant is in of the old estate: the partition operates only as an extinguishment of the other moiety.

And as to the expression in 34 and 35 H. 8, of “having a sole estate;” he was sole seised of his own part, and had power to dispose of it: he might alienate it, demise it, forfeit it. Why then might he not devise it?

Mr. Ashhurst, in his reply, did not insist upon the partition’s amounting to a revocation of the will: (though Lord Mansfield told him, he was at liberty to do it, if he was not satisfied about it).

As to the rest, he said that joint-tenancy is a personal disability to devise the land; as infancy, insanity, or coverture are, to do so: and it is tacitly excluded by the [1492] statute, by not being therein expressed, as co-parcenary and tenancy in common are.

It is no argument to prove his power of devising it, to “say that he might have given it or aliened it in his lifetime:” for, that would have defeated the survivorship; but this does not.

As to the passage in Perkins, § 500. It may be laid out of the case: for, his assertion is not supported by the authorities he cites. (Mr. Ashhurst said he had looked into the books referred to by Perkins; and could find no such thing \* in them.)

2d point. After partition, the mode of the devisor’s having the estate is altered; and the will must be published anew.

Ulterius concilium.

This cause now stood in the paper for a second argument. Mr. Morton was for the lessors of the plaintiff; and Mr. Eliab Harvey, for the defendant.

The Court put it upon Mr. Harvey, to shew how he could get clear of the statute of the 34 and 35 H. 8.

Mr. Harvey endeavoured to do it, by urging that the testator being sole seised at the time when the devise operated, that is to say, (at the time of his death) it is a good devise under the Statute of H. 8.

And this, he said, depended upon the quality of the estate, and not upon the personal ability of the testator. Where it depends upon the personal ability of the testator, it is not indeed sufficient that the disability be removed before the time of the operation of the will: it is necessary that the testator should have been free from all disability at the time of making it. But where it depends upon the quality of the estate, it then turns upon the time of the will’s operating. And in the present case, which is of this latter kind, the testator was sole seised at the time of the operation of his will.

Before the making of these Statutes of Wills (in 32 and 34 H. 8) none could

(a) See 7 Durn. 410. 8 Vin. 148, 149. Str. 1683, and 4 Burr. 1960. Also Lord Hardwicke in 3 Atk. 176, seems to have been of the same opinion, though he would not speak plainly that he was so.

\* Perhaps he looked into Fitz-Herbert’s *Natura Brevium* instead of the old *Natura Brevium*.

devise their inheritance, by the general laws of the land: but in most cities and boroughs, the right of doing it subsisted; and many questions were agitated concerning such devises; and many rules were laid down, and many principles established about [1493] them. One of those established principles was "that a joint-tenant could not devise;" or (in other words) "that a person must be sole-seised, in order to qualify and enable him to devise lands." And the intent of these statutes was, "to make the general law of the land conform to these local customs."

Upon the former of these two statutes (viz. the 32d of H. 8,) it was left doubtful, "whether a joint-tenant could devise by virtue of that Act or not;" the power being given to "every person having any manors, lands, or tenements holden in socage:" and the Act of 34 and 35 H. 8 was made to explain this doubt; and gives the power of devising, "to persons having a sole estate in fee-simple, or seised in fee-simple in coparcenary, or in common." So that it is now established by this latter Act, which adopts the known principles of the common law, "that a joint-tenant can not devise." And this is a remedial law, and therefore to be favoured; in order to promote the remedy, and effectuate the intentions of testators.

The reason why a joint-tenant cannot devise, is that the right of survivorship takes place in his companion immediately upon the devisor's death; and the surviving companion is paramount the title of the devisee, who can only claim under the devisor; whereas the survivor claims in his own right under the first feoffor. So is Littleton, § 287, and Co. Lit. 185 b. in his comment thereupon. And this paramount right having instantly prevailed, upon the testator's death, there remains no estate of inheritance for the devise to operate upon.

But, if between the time of making the devise and the time of its operating, the jointure be severed, and the estate consolidated, then the devise will be good: for, there now remains no paramount right, to prevail over it.

This doctrine is quite agreeable to Littleton's opinion just cited: and it is also the opinion of Perkins; who in his 500th section, title Devises, says, "that a devise by a joint-tenant, of land devisable which he holds in fee on the day of his death jointly with a stranger, is not good; and the law is the same, with regard to an use in jointure, &c. But if such devisor survives all his joint-companions, then such devise is good; as it is well shewn by my Lord Littleton, in his 3d book in the chapter of Joint-tenants folio 58, and also in Natura Brevium, with the additions upon the writ of ex gravi querela, &c. where there are several good cases, concerning devises put and shewn, &c." Perkins is clearly of opinion [1494] himself, and he deduces it also from Littleton, that if a "joint-tenant makes his will, and afterwards survives his companions, then such devise is good."

Thus it stood at common law, antecedent to the statute. And the statute adopts and proceeds upon the reasoning of the common law; and meant to make the law throughout the kingdom conformable to it in every respect: it does not destroy the former power of devising, which subsisted only partially, and not generally; but, on the contrary, establishes the like power, generally and all over the kingdom.

Upon this principle, the estates must be considered, as they stood at the time of the operation of the will. And for that reason, no livery is necessary, nor attornment. (V. 3 Leon. 276, 277, Egerton's argument of *Butler and Baker's case*.)

A tenant in tail, with remainder in fee in contingency, may devise: and if he leaves no issue at his death, his devise shall be good.

The case of lapsed devises, (where a devisee in fee dies in the life of the devisor,) tends to prove this point: but a much stronger instance is the case of a man's devising to his own wife; which can only be supported upon this foot of considering the estate as it stood at the time of the will's operating. So if a devise be "to the heir of A." and A. dies in the life-time of the testator; A.'s heir shall take.

The present case turns upon the quality of the estate: and therefore the devise is good, without re-publication or any other act done; as the testator was sole-seised at the time of the operation of the will.

Indeed where it depends upon the personal ability or disability of the testator, some other act must be done, after the disability is removed: as if a will be made by a feme-coverte, an infant or a mad person, it must be re-published after the disability is removed.

But where it depends upon the quality of the estate, the estate is disencumbered by the removal of the disabling circumstances: and it is enough if it be clear of any



incumbrance at the time when the will operates. Here, the deviser was in to the same uses after the partition, as he was before: his intention remained the same as it was before; and the establishing the devise he has thus made will not clash with any rule of law.

[1495] Mr. Morton, for the lessor of the plaintiff.

As to Perkins—his words do not import even his own opinion to be, “that the very identical will made by the surviving joint-tenant before the death of his companion would be good after it:” he only means, “that if a joint-tenant survives all his companions, he may then make a devise of the land before holden in jointure; which he could not do before.” Nor can any such opinion as is ascribed to him by Mr. Harvey, be inferred from the books cited by Mr. Perkins.

As to devises by tenants in tail—if a man has an estate tail and destroys that quality, and acquires a fee, such acquired fee will not pass by a prior will, without republication. In the particular case put by Mr. Harvey, of a tenant in tail, with remainder in fee to himself and his heirs, the estate would pass by the very words of the Statute of Wills; because the deviser then had a fee in the remainder; and the words of the statute are—“Having a sole estate in fee-simple, &c. in possession, reversion, or remainder.” But such deviseable estate must be either a sole estate in fee-simple, or a fee-simple in coparcenary or in common. Whereas, at the time of Mr. Gilbert’s making this devise, he had not such an estate as the statute intends: for he then held in joint-tenancy with his sister; and the express bequest in his will is “what he had jointly with his sister.”(b)

Suppose Mr. Gilbert to have survived his sister, would the whole have passed by the present will? Certainly not. And if so, how can his own share pass by it?

The general doctrine advanced by Mr. Harvey came in question in the case of *Butler v. Baker*, reported in 3 Co. 25, and Popham, 87. And Popham and Anderson, the two Chief Justices, and all the other justices and Barons, held (contrary to Periam, Clench, Clark, Walmesley, and Fennor) “that they were to consider what estate the deviser had in the land at the time of his devise made without regard to that which might happen by matter ex post facto upon the deed of another: and at the time when that will was made, the deviser had no other estate in the manor of Hinton than jointly with his wife; and if so, it follows that the manor of Hinton was then out of the letter and intent of the law; for, he was not then sole seised thereof, nor seised in coparcenary nor in common; and, by the words, he should be sole seised in fee-simple, or seised in fee-simple in coparcenary or in common.” (See particularly Popham, 87, and 3 Co. Rep. 30 b. 31.)

[1496] The Court, consisting of Lord Mansfield, Mr. Justice Wilmot, and Mr. Justice Yates, (for Mr. Justice Denison was absent,) were clearly and unanimously of opinion, that a will made by a joint-tenant during the continuance of the jointure, is not a good will (even as to his share of the estate,) under the Statute of Wills in 32 and 34 H. 8, notwithstanding a subsequent severance of this jointure by a partition made after the time of making the will, and before his death; unless there be a republication of it, after the partition: and they observed, that the deviser has expressly described this bequest as a right “which he had in the estate jointly with his sister.”

They all thought that this would have been a pretty plain case, if it had stood merely on the Statute of 32 H. 8, which enacts, “that every person having any manors, lands, or tenements holden in socage, &c. shall have power to give and devise, &c.” And consequently there was no necessity of the latter Act of 34 and 35 H. 8, to explain the former. But this latter explanatory Act clears the matter of all doubt. It professes to be made on purpose to remove all doubts about the exposition of it, and to declare and explain its meaning: part of which declaration and explanation is this, “that all

(b) See 3 Brown, 30, cont. In the case of a remainder limited to the survivor of the husband and wife and the heirs of the survivor, the limitation was in a settlement made before marriage, but to take effect on the marriage; therefore it seems they took by entireties, as if the limitation had been after the marriage, otherwise had the limitation taken effect before the marriage, they would have taken as joint tenants, Co. Litt. and then the devise would have been void, unless there be a difference between a devise of a rent out of an estate, which was the case there, and a devise of the estate; and there seems no ground for making such distinction.

and singular person and persons having a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary, or in common in fee-simple, &c. &c. shall have power to devise, &c." It is very clear, upon this statute, that the deviser must have the estate at the time of making his will: he cannot devise what he had not in him at the time of devising. Lord Mansfield said that by the feudal law there could be no devise of land, as constituting an heir: but a devise of land was considered as a limitation of the deviser's estate by a revocable act; and upon the custom, and independently of the statute, a man could not limit an estate which he had not. And Mr. Justice Yates observed, that the manner of pleading a devise of lands shewed that the deviser must be seised of them at the time of making the devise: for the form of such pleading is, "that the testator was seised, &c. and being so seised, made his will, and thereby devised so and so."

The question therefore is, "whether Richard Gilbert had a devisable estate in these premises at the time when he made his will."

And they were unanimous, "that he had not:" for it was only a joint estate; which is not devisable. They all were clear, "that a joint-tenant cannot make a will of [1497] what he holds in jointure." And Lord Mansfield held, "that such a will would be void, both at common law and upon the statute." If it could operate at all, he said, it must operate as a severance of the jointure: for it could not operate otherwise. But it cannot operate in that manner; because a severance of jointure cannot be effected by that method. A feoffment to uses (which the statute means when it speaks of an act executed in the person's life-time,) would have severed the jointure: but a will cannot have that effect. Where it took place by particular customs, it was in the nature of a revocable appointment or limitation of the land *causa mortis*; and not like the Roman testament, as a constitution of the heir. Therefore, before the statute, a man, by custom, could only devise lands, which he was then seised of. Mr. Justice Wilmot said, that the time of making the will was the material time, in this case as well with regard to the quality of the estate, as to the personal ability of the testator: for by the express words of the Statute of 34 and 35 H. 8, he must have the estate, in order to be capable of devising it: and the word "having" is a reason why an after-purchased estate should not pass. Now this man, who only held in jointure at the time when he made his will, had not a devisable estate, when he made the devise: which it was necessary that he should have had, at the time of devising, in order to make the devise good.

As to the passage cited from Perkins, 90 b. title *Devises*, section 500, (which see at large, ante, p. 1493,) they were extremely well satisfied, that it could not be true, in the sense in which Mr. Harvey would have it understood; namely, "that if a joint-tenant, who holds devisable land jointly with other persons, makes a devise of such land, and afterwards happens to survive all his joint companions, then such before-made devise shall thereby become a good one, (though it was confessedly a bad one before this event,) without being renewed or republished, or any other confirmatory act." The books he cites do not warrant any such conclusion: nor is there any foundation for supporting such a proposition. And (as Lord Mansfield observed) it would be absurd upon the face of it, to suppose that such a devise could be good for the whole of the estate. And both his Lordship and Mr. Justice Wilmot remarked, that what Perkins says relates to customary devises only, and not to devises under the statute: so that it has still the less weight upon the present occasion.

(N.B. It seems to me, that Perkins meant no more than this; that a joint-tenant, who continues till the day of his death to hold jointly with one or more other person or persons, can not devise: but if he survives all his companions, he then and thereby be [1498] comes capable of devising. And I apprehend, that he only cites Littleton and old *Natura Brevium*, in order to prove "that a devise by a joint-tenant is void;" and that he considers the latter part of his assertion, as a plain consequence of the former, and obviously clear without any proof.)

Per Cur'. Let the postea be delivered to the plaintiff.

FRANCIS *versus* WYATT. Friday, 29th June, 1764. [S. C. 1 Black. 483.]  
Carriages standing at livery may be distrained.

[Commented on, *Brown v. Shevil*, 1834, 2 Ad. & E. 145.]

This was an action in replevin, upon a distress for rent.

The replevin was brought by Mr. Francis, the owner of a chariot which stood in a coach-house belonging to and part of Mat. Wilkinson's livery stables; which chariot Mr. Wyatt, the landlord of the premises, had distrained for rent due to him from Wilkinson: and Wyatt avowed the taking of it as a distress for rent. To this avowry, Mr. Francis pleaded in bar, that the coach-house in which it was taken, was part and parcel of certain other coach-houses and stables known by the appellation of the Talbot livery-stables: whereof one Matthew Wilkinson was the tenant and occupier, under a demise from the avowant Mr. Wyatt, for a term of years, at the annual rent of 50l. that Matthew Wilkinson, during such his occupation of the premises, used and followed the trade and business of a common public livery-stable keeper, for keeping gentlemen's horses and setting up their coaches and carriages; and used the premises, in his said trade and business, for the keeping common public livery stables and coach-houses, for keeping gentlemen's horses and setting up their coaches and carriages; and that the plaintiff Mr. Francis set up his chariot there, at livery, with the said Matthew Wilkinson, as at a common public livery-stable keeper's; and that the avowant took his chariot so standing in the said coach house, as a distress for rent due to him from the said Matthew Wilkinson: and so concludes, that he took it of his own wrong. To this plea in bar to the avowry, Mr. Wyatt the avowant demurs: and Mr. Francis joins in demurrer.

And the question was, "whether a gentleman's chariot which stood in a coach-house belonging to a common livery-stable keeper, was distrainable for rent due to the landlord from the livery-stable [1499] keeper, for this coach house, which (together with the stables, &c.) he rented of the landlord who distrained it."

This point was twice argued, first, on Friday the 25th of May last, by Mr. Serjeant Nares for the landlord, and Mr. Ashhurst for the owner of the chariot; and again on Friday 29th June 1764, by Mr. Blackstone for the avowant (the landlord,) and Mr. Clayton for the plaintiff in replevin, (the owner of the chariot).

Upon the first argument, the serjeant insisted, that a livery-stable keeper differs widely from an inn-keeper; and that even horses standing at livery in a livery-stable would not be intitled to the like privilege from being distrained for rent due for the livery stables, as a horse put up at an inn would be, from being distrained for rent due for the inn; and much less can a chariot without horses, put up in a coach-house belonging to and parcel of a livery-stable, be intitled to such privilege.

An inn-keeper has a right to detain the horse till he be paid for his keeping. The reason is, because the inn-keeper is bound to receive the horse: and he gives credit to the thing, not to the person. So a farrier, who shoes a horse. So a common carrier. So likewise a taylor; who is bound to make the cloaths. 22 Ed. 4, 49.

But it must be the horse of a guest or traveller, left at an inn and fed, which the inn-keeper may thus detain: he cannot detain goods left with him. 2 Ld. Raym. 867.

Whereas here is a coach-house rented for a year, not occasionally used for a small time only: and the credit is given to the person, not to the thing. Moore, [877].

In a case of *Brenan v. Currint*, in B. R. Tr. 1755, 28 G. 2, a farrier insisted on retaining a horse, for his keeping and cure. The Court entered into the general doctrine, and determined (upon the case in Cro. Car. 271, 272, *Chapman v. Allen*,) "that the farrier could not retain the thing; because there was a special agreement, and the credit was given to the person."

But a livery-stable-keeper cannot detain a horse (as an inn-keeper may;) because he is not bound to take in a horse: much less can he detain, or is bound to take in, a chariot without horses.

[1500] A livery-stable-keeper is not bound to quarter soldiers, as an inn-keeper is. 1 Salk. 387, *Parkhurst v. Foster*.

Neither are livery-stable-keepers liable to the inconveniences that inn-keepers are liable to; as taking out licences, and a great number of other inconveniences.



Therefore they ought not to enjoy the same privileges: nor is there the same foundation for their under-tenants to claim any exemption from the general right which landlords have "to distrain what they find upon the premises." And this gentleman, Mr. Francis, is nothing more than an under-tenant to Wilkinson for this coach-house.

A livery stable keeper must rest upon his own agreement: he has no privilege himself; and none can be claimed under him. Yelverton, 66, *Case de Hosteler*; Cro. Car. 271, 272, *Chapman v. Allen*; 2 Ld. Raym. 687, *Yorke v. Grenough*; and 1 Salk. 388, *Yorke v. Grindstone*, S. C. Cro. Jac. 188, 189, *Gelley v. Clerk*, and in a case of *Crosier v. Tomlinson*, in C. B. at the Essex (or Hertfordshire) Assizes before Ld. Ch. J. Willes, a race-horse was holden liable to distress, in a stable at Barnet, let to an inn-keeper for a guinea.

Mr. Ashburst, contra, for the plaintiff in replevin, (the owner of the chariot,) argued, that the doctrine of retainer is uncertain, and not applicable to the present case. And he denied that the inn-keeper's right to detain was founded upon the principle of his obligation to receive. For a manufacturer (who is not bound to accept the work) has a right to retain; (as was holden in P. 9 W. 3, *Collins v. Ongley*, before Holt Ch. J. cited by Lord Ch. J. Ryder in the case of *Brenan v. Currant*;) so has a factor also. And taylorers are not bound to make cloaths for all who ask them.

The right of landlords, "to distrain the property of a third person for rent due from their own tenants," is founded upon reasons of public convenience, and calculated for the prevention of fraud: and the exceptions out of the general rule are, all of them, tending to the benefit of trade and commerce and general advantage.

Co. Litt. 47 a. 2 Lutw. 1578, *Kimp v. Cruves et Al.* 1 Rol. Abr. 668, letter J. title "Le Biens de que Poient Estre Distraine." 2 Bulstr. 270, *Robinson v. Walter*. Cro. Eliz. 596, *Rede v. Burley*.

[1501] But there is no case directly in point.

As to the case of *Crosier v. Tomlinson* at Hertford Assizes, the only question was, "whether the stable was or was not parcel of the inn:" and it was holden, "that it was not." It was a mile distant from it. That case therefore is not applicable to the present.

Mr. Serjeant Nares, in his reply, observed, that there was no surprize upon the owner of this chariot: he was fully apprized of the fact of its being a livery-stable, and not an inn.

And he cited 3 Lev. 260, 261, *Fowkes v. Joyce*.

Upon the second argument, Mr. Blackstone, on behalf of the avowant (the landlord) argued, that no privilege of exemption from being liable to distress for rent in arrear, could be claimed by the owner of the chariot, but upon one of these foundations, viz. either the analogy between a livery-stable and a common public inn, or the principle of general utility and convenience to the community.

1st. As to the former—An inn is *publici juris*: and every man has a right to put up at it. Formerly it has been questioned "whether a man could have erected an inn, at his own pleasure," (as it should seem:) at least it appears that common inns are so much devoted to the service of the community, that they are obliged to receive all guests and horses. 3 Bulstr. 269, *Robinson v. Walter*. Palmer, 367 and 374, *Rev v. Collins and Three Others*, and 2 Ro. Rep. 345, S. C. And the protection that they receive from the law is founded upon their being compellable by law to take in guests and horses. But that is not the case of a livery-stable-keeper. He is not bound, obliged, or compellable to receive coaches or horses: he stands upon the foot of private contract only; and may refuse to take in coaches or horses unless upon his own terms. There is no reason therefore why he should receive or be at all intitled to any particular or special privilege, protection or exemption from the law. And the addition of the epithets "common" and "public," to the description of this livery-stable keeper and his coach-houses and stables, makes no real difference in the case. The distinction between the obligation by law, and the standing upon the foot of private contract, is clearly shewn by Chief Justice Popham, in the case *De Hosteler*, Poph. 66. In Bro. Abr. title "Distresse," p. 251, pl. 56, Brian Ch. J. puts the privilege of exemption of cattle or goods from being liable to distress, upon their being in the place by [1502] authority. And so also, 1 Ro. Abr. 668, title "Distress" letter J. pl. 12, declares the reason of the exemption to be "because the law gives liberty to put them there." Lord Ch. J. Coke likewise, in Co. Litt. 47 a. gives the

same reason, viz. their being there "by authority of law." But in the present case, the chariot was not in this coach-house by authority of law, but on a mere private contract.

2dly. As to public utility or convenience to the community—No cases can be cited to support a notion, "that a privilege of exemption from a distress for rent can be maintained upon this foot."

If this chariot had been sent to a coach-maker's to be repaired, and had been distrained there for rent due from the coach-maker, that case might have seemed to fall within some of the cited cases: that would have afforded a pretence to exemption, from the necessity of sending it thither for that purpose. But there is no necessity that a gentleman lies under, to set up his chariot at a livery-stable. And the inconvenience would be much greater on the side of the landlord, if he should be debarred of his legal right "to distrain goods found upon his premises, for rent in arrear," than any that could arise from allowing him this established security for his rent, in the case of a person who appears to be no more than an ordinary under-tenant, and without any reasonable pretence of exemption from the general law of distresses.

Therefore he prayed judgment for the avowant.

Mr. Clayton, contra, (for the plaintiff in replevin,) premised, that it stood admitted on the pleadings, "that this Matthew Wilkinson (the tenant) kept a common public livery-stable." And he argued, that such a livery-stable is exactly upon the foot of a common inn, and intitled to the very same privileges and exemptions; and is equally to be protected upon the principles of necessity, utility and convenience to the community, though of more recent establishment indeed than inns: and therefore such a livery-stable is equally within the reason of the cases, as inns are; like new trades, which are under the same protection as old ones. Consequently, such a livery-stable is equally within the general reason of exemption from distress, for the sake of public utility, as cloth at a taylor's, cloth at a weaver's, a horse at a farrier's (to be shod,) a horse that brings goods to market to be sold, the goods themselves so brought, goods on a wharf or at a warehouse for exportation, goods delivered to a carrier to be carried for [1503] hire, wool in a neighbour's barn, goods in the hands of a factor. In all these cases, the law gives the privilege in respect to trade and utility: the privilege or exemption is not founded on any obligation to receive the goods or other things. A factor is not bound to receive goods: yet he may retain them. Nor do I know that a taylor is bound to make my clothes; or that a farrier is obliged to shoe my horse. And to prove "that the true foundation of the exemption from distress, in the exempted cases, is the detriment the common-weal would suffer if such things should be liable to distress for rent," he cited *M. 7 H. 7. 1 Fitz-H. Abr. 295, tit. "Distresse,"* pl. 8. *Noy, 19. Trassell v. Morris, Co. Lit. 47 a. Cro. Eliz. 549, Read v. Burley. Salk. 249, 250, Gisbourn v. Hurst.*

And here it appears, that the landlord knew this to be a common livery-stable, and consented to it.

Mr. Blackstone, in reply, observed, that there is no such thing known in the law, as a common livery-stable, in any technical sense of the word "common," or in the same sense in which it is applied to an inn (which is called commune hospitium).

He said, Mr. Clayton had compared the present case to many others which it did not at all resemble, and in which the exemption is founded upon very sufficient reasons; and a very good rule is laid down for such cases, in 1 *Salk. 250* (where goods delivered to a carrier were holden to be privileged,) viz. "that the law has given the privilege, in respect of the trader:" but those reasons are not applicable to this case; no more are any arguments drawn from a right of retaining goods, &c. till payment or satisfaction. This case does not at all differ from that of goods put into a common lodging-house, and there distrained by the landlord for rent in arrear.

Lord Mansfield and the two Judges \* present saw this question in such a light with regard to the consequences of it, and the inconvenience that might attend it, even to the landlords, owners, and keepers of these livery-stables themselves, as well as to gentlemen who used them, (in case this distress should be solemnly adjudged a good one,) that they intimated to the landlord (the avowant) who happened to be personally present, attending the event of this cause, that it might be well worth his while to

\* Mr. Justice Wilmot, and Mr Justice Yates.

consider, whether it would be for his own interest, to wish, "that judgment should be formerly pronounced for him."

[1504] But Mr. Clayton, who was counsel for Mr. Francis, (the plaintiff in replevin,) informing them that the Attorney General was retained to argue the point on his side.

The Court ordered an  
Ulterius concilium.

However, Mr. Francis, perceiving the opinion of the Court to be flatly against him, did not think proper to bring the question to a third argument.

And indeed it seems extremely clear, that his chariot was liable to this distress ; and that there is not the least shadow of legal claim for an exemption.\*<sup>1</sup>

JOHN late Bishop of Lincoln, now Bishop of Salisbury, *versus* WOLFORSTAN. Friday, 29th June, 1764. [S. C. in C. B. 2 Wils. 174. S. C. 1 Bl. 490.] Grant of an advowson after actual vacancy void. [Str. 262, 1084.]

[Discussed, *Rennel v. Bishop of Lincoln*, 1827, 7 Barn. & C. 150 ; 9 Dowl. & R. 815 ; 7 Bli. N. S. 241 ; 1 Cl. & F. 527 ; 1 Moo. & S. 683 ; 8 Bing. 490.]

This was a writ of error from the Common Pleas, upon a judgment given there against the Bishop of Lincoln, and Thomas Whitehead his clerk, in a quare impedit brought by the grantee of the advowson, in fee, of the church of Great Sheepy : in which quare impedit, the \*<sup>2</sup>pleadings had gone on to a plea, a replication, and a rejoinder ; to which rejoinder there was a special demurrer, and joinder in demurrer : and the judgment below was given against the bishop upon the badness of his rejoinder. But it now appeared manifest to this Court, that the plea, and the replication, and the rejoinder were all of them bad ; so that it stood, here, upon the declaration only. The declaration set forth a grant of the advowson made to the plaintiff, in fee, by the persons seized of it, on the 9th of November 1759. It then set forth the statute of 21 H. 8, c. 13, § 9, against Pluralities ; and stated the facts necessary to shew his right to the action ; viz. an avoidance of the church, and his own presentation thereupon, and the refusal of his presentee by the bishop.

The particulars of the facts stated were—That Great Sheepy is a rectory, a benefice with cure of souls, of above the yearly value of eight pounds. That Thomas Griesley, the incumbent, accepted and took another benefice with cure of souls, namely, the living of Seale : and was instituted, admitted and inducted in possession of the same. That [1505] thereupon the plaintiff below presented Thomas Hall to the rectory of Great Sheepy : who tendered himself to the bishop, and was refused by him.

The bishop's plea (which was a bad one) admits the incumbency of Griesley, and his acceptance of the living of Seale ; but supposes the avoidance of his former church to have been by his institution to the second, on the 31st of October 1759 : and then, by computing from the institution, shews that six months elapsed : whereupon he collated Thomas Whitehead to it, by lapse, on 20th of June 1760.

The replication (which was an informal one) specifies the time of Griesley's induction to Seale to have been upon the 22d of December 1759 ; and alledges that upon the 20th of June 1760, the day when the bishop collated his clerk, Mr. Thomas Whitehead, six months from the induction of Griesley to Seale had not elapsed.

The bishop's rejoinder insists upon the lapse incurring at the end of six months from the time of Griesley's institution to Seale ; and traverses his refusal of Hall before he himself had collated his own clerk, or that Hall tendered himself to him before he had collated the other, or within six months after the institution of Griesley to Seale.

To this rejoinder the plaintiff demurred, both generally and specially ; and the bishop joined in demurrer.

Mr. Blackstone argued for the plaintiff in error (the bishop :) and he said,

\*<sup>1</sup> [Judgment was afterwards given for the defendant, 2 Bl. Rep. 485.]

\*<sup>2</sup> See all the pleadings at large, in Mr. Serjeant Wilson's Reports, part 2d, p. 174 to 179. And also the three arguments in C. B. and the judgment there, *ibidem*, p. 179 to 202.



that the real question (if it could be cleared from the special pleadings) was, "whether the plaintiff in the quare impedit had a right to present for this turn." And he endeavoured to shew, "that he had not," for these two reasons: first, that the church was vacant at the time when the grant was made to the plaintiff; so that he had no sort of right to present: secondly, that six months had elapsed from the time of Griesley's institution to the living of Seale: and that the plaintiff's presentee did not tender himself within that time, or before the collation of Whitehead by the bishop by virtue of the lapse; which lapse incurred (as he insisted) at the end of six months after Griesley's institution to the second living.

He observed upon the plaintiff's replication, "that it was informal, by introducing new matter, viz. Griesley's induction to Seale upon the 22d of December 1759;" whereas the question depends (as he hoped to prove) upon Griesley's institution, not upon his induction to this second living.(a)

[1506] He then stated the facts, as they appeared upon the pleadings, to stand thus—That Griesley, being incumbent of Great Sheepy, was instituted into the rectory of Seale on the 31st of October 1759. That he was inducted to it on the 22d of December 1759. That the grant of the next presentation to the rectory of Great Sheepy was not made to the plaintiff till the 9th of November 1759; (at which time the church of Great Sheepy was, as he insisted, become vacant by the institution of Griesley to Seale upon the preceding 31st of October). That the plaintiff presented Hall to Great Sheepy, upon the 29th of March 1760; but that Hall did not tender himself to the bishop within six months after the institution of Griesley to Seale, nor before the bishop had collated his clerk. And that the bishop collated upon the 20th of June 1760; (at which time, more than six months were elapsed since Griesley's institution, though it was within six months from his induction). From these premises he inferred, that, as the church became actually vacant upon the 31st of October, the plaintiff could claim no right to present to it, under a subsequent grant made in November: and that the bishop had, upon the 20th of June, a right to collate by lapse, no presentation at all having been then tendered to him.

1st. The grant (by a subject) of the next presentation to a church, or of the advowson in fee, (for there is no difference between them, in this respect,) after the church is actually fallen vacant, is a void grant quoad the fallen vacancy; both because it is a chose in action; and also because it tends to simony.

Cases in point to this effect, are Hil. 28 H. 8, Dyer, 26 a. pl. 165. 11 Eliz. Jenkins's Cent. 236, case 13, S. P. by all the Judges of England. P. 11 Eliz. Dyer, 282 b. pl. 28, S. P. M. 39, 40 Eliz. Cro. Eliz. 600. *Bennet v. Bishop of Norwich*, M. 42, 43 Eliz. *Baker v. Rogers*, Cro. Eliz. 788, S. P.(b) P. 2, 3 Ph. & M. *Agard v. Bishop of Peterborough*, 1 Anders. 15, S. P. twice. Dyer, 129 b. pl. 66, S. C. Moore, 12, S. C. and Benloe, 43, S. C.

These are cases of next presentations which were granted after the respective churches were fallen vacant: the following are grants of advowsons made after actual vacancy.(c)

Trin. 10 Eliz. *Stephens v. Disley, et Al'*, cited in 1 Anderson, 15. *Stephens v. Wall, Disley, et Al'*, Benloe, 192, S. C. and Hil. 43 Eliz. *Leak v. Bishop of Coventry and Dr. Babington*, Cro. Eliz. 811.

[1507] 2dly. The bishop had a right, upon the 20th of June 1760, to collate by lapse; the six months being expired before that time, and no presentation tendered to him: for, we say, the church became void by the institution of Griesley to the living of Seale.

The words of the statute of 21 H. 8, c. 13, are these—section 9 enacts "that if any person or persons having one benefice with cure of soul, being of the yearly value of 8l. or above, accept and take any other with cure of soul, and be instituted and inducted in possession of the same, that then and immediately after such possession had thereof, the first benefice shall be adjudged in the law to be void; and (by section 10) it shall be lawful to every patron having the advowson thereof, to present

(a) Because the allegation in the count of the time of the induction was as appears in 2 Wils. 170, under a to wit.

(b) That is only in the argument of council.

(c) This is in effect so as to the three authorities next cited, and as to the last it seems to be strictly so.

another; and the presentee to have the benefit of the same, in such like manner and form as though the incumbent had died or resigned; any licence, union, or other dispensation to the contrary thereof obtained, notwithstanding."

Now though it be true, that the words of this Act are "instituted and inducted;" yet it has been holden, "that institution only, without induction, vacates the former benefice."

*Digby's case*, in Hil. 41 Eliz. B. R. 4 Co. 79, is a full and solemn determination in point, and agreed to by all the Judges in England; and cites a like determination in C. B. "that he who is only instituted, is, within this Act of 21 H. 8, said to have a benefice with cure."

*Robins v. Gerrard and Prince*, in Moore, 434 to 448, S. C. agreed by all the Judges of England; (p. 448). *Robins v. Prince*, Goldesbr. 162, S. C.

Lord Ch. J. Hobart likewise, in the case of *Colt and Glover v. Bishop of Coventry and Litchfield*, p. 157, 158, lays it down, that a benefice is taken, received and had "by institution only," and says, "it was so judged in *Digby's case*."

2 Ro. Abr. title "Presentment, Lapse:" letter A. p. 1 & 2. After lapse incurred to the Ordinary, the patron may present before the church is full; "but if the Ordinary collates by lapse; and afterwards, before induction, the patron presents, the Ordinary is not bound to receive."

[1508] In the case of *Shute v. Higden*, Hil. 22, 23 C. 2, Lord Ch. J. Vaughan says, that by admission and institution into the second benefice, the first is ipso facto so void that the patron may present another, if he will: and if the first living be of the value of 8l. or above, the patron, at his peril, must present within six months, by 21 H. 8, though if it be under that value, no lapse shall incur, until deprivation of the first benefice, and notice.

But there is no need, in the present case, of either deprivation or notice to the patron: for, this former benefice being above that value, the cession of it does not depend either upon the common law or the ecclesiastical law, but upon the Act of Parliament: and therefore the patron must take notice of it at his peril. This appears clearly from *Dyer*, 237 a. pl. 29. *Godbolt*, 23, case 33. 4 Co. 75 b. *Holland's case*. Cro. Eliz. 601, *Armiger v. Holland*, S. C. and *Watson's Complete Incumbent* 49.

Mr. Serjeant Burland argued this case on behalf of the defendant in error, (the plaintiff in the quare impedit).

As to the pleadings—he said that the bishop's rejoinder was given up below; and is certainly bad, in that it departs from one matter to another, which other he might have originally resorted to: it does not fortify the matter of his former plea; but introduces new matter. And this is a departure; *Finch's Law* 57 a. And it puts in issue a matter not asserted in our replication; viz. "that he did not refuse to admit Hall, before the time of his collating Whitehead."

If the replication is informal, the bishop cannot take advantage of that informality, upon our special demurrer to his rejoinder: he can only take advantage of matter of substance.

Now upon the substantial part of the case, it appears that the plaintiff has a good title; and that no lapse had incurred.

1st. It does not judicially appear upon the record, that the grant to the plaintiff was subsequent even to the institution.

The defendant cannot avail himself of his own bad pleading, to find fault with the pleadings of his adversary: he cannot connect them together: nor is the particular day on which the grant is, under a videlicet, mentioned to have been made to the plaintiff, either material or issuable: and here it is only mentioned thus, "viz. on the 9th of November 1759." It is no where alledged, "that Griesley was instituted to Seale before the [1509] advowson was granted to the plaintiff:" if it had, that might have been traversed. But it is here set out, the plaintiff might have given any particular day in evidence: this 9th of November is not material nor traversable.

Cro. Jac. 202, *Lane v. Alexander*. Yelv. 122, S. C. *Skinner*, 660. *Rex v. Bishop of Chester* (in point). 2 Lev. 211, *Holbeck v. Bennett*. 2 Mod. 184, *Stroud v. Bishop of Bath and Wells* and *Sir George Horner*. 5 Mod. 287, *Blackwell v. Eales*.

Therefore this priority of Griesley's institution to Seale, to the plaintiff's grant is not admitted by the plaintiff. Nor is any thing admitted by the demurrer; as the rejoinder is confessedly vitious; and this appears by 2 Ro. Rep. 22, *Holford and Platt's case*.



Neither indeed is it alledged, "that the institution was upon the 31st of October 1759:" nor "that the institution was prior to the grant." And this being an unfavourable case, the Court will not assist them to take advantage of a forfeiture.

2dly. The lapse does not incur from the time of the institution, but from the time of the induction: for it is the induction into the second benefice that vacates the first; and not the institution to it.

The doctrine of pluralities is laid down at large, in Moore, 434 to 448, *Robins v. Gerrard and Prince*; and in Linwood's Provincials, 135, 137, 138.

The latter is in point "that the first church is not vacant till induction into the second." And in the case of *Agar v. Bishop of Peterborough and Denn*, issue was taken up on the induction to the second benefice: whereby it seems to be allowed, (as it is observed in Moore, 12,) "that admission and institution do not make the first void, without induction." And in the argument of the case of *Robins v. Gerrard and Prince*, it is admitted "that the first benefice is not actually void till induction." Moore, 442.

Watson's Complete Incumbent, chapter 2, collects many cases to this effect. In the case of *Winchcombe v. Bishop of Winchester and Pulleston*, Hobart says "he is not within the Statute of 21 H. 8, if he be not inducted." And Cro. Car. 354, *Rex v. Archbishop of Canterbury and Pryst*, goes upon the same principle.

The words of the Statute of 21 H. 8 are taken from the Provincials: and the cases since the statute have been uniform, as to lapse.

[1510] Before the statute, the patron had his election, "whether he would present as upon a vacancy; or stay till after the deprivation and notice of it." But no lapse incurred by deprivation without notice: he was not bound to take notice at his peril till induction.

Godbolt, 23. 4 Co. 75 b. *Holland's case*. 4 Co. 79 b. *Digby's case*. Moore, 438, 542. Cro. Eliz. 601. 2 Ro. Abr. 361, title "Presentment," letter L. pl. 6, and 2 Lutw. 1306, 1307, at large, in the case of *Sharpe v. French*.

Mr. Blackstone, in reply—As to the pleadings—he said he could by no means give up the bishop's rejoinder: which he denied to be a departure. It avers "that Hall did not tender himself within the six months:" which averment, he said, was no departure from the plea, but a necessary support of it. And the traverse, "that he did not refuse to admit Hall, before the time of his collating his own clerk," is a right and proper traverse.

And he insisted that it appears sufficiently upon the pleadings, "that the institution of Griesley was upon the 31st of October; and that the grant of the plaintiff was not made till the 9th of November following:" for the day under the scilicet is materially alledged; and is a positive and substantial averment of the particular day. And he offered to maintain, that the day "under the scilicet is material, where the precise exact time is the gist of the action."

As to lapse incurring from the time of the institution—he said he must leave that point upon the cases he had cited, and the general reasoning: which he would not press any further; having observed, by what had been dropped from the Bench, during the argument, that the Court was of opinion "that it was to be computed from the time of induction only."

The Court were extremely clear, that, as to lapse, the avoidance of the former benefice does not take place till induction to the second; and Lord Mansfield and Mr. Justice Wilmut both said, that this was a point so settled, that it ought not now to be disputed.

The Court were equally clear, that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant, quoad the fallen vacancy.\*(d)

[1511] But they thought that the fact was not sufficiently ascertained upon these

\* But it is good as to the advowson itself; (unless it be a corrupt purchase). H. 16 G. 3, *Barret and Reynel, Cl. v. Glubb (Clerk) and Rolle*.

(d) Contra Dy. 26, pl. 165, per Fitzherbert and Shelley, and that the grantee shall have the next avoidance, not that which was void before the grant. S. P. 1 And. 15, acc. Benl. 192. Jenk. 236, pl. 13.

And note, Lord Chief Justice de Grey took notice of the mistake already mentioned in this report, and was confirmed in his observations by Mr. J. Blackstone in *Barrett v. Glubb*, Hil. 16 G. 3, C. B.



pleadings: for though it appears clearly enough, "that the grant was made on the 9th of November 1759," yet it does not appear "at what time Griesley was instituted to the second benefice." Consequently, the objection can not be let in, "that it was vacant when the grant was made." It is no where averred "that the grant was subsequent to the avoidance:" nor is there any thing that appears upon the pleadings, sufficient to support the objection. Therefore they

Affirmed the judgment, unless cause.

Afterwards (on the last day but one of the term)

Mr. Blackstone attempted to shew cause: and hoped to satisfy the Court, that he was not precluded from taking his objection to the grant: for he relied upon it, that "if a proper time be alledged, where the precise exact time is the gist of the action, the day under the scilicet is then material."

But the Court were still of opinion "that he could not get at his objection, upon these pleadings." For all the pleadings are bad, except the plaintiff's declaration; which is good. The whole stands, therefore, upon the declaration only: which states the conveyance of the right to the plaintiff to present, to be by a grant made on the 9th of November; and, upon the face of it, shews a good title in the plaintiff to present. The plea means indeed to put the matter upon the question "whether the six months should be computed from the institution, or from the induction." But the plea, and likewise the rejoinder, are both out of the case; for they are both of them bad: and being bad, there is a total end of them, to every intent and purpose whatsoever. You cannot therefore extract from them a fact to destroy the plaintiff's title: for they are nullities, and just as much so, as if they had never been pleaded at all.

Per Cur. Judgment affirmed.

Mr. Serjeant Burland thereupon prayed costs and damages for the delay, upon 3 H. 7, c. 10, citing Dyer, 77 a. pl. 34. Cro. Eliz. 617, *Graves v. Short*.

[1512] But he withdrew this motion; thinking it more adviseable to drop it, as he could only have a rule to shew cause next term.

N.B.—It was observed by Mr. Justice Wilmot, upon the first argument, "that though the patron has six months from the induction, to present, (so that no lapse shall incur within that space of time;) yet he may, if he pleases, present before the induction."

Note also, that Lord Mansfield and Mr. Justice Wilmot both said, that the true reason why a grant of a fallen presentation, or of an advowson, after avoidance, is not good, quoad the fallen vacancy, is the public utility, and the better to guard against simony; not for the fictitious reason of its being then become a chose in action.

N.B. A writ of error returnable in Parliament was brought upon this judgment.\* (e)

REED *versus* COLE. Tuesday, 3d July, 1764. On mutual insurances, all the parties are to be contributory.

[Referred to, *Mackenzie v. Whitworth*, 1875, L. R. 10 Ex. 149; 1 Ex. D. 36.]

This was an action on the case, upon articles of agreement constituting a society for the mutual assurance of each others ships: whereby they engaged that when and so often as any of the ships wherein any of the members of this society had property, should be lost, the rest should contribute to such loss. But every member was obliged to prove a property of 500l. in a ship: and if he would cease to be a member, he was obliged to give six months' notice. The plaintiff shewed that he had the requisite

\* (Qu. what became of this writ of error? I believe nothing: for I never heard any more of it, and I do not find it amongst my Parliament Cases.

(c) There are several cases where it hath been holden that a presentation to a church when void, cannot be granted for the void turn, though the grant were voluntary; and the old law was, that a right of action could not be granted: and there is no exception of modern times in this, though perhaps there are some in other cases; but even then, the action must be in the name of the assignor, except in particular cases, such as where it may by stat. be brought in the names of the assignees of a bankrupt, the assignees of bail-bonds, and some few other cases, and perhaps by the *Lex Mercatoria* in some others, but in none by the common law.

property in a ship, and became a member; and that the ship was lost. Plea That the plaintiff had parted with his interest in the ship before the loss happened. Replication—That by articles of agreement with the purchaser of the ship, the plaintiff had agreed to pay 500*l.* if a loss happened within three months: and therefore he was interested during the voyage. Demurrer to this replication and joinder in demurrer.

Mr. Wallace, for the defendant, argued that the stipulation between the plaintiff and the defendant was at an end, as soon as the plaintiff had disposed of his property in the ship: and his private agreement with the purchaser of it, without the consent of the society, is no more than [1513] his own private and personal insurance made to the purchaser.

Mr. Ashburst, contra, for the plaintiff, argued, that he ought to recover; both upon the words of the agreement, and within the equity of it: for he had not ceased to be a member of the society, nor could cease to be so, without giving six months' notice. Therefore he remained bound to contribute to the losses of the rest: and consequently, the rest were bound to contribute to his. And he stood as a trustee for the person to whom he had sold his interest in the ship: it was not necessary that he should continue to hold it in his own right. He remained contributory to the losses of the other members, as he had not given six months notice of his ceasing to be one.

Mr. Wallace, in reply, urged, that as the property was out of the plaintiff at the time when the loss happened, he could take no benefit of the articles of mutual insurance amongst the members of this society. For, the parting with his property in the ship was his own act: and if he remained contributory to the losses of the other members, that arose from his own neglect in not giving the six months notice, as the articles required him to have done.

But the \* Court were of opinion, that as he continued contributory to the losses of the others, at the very time when this loss happened, it was but just and equitable, and within the words and meaning of the agreement, that they should contribute to his. He still had an interest in the safety of the ship: he had not parted with all his interest in it; but continued interested quoad this loss.

Per Cur'. Judgment for the plaintiff.

REX *versus* LE CHEVALIER D'EON. Wednes. 4th July, 1764. [S. C. 1 Bl. 510.]

Absence of witnesses abroad and not likely to return, no cause for putting off a trial.

Monsieur D'Eon, who came over hither in the quality of secretary to M. le Duc de Nivernois the late French Ambassador, and after the duke's departure, remained here charged with the affairs of France, was afterwards (upon a particular occasion) invested with the character of minister plenipotentiary. Upon the arrival here, of the present French Ambassador, the Count de [1514] Guerchy, M. D'Eon set up a press in his own house, and in his book there printed under his own inspection, libelled the Count de Guerchy. Upon this, an information was filed against him by Mr. Attorney General, not only for printing and publishing this libel, but as an infractor of the law of nations: and notice of trial was given. Whereupon M. D'Eon (by his counsel) moved to put off the trial, on account of the absence of several material witnesses, whom he specified in his affidavit: and his affidavit contained the usual assertions requisite for putting off a trial, and particularly "that they were material witnesses for him; that he could not safely go to trial without their evidence; and that he had hopes and expectation of procuring their presence by next Michaelmas term."

Upon shewing cause against putting off the trial, it appeared that the libel was not printed or published till March or April; and that these witnesses went away from England to France, in the preceding November or December. It appeared also, that they were natives of, and resident in France; that they were in the service of that Crown; and that there was no probability of their being sent over, or even permitted to come over, to give evidence on behalf of M. D'Eon, (who stood, at this time, in no favourable light at his own Court, but very much otherwise).

\* Mr. J. Denison was absent.

After a full hearing of counsel on both sides (M. D'Eon being present,)

The \* Court were unanimous that there appeared no sufficient reason for putting off the trial.

They granted that in all cases, whether criminal or civil, and whether the nature of the proceeding be instantaneous or otherwise, a trial shall not be so hurried on, as to do injustice to the defendant; an affidavit in common form may be sufficient where no cause of suspicion appears: but men take such latitude to swear in the common form, that where a suspicion arises from the nature of the question or from contrary affidavits, the Court will examine into the ground upon which the delay is asked; and have, in criminal as well as civil cases, refused to put off a trial, notwithstanding an affidavit in common form.

It is necessary therefore in such a case as this, (1st,) to satisfy the Court that the persons are material witnesses; 2dly, to shew that the party applying has been guilty of no laches nor neglect, in omitting to apply to them and endeavour to procure their attendance; and 3dly, to [1515] satisfy the Court that there is a reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off.

But in the present case, all these reasons fail.

These witnesses are sworn to be material, as the defendant apprehends and believes. But on the contrary, it appears (negatively) that they can not be material: for, as they were gone out of England some months before the printing or publication of this book; they could not be conversant of the facts of the offence laid in this information. If their knowledge relates to any circumstances that may serve to mitigate the punishment in case he should be convicted, that sort of evidence will not come too late after conviction of the offence, and may be laid before the Court by affidavits.

But if it should appear upon the case proved at the trial, "that the defendant was prejudiced by refusing this delay," the Court could set it right by granting a new trial: which had often been said upon like occasions; but no case had yet happened, where any prejudice appeared to have been done by the Court's refusing, upon particular circumstances, to put off a trial notwithstanding the formal affidavit.

As to their being sent out of the kingdom by the Count de Guernsey himself, on purpose to prevent their giving testimony in the cause, (which has been alledged;) there neither is any proof of it, nor is it possible that it could be so: they were actually gone, before the fact which is the subject of the charge was committed. It is impossible that they could be sent abroad by M. de Guernsey, to prevent their giving evidence in this cause, the foundation of which did not exist at the time when they went. If they had been material witnesses for the defendant in this cause, and had been sent away by the person on whose account the prosecution is carried on, that indeed would have been a sufficient ground for putting off the trial till they could be had. But here is no pretence for such an insinuation.

Neither does it appear, that there has been the least endeavour used by this gentleman or any on his behalf, to get them over.

And as to any expectation of their returning to England by the next Michaelmas-term or at any future time, there does not seem to be any probability of it; nor does the defendant lay before the Court any grounds of such an expectation. On the contrary, the reverse is highly pro-[1516]-bable; the presumption seems strong, that they will not come. They cannot be compelled to come: and it does not seem likely that they will be ordered to come, for this purpose. These are foreigners, natives of and resident in France, and in the actual service of that King: which renders this case quite different from the ordinary cases of English witnesses being accidentally gone abroad, or gone for a small time only, and expected to return to their own country, their natural home and residence.

Upon the whole, they were clearly of opinion "that the putting off the trial could not tend to advance justice, but on the contrary would delay it;" and therefore discharged the rule for shewing cause why it should not be put off.

Rule discharged.

M. D'Eon was soon after tried and convicted, upon so clear evidence, that he made no defence: and from the proof against him by witnesses and writings under his hand, it was impossible for him to make any defence. Yet he seems to have

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\* Mr. Justice Denison was absent.



sheltered himself under some salvo, in swearing the persons in France to be "material witnesses."

GRANT *versus* VAUGHAN. Wednes. 4th and Thurs. 5th July 1764. [S. C. 1 Black. 485.] Bearer of a bill of exchange, may maintain an action against the drawer. [See Bull. 273. 3 Durn. 177. 4 Durn. 155. 1 H. Bl. 317. 4 Bosanq. 649. 3 Bosanq. 561.]

[Referred to, *Goodwin v. Roberts*, 1875-76, L. R. 10 Ex. 357; 1 App. Cas. 476; *Bechuanaland Exploration Company v. London Trading Bank* [1898], 2 Q. B. 675.]

Upon shewing cause why a verdict which had been given for the defendant should not be set aside (upon payment of costs,) and a new trial granted—the case appeared to be this—

The defendant Vaughan, a merchant in London, gave a cash-note upon his banker, to one Bicknell a husband of a ship of his: which note was dated "London, 22d October 1763," and directed to Sir Charles Asgill, who was Vaughan's banker; and was worded thus—"Pay to ship 'Fortune,' or bearer," so much. Bicknell, by some accident, lost this note. The person who found it, or who at least was in possession of it (however he might obtain that possession,) came, four days after the note was payable in London, to the shop of Grant the plaintiff, who was a tradesman at Portsmouth, and bought five pounds worth of tea of him and gave him this note in payment, desiring to have the change out of it. Grant (the plaintiff) stept out, to make inquiry "who this Vaughan might be:" and upon being informed "that he was a very good man and that it was his hand-writing," he readily gave the change out of the note, retaining the price of the tea. Vaughan, upon being apprized [1517] that Bicknell had lost the note, sent notice to Sir Charles Asgill, "not to pay it." Whereupon Grant, being refused payment, brought his action upon the case against Vaughan, and inserted two counts in his declaration; one, upon an inland bill of exchange; the other, an indebitatus assumpsit for money had and received to his use. The cause was tried by a special jury of merchants; who found for the defendant.

Sir Fletcher Norton and Mr. Dunning argued on the part of the plaintiff; and Mr. Morton, Mr. Eyre (Recorder of London,) and Mr. Wallace, on the defendant's part.

On the part of the defendant it was insisted—

That an action could not be maintained on either of these two counts.

That this is not a negotiable note; but only an authority to receive so much cash.

That Grant did not take it upon the credit of the drawer; but upon the credit of the person who gave it him in payment.

That such a draught as this cannot be considered as a negotiable bill of exchange: for it was not accepted, nor indorsed: nor was it protestable, nor intitled to any day of grace. It is only a mere contrivance or convenience between the banker and the person who keeps cash with him. And Mr. Wallace not only insisted that these cash-notes are never intended to be generally negotiable; but even supposed them to be confined within the extent of the bills of morality, at furthest. A bill of exchange to A. or bearer, is a bill of exchange to A. himself: but is not negotiable. And there is \* no instance (as the recorder said) of any custom of merchants, "for a bill of exchange being made payable to bearer," generally.

In 3 Lev. 299, *Horton v. Coggs*, in C. B. P. 3 W. & M. on an action brought by the bearer of a goldsmith's note payable to B. or bearer, the custom "to pay to the bearer" was holden too general.

In 1 Salk. 125, *Hodges v. Steward*, P. 5 W. & M. B. R. the first point resolved is, "that a bill of exchange payable to J. S. or bearer, is not assignable by the contract; so as to enable the indorsee to bring an action, if the drawer refuse to pay."

[1518] The preamble to 3, 4 Ann. c. 9, does not say one word about notes payable to bearer. It begins thus—"Whereas it has been held, that notes in writing whereby the party promises to pay unto any other person, or his order, are not

\* Sed vide 2 Shower, 235, *Hinton's case*, 34 C. 2, B. R.

assignable, &c." And though the words, "or unto bearer" are slipped into the enacting part of the first clause, yet no part of the whole statute bears any relation to them.

In the case of *Morris v. Lee*, Tr. 11 G. 1, B. R. (which was an action brought by the indorsee of a note "to be accountable to A. or order, for 100l.") the "Court observed that the words or order" was the proper expression used in such notes, and mentioned in the Act of Parliament, where it intended the note should be indorsable or negotiable.

Arguments therefore arising from cases upon notes of hand will not prove much in the present case.

And upon the second count, the plaintiff can have no pretence, they said, to recover against Mr. Vaughan: he can only resort to the person from whom he received or purchased the note. This note is not like a banker's note payable to bearer. However, even upon one of them, the bearer can not recover as bearer: for which, they cited the case of *Walmsley v. Child*.<sup>\*1</sup>

If a bill is payable "to bearer" only, the original advancer of the money may indeed maintain an action against the drawer upon an indebitatus assumpsit, for money had and received to his use: but no other person can do so, though he comes by it fairly and upon a valuable consideration. And for this they cited the abovementioned case of *Hodges v. Steward*, in 1 Salk. 125.

The plaintiff's counsel insisted that this bill or note was in its nature negotiable; and that such bills were in fact always considered as negotiable and actually negotiated, and commonly circulated as cash. And if they be, from the nature of the contract, negotiable, the finding of the jury can not alter the law: it is not the province of the jury, but of the Court, to determine what is or is not an inland bill of exchange or a promissory note, within the statute. If the jury founded their verdict on law, they have mistaken the law: if on fact, it is directly contrary to the notoriety of the fact; and bank-notes alone are a full and sufficient proof of that. And it is not to be conceived, that they are negotiable within the bills of mortality, and not negotiable beyond or out of them: if they are negotiable any where, they must be so every where.

[1519] They object "that it is not a bill of exchange, because it is not accepted, nor can be protested, nor is intitled to a day of grace, nor is indorsable."

But it is a negotiable instrument; it is not necessary that it should be a bill of exchange. An inland bill of exchange is not like a foreign bill of exchange: for the former could not have been protested, before this Act of Parliament, nor needs to be so, since the Act; whereas a foreign one always absolutely required it. This is just the same as a bill payable to bearer. The name of the person to whom such a bill is made payable, means nothing at all, in general cases of being made payable "to such a one or bearer:" much less can it mean any thing in this particular case, where no name of a person precedes, but the payment is to be "to ship 'Fortune,' or bearer."

Then it is extremely clear (and indeed admitted) that the plaintiff came by it fairly and honestly and bona fide, and upon a valuable consideration, and without notice of its being a lost bill. He therefore stands in the place of Bicknell, and is equally intitled to maintain his action, as Bicknell himself would have been if he had never lost it nor parted with it: and he is intitled to recover upon either of the two counts laid in the declaration. It is equal to him indeed, which of them he recovers upon: and there can be no doubt as to the latter. And as to the former, the Court will not readily listen to objections about forms, when the true merits and honest title are clear and plain.

The only true and fair question is, "whether Bicknell or Grant ought to bear this loss."

And surely there can be no doubt, as between the man who lost the note (be it accidentally or carelessly,) and a fair purchaser of it for a valuable consideration.

This case was determined in the case of *Muller v. Race*, H. 31 G. 2, B. R.<sup>\*2</sup> That resolution was founded upon the fair purchaser's having a better right than the loser of a bank-note: even though the man was, in that case, robbed of it.

<sup>\*1</sup> V. post, 1524. [And 1 Burr. 459.]

<sup>\*2</sup> Vide ante, p. 452.

Whoever gives a note payable to bearer, expressly promises to pay it to every fair bearer. However, an implied promise would suffice for our purpose.

This point is clearly settled by the Act of 3 & 4 Anne, c. 9, which puts notes of hand upon the same foot with both sorts of bills of exchange, and makes them assignable (though choses in action). It enacts, that all notes [1520] in writing, promising to pay to any person or order, or unto bearer, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons to whom the same is made payable: and that the assignee may bring his action in like manner as in case of inland bills of exchange.

It is objected that the words "or to bearer" were not intended to have any operation; because no notice is taken in the preamble of the statute, of notes made payable to bearer, but only of notes which are made payable to a person or his order.

But how could any notice be taken of the former, in the preamble? Such notes did not require indorsement: and the preamble only recites, "that the latter had been holden not to be assignable or indorsable over, within the custom of merchants; and that the assignee or indorsee could not, within the custom of merchants, maintain an action upon them against the drawer." But they were negotiable, before the Act was made; and an action would so far have lain upon them, that they were evidence of a debt, and would put it upon the defendant to shew that the debt was satisfied. The person to whom such a note was given, might have declared in a general indebitatus assumpsit for money lent, and the note would have been good evidence of it: though he could not have declared upon the custom of merchants. This was settled in the case of *Clerke v. Martin*, P. 1 Ann. B. R. reported in 2 Ld. Raym. 757, and 1 Salk. 129. And Lord Ch. J. Holt was peevish there, and said "that the continuing to declare upon these notes, upon the custom of merchants, proceeding from obstinacy and opinionativeness; since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general indebitatus assumpsit for money lent."

That action was brought upon a note payable to the plaintiff Clerke or his order, and brought by Clerke himself. But actions had been sometimes brought by the bearer, before the making of the Statute of 3 & 4 Ann. upon bills or notes payable to bearer only; particularly, in the case of *Nicholson v. Sedgwick*, P. 9 W. 3, in C. B. mentioned in 3 Salk. 69, but best reported in 1 Ld. Raym. 180.

*Hinton's case*, in 2 Shower, 235, M. 34 C. 2, B. R. [1521] (though loosely reported) is on the plaintiff's side as far as it goes. It is plain that the plaintiff Hinton brought the action as bearer: and the case fully proves "that the action would lie, if the plaintiff came by the bill of exchange honestly and on a valuable consideration;" this being Lord Chief Justice Pemberton's general allegation.

As to the case of *Horton v. Coggs*, reported in 3 Lev. 299—the reason given why the custom "to pay to the bearer" is too general, (viz. "that perhaps the goldsmith, before notice by the bearer, had paid it to Barlow himself,") is a bad one.

The case of *Nicholson v. Sedgwick* (or *Seldnith*, as it is called in 3 Salkeld) was exactly like the case of *Horton and Coggs*: and the Court agreed, "that the action could not be brought in the name of the bearer; but ought to be brought in the name of him to whom the note was made payable." But the reason there given is not a sufficient one: it is this, "that if the bearer should be allowed to bring the action in his own name it might be inconvenient: for then any one who finds the note by accident, may bring the action and recover." Whereas it appears by *Hinton's case*, "that he must intitle himself to it on a valuable consideration: for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." Neither does that reason (if it had been a better one than it is) clash with the present case; because this plaintiff did here pay a valuable consideration for the note.

And to urge the necessity of the action's being brought in the name of the person to whom the note was originally made payable would carry the matter too far: for that would prove that Bicknell himself could not have maintained the action; since the note is not made payable to him, but to ship "Fortune." Yet without doubt, Bicknell himself might have maintained the action. And this appears by a remark of Lord Raymond's, in reporting the case of *Tassel and Lee v. Lewis* (1 Lord Raym. 744,) "that if the party to whom the note is delivered, demands the money of the goldsmith



in reasonable time, and he will not pay it; it will charge him who gave the note : *Hopkins v. Geary*, H. 1 Ann. B. R. Guildhall."

It would be absurd indeed to say, "that the bearer could maintain an action upon the note that he came dishonestly by." Certainly, he can not : for he must prove, "that he came by it honestly."

As to the inference drawn \* from the case of *Morris v. Lee*, that these notes made "payable to bearer" were not "intended to be negotiable;" it is impossible to suppose such a thing : the contrary is most clear and apparent. This was one of the matters which the Act of 3 & 4 Ann. [1522] intended to remedy. The cases relied on by the defendant were prior to that Act : there is none, since the making of it, that can avail them. And there is no case at all, where it has been determined, that a note of this kind could be given in evidence upon a general indebitatus assumpsit for money had and received.

It is enough for the plaintiff that this note was negotiable. The bearer must prevail against the drawer in some mode of action; having come by it fairly and honestly. Since the Act the fair holder of a note payable to bearer may, by the express words of the Act, maintain an action against the drawer : otherwise, the Act would not put promissory notes upon the same foot with inland bills of exchange, as it professes to do. The words of it are "shall and may maintain an action for the same, in such manner as he might do upon any inland bill of exchange." And the interests of commerce require this determination. But there can be no sort of doubt on the latter count; as the note is evidence of the plaintiff's money being in the hands of the person who gave it.

Whether therefore this case be considered upon principles of law, prior to the Act of 3 & 4 Ann. or upon that Act, or upon what is passed since the Act, it will appear that the plaintiff ought to recover in this action : and consequently, the present verdict is a wrong one, and ought to be set aside.

And no inconvenience can happen, nor will any injustice be done thereby : for the matter will be open to evidence, and all facts may appear.

Lord Mansfield said the case of *Nicholson and Sedgwick* was urged by the defendant's counsel at the trial : and, not being apprized of the point in question, till it came on to be tried before him, he was not fully aware of the cases which differed from it. And yet he was struck, he said, very strongly that, upon general principles that case was not agreeable to law and justice : and he then thought that the reasons, upon which that case and the other authorities relied upon by the counsel for the defendant at the trial, were grounded, were insufficient ones.

That "of the goldsmith's having perhaps paid the money to the original payee himself, before notice from the bearer," can never hold : it cannot happen, in the course of business, that the money should be paid to the nominee, before notice from the bearer.

[1523] Nor was any satisfactory reason given, why an action might not be brought in the bearer's own name. The reason alledged, "that then any person who finds the note accidentally, may bring an action and recover," is insufficient; because the plaintiff in such action must prove that he came by it bona fide and upon a valuable consideration.

As to the necessity of bringing the action in the name of the person to whom the note was originally made payable;—it was impossible in the present case; because there was no person originally named as the payee : it runs "Pay to ship 'Fortune,' or bearer." However if there had been a person named, the reason would not hold : or the person so originally named may become bankrupt; or may be indebted to the drawer of the note, so as to give the drawer a right to set off such debt against the demand of the money due upon the note. So that if the Courts of Law should not allow the bearer to bring the action in his own name, there might be no relief at all. And it can never be supposed reasonable or legal, that the banker should have it left in his discretion or choice, to pay the money to one or the other as his fancy or inclination should lead him.

These thoughts occurred to me at the trial : and therefore I chose to take the opinion of the Court.

I left two things to the consideration of the jury. The first was, "whether the

plaintiff came to the possession of this note fairly and bona fide : " (which necessarily includes his not having notice of its being a lost note). The second was, " whether such draughts as this is, were, in the course of trade, dealing and business, actually paid away and negotiated, or in fact and practice negotiable : " and I then considered this, as leaving a plain fact to them, upon which they could have no doubt.

But I am now clearly of opinion, that I ought not to have left the latter point to them : for it is a question of law, " whether a bill or note be negotiable, or not."

It appears in the books, " that these notes are, by law, negotiable." And the plaintiff's maintaining his action, or not maintaining it, depends upon the question " whether such a note is negotiable, or not."

It appears likewise, " that the bearer of them may maintain an action as bearer, where he can intitle himself to them on a valuable consideration."

[1524] *Hinton's case*, in 2 Shower, 235, is this—" Case on a bill of exchange, against the drawer, (bill not being paid,) and payable to J. S. or to the bearer. The plaintiff brings the action, as bearer. And, upon evidence, ruled by the Lord Pemberton, that he must intitle himself to it on a valuable consideration, (though among bankers they never make indorsements in such case :) for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." (And it would be absurd, to indorse such bills as are made payable to bearer.)

*Crawley v. Crowther*, 2 Freeman, 257, Tr. 1702, in Chancery—" If a bill be payable to A. or bearer, it is like so much money paid to whomsoever the note is given ; that, let what accounts or conditions soever be between the party who gives the note and A. to whom it is given, yet it shall never affect the bearer ; but he shall have his whole money." So that the whole interest is transferred to the bearer.

1 Salk. 126, pl. 5, *Anonymous*, M. 10 W. 3, coram Holt Ch.J. at Nisi Prius at Guildhall. " A bank-bill payable to A. or bearer, being given to A. and lost, was found by a stranger, who transferred it to C. for a valuable consideration : C. got a new bill in his own name. Per Holt Ch.J. A. may have trover against the stranger who found the bill ; for, he had no title, (though the payment to him would have indemnified the bank :) but A. can not maintain trover against C. by reason of the course of trade ; which creates a property in the assignee or bearer." It is negotiable by delivery.

*Miller v. Race*, H. 31 G. 2, B. R.\* The holder of a bank-note recovered against the cashier of the bank, though the mail had been robbed of it, and payment was stopt ; it appearing, that he came by it fairly and bona fide and upon a valuable consideration. And there is no distinction between a bank-note and such a note as this is.

The Act of 3, 4 Ann. c. 9 puts promissory notes upon the same foot, throughout, with inland bills of exchange. And therefore whatever is the rule as to inland bills of exchange payable to bearer, must be so likewise as to notes payable to bearer.

In a case between *Walmsley v. Child*, 11th December 1749, in Chancery, where one of Mr. Child's notes, payable to bearer, was lost or stolen, and payment stopt by the true owner, who demanded that it should be paid to him ; [1525] Mr. Child refused to pay it without surety against the demands of a future bearer. The true owner brought his bill. Lord Hardwicke dismissed the bill, unless the true owner would find such security. And he went upon the principle, that no dispute ought to be made with the bearer of a cash-note, who comes fairly by it ; for the sake of commerce, to which the discrediting such notes might be very detrimental.

Upon looking into the reports of the cases on this head, in the times of King William the Third and Queen Anne, it is difficult to discover by them, when the question arises upon a bill and when upon a note : for the reporters do not express themselves, with sufficient precision, but use the words " note " and " bill " promiscuously. It appears, however, that there were different opinions about the manner of declaring upon them : Lord Ch. J. Holt got into a dispute with the city about it. He was of opinion, that the plaintiff could not declare as upon a specialty, (where the consideration could not be disputed :) but he all along agreed, that the plaintiff might declare upon an indebitatus assumpsit. The objection was, to bringing an action upon the note itself, as upon a specialty ; but I do not find it any where disputed,

\* Vide ante, p. 452.

that an action upon an indebitatus assumpsit generally, for money lent, might be brought on a note payable to one or order.

Great force arises from the Act of Parliament of 3 & 4 Ann. putting notes merely upon the foot of inland bills of exchange, and particularly specifying notes payable to bearer.

But upon the second count, the present case is quite clear, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use, may be brought by the *bonâ fide* bearer of a note made payable to bearer. There is no case to the contrary. It was certainly money received for the use of the original advancer of it: and if so, it is for the use of the person who has the note as bearer. In this case, Bicknell himself might undoubtedly have brought this action. He lost it: and it came *bonâ fide* and in the course of trade, into the hands of the present plaintiff, who paid a full and fair consideration for it. Bicknell and the plaintiff are both innocent. The law must determine whether of them is to stand to the loss, and by law, it falls upon Bicknell.

There ought to be a new trial.

Mr. Justice Wilmot—If a verdict be given without evidence at all, or against plain evidence, or against law, it ought not to stand.

[1526] The two matters left to the consideration of the jury, upon this trial, were "whether the plaintiff came by this note fairly and *bonâ fide*;" and whether such notes or bills as this is, are in fact and practice negotiated."

The latter is as plain and notorious, as that there is a Bank of England: no man can doubt it. The verdict is therefore against evidence, as to this point.

Probably, the jury took upon themselves to consider "whether such bills or notes as this is, were in their own nature negotiable." But this is a point of law: and by law, they are negotiable. Their verdict is therefore against law; and ought to be set aside. For, though when facts and law happened to be so complicated and intermixed that a jury can not help taking both into their consideration, it may be difficult or even impossible for them to avoid founding their verdict upon both; yet they are not at liberty to determine contrary to law: they ought to take their notion of law, from the direction of the Judge who tries the cause. Formerly, a jury would have been liable to an attain, for such a verdict: now, the Court control their verdicts, by setting them aside and granting a new trial.

As to the other matter, the manner how this plaintiff came by the note—it appears to have been taken by him fairly and *bonâ fide*, in the course of trade, and even with the greatest caution; he made inquiry about it, and then gave the change for it. And there is not the least imputation or pretence of suspicion that he had any notice of its being a lost note.

So that this verdict is clearly against law: for if the note be negotiable, and the plaintiff came fairly by it, he was intitled to recover.

Though both the claimants were innocent; yet, as Bicknell lost the note, and Grant took it in the course of trade, *bonâ fide* and upon a valuable consideration, Grant has the better equity. But if their equity were only equal, it is a known and a good rule, that "*melior est conditio possidentis*;" and that would be sufficient to turn the scale. If there was negligence on one side, and none on the other; that also would turn the scale: and if there be any on either side in this case, it should seem to be rather imputable to the person who lost it, than to him who thus took it in the course of trade.

[1527] If this bearer can not bring an action upon it, no-body can: for as it is not made payable to any particular person by name, no action can be brought in the name of such particular person.

But this is a negotiable note; and the action may be brought in the name of the bearer. "Bearer" is *descriptio personæ*: and a person may take by that description, as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract "to pay the bearer, or to the person to whom he shall deliver it," (whether it be a note, or a bill of exchange:) and it is repugnant to the contract, that the drawer should object "that the bearer has no right to demand payment from him."

Then upon the cases—*Hinton's case* in 2 Show. 235 is decisive: and it is agreeable to common sense and reason, "that if a man comes by such a note or bill, fairly and



on a valuable consideration, he should have a right to maintain an action upon it as bearer."

The reasons given in the cases that are opposite to this, are altogether unsatisfactory. Those determinations strike at this great branch of commerce: if they were to prevail, they would put an end to all this species of it. Who would take a bill or note payable to one or bearer, if the person named in it might release it, or if a debt of his might be set off against it?

On the other hand, it is but just and reasonable, that if the bearer brings the action, he ought to intitle himself to it on a valuable consideration; and strictly to prove his coming by it *bonâ fide*.

Even before the statute of 3 & 4 Ann. Lord Ch. J. Holt himself thought, that an *indebitatus assumpsit* for money lent, or for money had and received, might be maintained upon such a note: and if it was a question antecedent to that Act, I should stand by that first case of *Hinton*, rather than the latter ones which differ from it.

But that statute was made expressly and on purpose to obviate these doubts.

However, if you would suppose it made to introduce a new law, and that such an action could not have been maintained before the making of it; yet it is the manifest and professed intent of the Act, to put promissory notes [1528] upon the same foot with inland bills of exchange: and it clearly means to make notes payable to bearer, liable to actions brought upon such notes as upon a specialty.

And no case having happened upon this head since the making of the statute, is a circumstance which shews that the statute was so understood, and that the true and sound construction of it is "that promissory notes should be put upon the same foot with inland bills of exchange." If it should be construed otherwise, it would follow, "that inland bills of exchange would be upon a better foot than promissory notes," which would be contrary to the words and meaning of the statute.

This, now under consideration, is a negotiable instrument, which, I think, participates more of the nature of a promissory note, than of a bill of exchange. But taking it as a bill of exchange,—a bill of exchange is a promise "to pay the money, if the drawee does not pay it;" consequently, the payee may bring the action against the drawer.

In this particular case, if the bearer can not bring the action, who can? No person at all is named: it is "pay to ship 'Fortune,' or bearer." Therefore this particular case is out of all the cases cited. For, they say "that the action must be brought in the name of the person to whom the note is made payable:" but there is no such person in the present case.

It would be of infinite inconvenience, and would introduce the utmost confusion, if it were to be established "that the bearer of a bill or note made payable to bearer could not maintain his action upon it."

As to its being negotiable within the bills of mortality and no further; there is no colour for such a distinction: it must be negotiable every where, if it is negotiable at all.

Upon the whole, I think this to be a verdict against law; and am of opinion that it ought to be set aside.

Mr. Justice Yates delivered his opinion much to the same effect; and clearly held the verdict to be against law.

It was not within the province of the jury, to determine upon the negotiability of this note: it was a question of [1529] law, not of fact, "whether such a bill or note was or was not negotiable."

And nothing can be more peculiarly negotiable than a draught or bill payable to bearer; which is, in its nature, payable from hand to hand, *toties quoties*.

And he was of opinion, that an action will lie for the bearer of such a bill.

The reasons given against it, in the cases which have been cited by the defendant's counsel, are not at all satisfactory.

It had been doubted, it is true, "whether that species of action where the plaintiff declares upon the note itself as upon a specialty, was proper:" but here is a count upon a general *indebitatus assumpsit* for money had and received for the plaintiff's use. The question "whether he can maintain this action," depends upon its being assignable, or not. The original advancer of the money manifestly appears to have had the money in the hands of the drawer: and therefore he was certainly intitled to

bring this action. And if he transfers his property to another person, that other person may also maintain the like action. Whoever has money in the hands of another may bring such an action against him. This appears from the determination of the case of *Ward v. Evans*, reported in 2 Ld. Raym. 930, where not a shilling of money had passed between the plaintiff and defendant; and yet Holt and Powell both held, "that an indebitatus assumpsit for monies received to the plaintiff's use, properly lay." In the present case, the drawer had money in his hands belonging to Bicknell; and Bicknell must be considered as having delivered this instrument to the plaintiff Grant; which is tantamount to an indorsement. (A real indorsement of a note payable to bearer would have been absurd.) The delivery of it must indeed be proved: and the circumstances of the present case do amount to a proof of a delivery of it to the plaintiff. And there is no doubt about his having come by it fairly, *bonâ fide*, and on a valuable consideration.

There would be great inconveniences, if such an action as this is, might not be brought by the bearer. If no action could be brought but in the name of the person to whom the bill or note was originally made payable, that person might release the action; or a debt due from him might be set off against it, in account; and so the true owner of the note might lose the whole or part of it, though it was transferred to him upon a valuable consideration.

[1530] As to the notion of its being negotiable in London, and not elsewhere, there is no foundation for such an imagination. It must be equally so out of London, as in London: and it is just the same as a bank-note.

Upon the whole, I think the jury have done wrong: and therefore the verdict ought to be set aside.

Per Cur' (unanimously and clearly)

Rule made absolute (for a \*1 new trial).

REX *versus* JUSTICES OF PEACE FOR WILTSHIRE. 1764. [S. C. 1 Bl. Rep. 467.]  
Presentment of highways by justices on view traversable.

On Saturday the 2d of June last, Mr. Thurlow shewed cause why a writ of mandamus should not issue, directed to the justices of the peace for the county of Wilts, commanding them to receive and proceed upon a traverse to a certain presentment made by a justice of peace upon view, against the inhabitants of the tything of Connock in the same county, for not repairing a highway within the said tything.

The cause shewn by Mr. Thurlow was, that, as this was a presentment in the sessions made by a justice of peace upon his own knowledge "that the highway was out of repair," a general traverse could not be admitted: for though such a presentment by a justice of peace upon view be traversable as to all other points, yet it is conclusive so far as the view and knowledge of the justice goes; and the fact of its being out of repair can not be disputed. Consequently, though a special traverse ought to be received, a general one ought not.

This power of presentment by any one justice upon his own proper knowledge, "of any highway not being well and sufficiently repaired and amended," is given by 5 Eliz. c. 13, § 9, which refers to 2, 3 Ph. & M. c. 8. And 3 W. & M. c. 12, has also a relation to the same subject.

And it has been holden, "that the party against whom such a presentment is made, can not take a traverse to the want of repair of such highway."

Keilway, 34 a. Dalton, c. 26. Crompton, 110, (not 131, as it is cited by Hawkins). Hawkins's P. C. lib. 1, c. 76, [1531] § 72, p. 217, (who acknowledges this, though he does not enter into the reason of such an exposition of the clause. Dyer, 13 b. p. 64).

And in the case of \*2 *The King against The Inhabitants of Hornsey*, in B. R. Lord

\*1 The plaintiff, upon such new trial, recovered the money.

\*2 See this case in 5 Reports; viz. 4 Mod. 38. Trin. 3 W. & M. 1691. Holt, 338. S. C. of the same term. 12 Mod. 13, S. C. of the next term, M. 3 W. & M. 1691. 1 Shower, 270, of Trin. 3, and 291 of M. 3 W. & M. Carthew, 212, of a later term than any of the others, namely, Hil. 3 W. & M. 169½. Not one of these five reporters say what became of the case, excepting that Shower, in p. 291, says, "Per Cur. ordered to stay." Note, three of the first four represent even Holt himself to say "that the defendant may traverse." The words here cited by Mr. Thurlow are taken from Carthew's report of the case.

Ch. J. Holt held, that where a justice of peace presents a highway upon his view, to be out of repair, there the parties are estopped to plead "that it is in repair." It is true indeed, that the other Judges were against him; and held, "that the parties might traverse the non-repairing, though the presentment was on view."

Mr. Dunning, contra, argued in support of the rule, that the justices were obliged to receive the traverse generally; and that the defendant had a right to traverse the ways being out of repair, notwithstanding that the presentment was made by the justice upon his own view.

The words of the 5 Eliz. c. 13, § 9, are that "every justice of peace shall have authority, upon his own knowledge, in the open sessions, to make presentment of any highway not well and sufficiently repaired and amended, &c. And every presentment made by any such justice of peace upon his own knowledge as is aforesaid, shall be as good and of the same force, strength and effect in the law, as if the same had been presented, found and adjudged by the oath of twelve men."

It can therefore be no more than equal to an indictment, or to presentment by twelve men on their oaths: both of which are traversable in all points. The traverse must apply to the thing presented: and that is the want of repair. It is traversable in the same manner as indictments for forcible entries, or for trespass: that is in all points.

Serjeant Hawkins's own opinion is in point, against the old exposition of the clause; which (by the way) is not to be found in the books referred to in his margin: †<sup>1</sup> the statute expressly saves to every person that shall be touched by any such presentment, "his lawful traverse to the same presentment," as "he might have upon any indictment of trespass or forcible entry, by the laws of this realm, before the making of that statute:" and, as the serjeant thinks, it is clear, "that every defendant to any [1532] such indictment may traverse the whole matter alledged against him." Therefore he ought to have the same benefit, in the present case.

A coroner's inquest finding a person *felo de se*, is traversable.

The Court thought proper to enlarge the rule, to the present Trinity term. For, it appeared, upon a discussion of the question, at the Bar, and on the Bench, and upon inquiry into the practice in different counties, that there had been a great variety both of opinion and practice about this matter.

Mr. Justice Wilmot said, that a notion had long prevailed, and seemed to be countenanced by the old books, "that a presentment made by a justice of peace, pursuant to 5 Eliz. c. 13, § 9, of a highway's being out of repair, could not be controverted as to the facts of its being out of repair;" and he knew that the late Mr. Justice Abney was of that opinion, and thought "that the statute had trusted the eye of the justice with the view of the repair:" but he did not know, he said, of any judicial determination that way. And he had always understood, that for about thirty years past, the notion and practice had been contrary: and for his own part, he understood such a presentment to be as traversable as an indictment. And the Act of Parliament puts it upon the same foot: for the word "adjudged" by the oath of twelve men, means nothing more than found by a grand jury. The words of this Act can only apply to the repair: and the traverse puts the fact of its sufficiency immediately in issue.

Mr. Justice Yates observed, that there is no jurisdiction in this kingdom, where a defendant can be convicted unheard. ‡<sup>2</sup>

And Lord Mansfield thought the reasons for its being traversable, to be very strong. The rule was enlarged.

And—Lord Mansfield now declared (generally and without saying more,) that they were all of opinion, that "a mandamus should go, commanding the justices to receive and admit a general traverse."

Rule made absolute.

†<sup>1</sup> See lib. 1, p. 217.

‡<sup>2</sup> *V. Rex v. Roupel*, Tr. 1776, 16 G. 3, B. R. presented at a leet for keeping a bawdy-house.



[1533] BADDELEY *versus* LEPPINGWELL. Friday, 6th, Monday, 9th of July, 1764. Intention of a testator to be collected from the whole of the will. [See 3 Durn. 359. 5 Durn. 14, 293.]

This was an action of trespass for breaking and entering the plaintiff's close called the Hop-Ground. The defendant pleads "not guilty;" and also a justification of his entry, under a grant in fee from Thomas Ashurst, Esq. lord of the manor of Hedingham-Borough in Essex, made to him on 10th December 1761, by his steward, at a court-baron; to hold the said close to him and his heirs, by copy of court-roll, according to the custom of the manor. The plaintiff, in her replication, admits that Thomas Ashurst, Esq. was lord of the manor of H. and was seised in fee of the close: but alleges that at a court of the said manor holden upon the 3d of July 1754, he made a prior grant of it to the plaintiff and one Ellen Baddeley her sister; to hold in coparcenary, by copy of court-roll: and that Ellen died; and thereupon, at a subsequent court, the lord granted her moiety to the plaintiff in fee, and she was admitted thereto on 25th June, 1756, and so became sole seised. The defendant, in his rejoinder, alleges, that the lord had made a former grant to Thomas Ives, in fee; who died; and the premises thereupon descended to Thomas Ives, his nephew and heir; who conveyed the same to him the defendant, and traverses the grant alledged in the replication to have been made by Thomas Ashurst, Esq. to the plaintiff and her sister Ellen Baddeley, in manner and form as in and by the replication is alledged. And upon this traverse of the grant alledged in the replication, issue is joined.

The cause was tried at the Essex Assizes, before Mr. Justice Bathurst: and a special case was stated to the following effect.

The trespass being proved, upon the first issue taken upon the plea of not guilty, the case (upon the second issue) appeared to be—

That Thomas Ives was seised in fee of the place where it was committed; and that he surrendered it to the use of his will, and then made his will, and died: which will was as follows—"In the name of God: amen. I Thomas Ives of Castle-Hedingham in the county of Essex victualler, being, &c. do make, &c. I give and bequeath unto Clement Boreham of Rowhedge in the said county of Essex victualler, the house I now live in, situate and being in Castle-Hedingham aforesaid, and called or known by the name or sign of the Cock, for and during the term of his natural life; he paying thereout [1534] yearly and every year, by half-yearly payments, forty shillings a year to Robert Boreham my grandson: and after the decease of the aforesaid Clement Boreham, to be equally divided to Robert Boreham, Sabill Boreham, and Jeremiah Boreham, the children of Robert Boreham deceased. Item, I give and bequeath my two copyhold tenements now in the tenure or occupation of Edward Twogood and Elizabeth Savill, widow, being in Castle-Hedingham aforesaid, to Sarah Boreham, the daughter of Elizabeth Boreham widow; she paying thereout forty shillings a year to her sister Elizabeth Boreham. Item, the forty pounds that my daughter Elizabeth Boreham aforesaid has of mine, I give to Anne Boreham and Mary Boreham my grand-daughters: to wit, 20l. a-piece share and share alike. Item, I give and bequeath to my brother John Ives 50l. and do also acquit him of a note I have under hand for 50l. more. Item, I give to the children of John Fardersworth that he had by his first wife, 15l. Item, I give to Sander Walford's three children fifteen pounds. My mind and will is, that what legacies I have herein given, shall not be paid till after the decease of me and my wife, and three months after. And lastly, I do hereby nominate, make and appoint my said wife, Clement Boreham aforesaid, and John Ives, executrix and executors of this my will. In witness whereof, &c. the 3d day of December 1740. Thomas Ives."

That the estate devised by the will of the said Thomas Ives to Sarah Boreham consisted of two cottages and the hop ground in question; and was, at the time of his death of the yearly value of five pounds and six shillings.

That at a court-baron holden for the manor of Hedingham-Borough on 4th April 1743, Sarah Boreham was admitted to the said premises, (prout the admission;) and made a surrender to the use of her will; and afterwards devised the same (prout the will;) and died.

That at a court-baron holden for the said manor on 17th June 1747, Elizabeth Boreham was admitted, (prout that admission).

That at a court-baron holden for the said manor on the 3d July 1754, the plaintiff and her sister Ellen were admitted to the premises in question, (prout that admission).

The defendant claimed under Thomas Ives, the son of John Ives who was brother and heir (according to the [1535] custom) to Thomas Ives the testator; and at a court holden on 10th December 1761, was admitted to the premises in question, (prout his admission).

The questions submitted to the Court were—

1st. Whether Sarah Boreham took an estate in fee, or for life only, under the will of Thomas Ives.

2dly. If she took an estate for life only, then whether the defendant could take advantage thereof, on the issue joined upon these pleadings.

Mr. Leigh argued for the plaintiff: Mr. Ashhurst, for the defendant.

Mr. Leigh insisted (upon the 1st question) that Sarah Boreham took an estate in fee, under this devise of the tenements "to her, she paying thereout forty shillings a year to her sister Elizabeth Boreham."

For where a testator lays such a charge upon the estate devised as may render it, by any possibility (even though not within probability) a burthen instead of a benefit to the devisee, in any year; the devisee shall take in fee: otherwise, indeed, if the payment is only directed to be made out of the rents and profits.

Now in the present case, Sarah the devisee may be a loser by the devise, unless she takes a fee: for, the annuity charged upon her is not restrained to Sarah's own life; but is a continuing annuity. And as the testator intended, that the annuity to her sister Elizabeth should continue during Elizabeth's whole life, he certainly meant to devise a fee to Sarah who was charged with the payment of it. And this intention with regard to the present devise is strengthened by his being explicit in the former devise to Clement Boreham "for and during the term of his natural life; he paying thereout yearly and every year 40s. a year to Robert Boreham:" whereas he adds no such restrictive words to this devise to Sarah.

He said it was not necessary to cite cases; because the principle is clear, (though they might differ in the application of it,) and all the cases prove it. However, he would mention one, in point: which was that of *Reed v. Hatton*, in 2 Mod. 25, a devise "to R. upon this condition, that he pay unto his two sisters 5l. a year:" and the houses were worth 16l. per annum. This was holden to be a [1536] fee: for, "if there be a possibility of a loss, (though not very probable that the devisee may be damnified,) it shall be construed a fee. If A. devise 100l. per annum to B. paying 20s. it is not likely that the devisee should be damnified; but it is possible he may." And judgment was given accordingly.

2d question—But supposing that we were to fail in this first point, yet as this is a mere possessory action, it is enough for the plaintiff, if she can destroy the defendant's title: it is not necessary, in a mere possessory action, for the plaintiff to set out a title, unless he is obliged to it by the defendant's setting out one in himself: which the defendant has not done in the present case. He says indeed in his rejoinder, "that the lord made a prior grant to Thomas Ives; whose heir conveyed to him." But this ought to have been specially pleaded: whereas, here, he has only traversed the lord's grant to the plaintiff; by which traverse of the grant, only the legal operation of the grant itself is put in issue; not the title of the plaintiff. He can not, upon this traverse, go into the title of Thomas Ives, or give evidence of any thing foreign and extrinsic to the point in issue. If he would have done this, he should have pleaded the matter specially. But upon the present issue, the plaintiff could not tell how to direct his evidence: for, the defendant might as well claim under any other person, as under Thomas Ives. The defendant could no more go into title, upon this traverse, than he could have done upon the general issue. In *Hobart, 72, Humberton v. Howgil*, issue was taken upon the seisin of Thomas Howgil; and the jury found that "Thomas had made a feoffment to John Howgil;" but added—"that it was made by covin, to defraud the plaintiff and other creditors." It was judged for the plaintiff: for, Thomas remained still seised, as to the creditors, notwithstanding the feoffment. But if the issue had been taken directly, "infeoffed or not infeoffed," it had been found against the plaintiff. For, in that case, he must avoid the feoffment, by covin especially pleaded; for, it is a feoffment, *tiel quel*: as, you can not plead "*non est factum*" generally, upon the Statute of Usury, or the Statute of Sheriffs. But here (says the book) the issue is general, "seised or not



seised by the feoffment ;” and therefore the covin may be given in evidence, when the feoffment is given in evidence. So in the present case, the issue being taken on the grant, it was enough for us, to prove the admission, as stated in our replication : which we did prove. If the defendant could have invalidated it, that ought to have been done by special pleading.

Mr. Ashhurst, contra.

[1537] 1st. The intention of the testator is indeed a general rule for the construction of wills, in cases where it is plain, and clear, and positive, and excludes every other implication : but an heir at law shall not be disinherited without an absolute necessary implication. Vaughan, 262, *Gardner v. Sheldon*.

It is true, that where the devisee is charged with the payment of a sum in gross, he shall have a fee, though the estate be not devised to him “and his heirs :” but if it be an annual payment out of the thing devised, it will not create a fee, without apt words ; because the devisee can not lose by the devise. This distinction is laid down in Cro. Car. 158, 159, *Ansley v. Chapman*, and in *Collier's case*, 6 Co. 16. And here the value of the thing devised is 5l. 6s. per annum ; and the charge is only 40s. per annum. So that the devisee may pay it out of the profits, and is sure to have no loss. And *Collier's case* is most expressly in point, “that this is but an estate for life.” But the very words of this will are as explicit as possible—“she paying thereout.” Which circumstance distinguishes this case from that of *Reed v. Hatton*, where the words only were “that he pay unto his two sisters 5l. a year ;” (not saying, “out of the profits”). Possibly, that case might have been so circumstanced, that the devisee stood a chance of being a loser : here she certainly could not. In the former devise to Clement Boreham, the testator expresses his intention “that it should be only for his life :” and the two clauses being exactly similar, must be construed both alike. There is nothing in this will, from whence it can be inferred that the testator intended that the annuity which Sarah is to pay to Elizabeth Boreham should continue during Elizabeth's life. The contrary seems rather to be implied : for, the testator gives a like annuity to his grandson Robert Boreham, in the same words, out of Clement Boreham's house which he has expressly devised to Clement for life only. And it does not clearly appear, that Robert Boreham, who was to have a share in the reversion after Clement's death, was the same person as Robert Boreham the annuitant.

2d question—It is objected, that upon this traverse, nothing but the effect of the grant can be controverted.

But the pleading in cases of copyholds is different from the pleadings in cases of freeholds. A copyholder has, in the eye of the law, only an estate at will ; and in pleading, he may alledge an admittance as a grant. But the lord is only an instrument : he can only transfer an estate [1538] according to the surrender, and according to his authority. He can not vary in person, estate, tenure, or in any other collateral points : if he exceeds his authority, his admittance is good only pro tanto. Coke's Complete Copyholder, p. 52, 53, § 41.

Now if Sarah Boreham was (as we say she was) only tenant for life, she then had no estate which she could devise at her death : but immediately upon her death, the heir of the testator Thomas Ives became intitled to the reversion. Consequently the admission of the plaintiff and her sister Ellen (mentioned in the replication) of the 3d July 1754, is in effect a grant of nothing. The defendant in his rejoinder therefore denies, that the lord then granted the estate in manner and form as is alledged by the replication ; and shews a title in himself, inconsistent with it. He was obliged either to admit that title, and derive under it ; or to traverse it. And having traversed the plaintiff's, he properly sets up his own. This admittance was not, in fact, a grant of the thing itself ; it is incumbent upon the plaintiff, to shew that it amounts to a grant, in point of law.

The case of *Humberton v. Howgil* in Hob. 72 is distinguishable from this case : for, there the feoffment was not void, but only voidable : it would operate between the feoffor and feoffee, though not to defraud creditors. But where the feoffment is absolutely void, it may be given in evidence upon a plea of non feoffavit : Bro. Abr. title General Issue, p. 73, expressly. So, if a bond is void, (as the bond of a feme-covert,) this may be given in evidence, upon “non est factum” pleaded : but not where voidable only, (as the bond of an infant). So here, the admission is a nullity ; it is no grant at all ; (for the party admitted had no right :) therefore the defendant may with propriety say, “that the lord made no such grant.”



As the plaintiff, being a copyholder, could not plead a title, but could only plead it as a grant from the lord, the defendant could only traverse the grant.

Mr. Leigh, in reply—

1st. Insisted that the charge of the annuity to Elizabeth might have continued longer than Sarah's life: and therefore the devise might have been prejudicial to Sarah, instead of beneficial, if it was to be construed only a life-estate. And he relied upon the case of *Ansley v. Chapman*, in Cro. Car. 157, (which, he said, proved strongly for him;) and on that of *Reed v. Hatton*, in 2 Mod. 25, and also now added another, *Lee v. Stephens et Al*, 2 Shower, 49, where a devise to James, conditionally, "that he shall allow to Nicholas, meat, drink, apparel, washing, and lodging during his natural life," was ad-[1539]-judged a fee. So the present devise was intended, he said, as a provision for both sisters; and it was not meant that the annuity should cease upon the death of Sarah: and it was payable out of the estate, not out of the rents and profits. In that case of *Lee v. Stephens et Al*, Pemberton took a diversity between those cases where the money to be paid was somewhat granted and secured before the death of the testator; and those where the charge is laid by the testator on the devisee.

2dly. The defendant could not put the plaintiff to shew any other title than the grant of the lord. In a possessory action, a defendant can not drive a plaintiff to shew a title, without first shewing one in himself.

The difference of pleading, in case of freehold and in case of copyhold, is only in point of form.

This grant of the lord is not void. And the defendant not having pleaded any bar to it, he can not give any in evidence. This grant cannot be compared to the bond or to the feoffment of a feme covert: for, they are absolute nullities: but this is not.

The case of *Humberton v. Howgil*, in Hob. 72, is in point.

Lord Mansfield was gone; and Mr. Justice Denison absent: and the other two Judges having some little doubt on the first point, though none on the second, took time till Monday to consider of it. And on Monday the 9th of July,

Mr. Justice Wilmot declared their opinion in favour of the plaintiff. He premised, that there was an apparent inconsistency in the state of the case, as it stands drawn up for the opinion of the Court; for, upon the face of the stated case, it appears that Thomas Ives the devisor left a daughter and grand-daughters; and that the plaintiff is grand-daughter to him; and that the title is in her as his heir at law, or at least can not be in the defendant as claiming under Thomas Ives as his heir at law: for, Sarah's mother, Elizabeth Boreham, was the testator's own daughter; and here is no mention of any custom to exclude females; nor did he ever hear of such a custom, he said, in any manor. And yet it is admitted upon the case, "that John Ives, the testator's brother, was his heir according to the custom:" and the defendant claims under him as being so. But if in fact he was not so, there seems to be an end of the defendant's pretensions.

[1540] However, two points are, by the case, submitted to the opinion of the Court:

1st. Whether Sarah Boreham took an estate in fee, or for life only.

2d. Whether (in the latter case) the defendant could take advantage of it, upon this issue joined upon these pleadings.

On the 1st point, he owned that he had, at first, had some doubt: but that doubt was removed.

The plaintiff, at the trial, derived her title under the will of Thomas Ives; who after having surrendered to the use of his will, devised to Sarah Boreham in fee, (as the plaintiff insisted:) which Sarah Boreham was admitted, and surrendered to the use of her will, and devised the estate to her sister Elizabeth Boreham in fee. Elizabeth married Baddeley; and had two daughters by him, viz. the plaintiff and her sister Ellen, who took as coparceners, and were admitted accordingly; and on Ellen's death, her moiety descended to the plaintiff; and she was admitted to it, and so became sole seised.

But the defendant insisted that Thomas Ives's devise to Sarah Boreham gave her nothing more than an estate for life: and consequently, she had no power to devise. And he makes his claim under the heir at law (as he is stated to be) of Thomas Ives the devisor.

The plaintiff's counsel insisted that the devise to Sarah Boreham must be construed to be a devise in fee: but even if it was not so, but only a devise to her for life, yet that the fact of the grant to the plaintiff and her sister Ellen was the only matter now in issue; and the defendant could not, under these pleadings, take advantage of the plaintiff's want of title.

The first question is the material point: and we are of opinion "that Sarah Boreham took an estate of inheritance."

The short of the case is, that Thomas Ives, being seised of a house, and of two copyhold tenements, and having a daughter and several grand-children, made his will, and devised the house to Clement Boreham for his life, he paying thereout 40s. a year to Robert Boreham the testator's grandson; and after Clement Boreham's decease, to be equally divided between Robert, Sabill, and Jeremiah [1541] Boreham, the children of Robert Boreham deceased, (who were his three grand-sons:) and he gives his two copyhold tenements to Sarah Boreham, she paying thereout 40s. a year to her sister Elizabeth Boreham. Then he gives 40l. to two grand-daughters, Anne and Mary Boreham, and makes several other bequests.

Mr. Justice Wilmot, after having thus stated the will, laid down this general position—"That the intention of a testator is to be collected from the whole of his will, ex visceribus testamenti; so as to leave the mind quite satisfied about what the testator meant: and as a will of lands must be in writing, such collection of the testator's intention must be founded upon the writing itself."

This is the principle. The only difficulty is upon the application.

Particular cases serve rather to obscure and confound, than to illuminate questions of this kind: and no case in the books exactly tallies with the present. Therefore the gentlemen who have argued this case have acted very properly in mentioning only a few; and have rightly put it upon the intention of the testator.

Now I collect that intention (he said) first, from the devise to Clement Boreham; and then, from the devise to Sarah Boreham.

He devises to Clement, expressly, "for and during the term of his natural life; and, after his decease, to Robert Sabill, and Jeremiah Boreham." But in the devise to Sarah, he omits the words "for and during her life:" which words it must be supposed he would have inserted, in case he had intended to give her only an estate for life; because he had just before done so, in the preceding devise to Clement. It is plain, that by giving it to her generally, without having any such restrictive words, as he had before added to his devise to Clement, that he meant to give her the absolute property: he meant to devise it ut bona et catalla: as a man unacquainted with the law might very naturally do. And his making no limitation over, in this devise to Sarah, is an additional and auxiliary proof of his intention to give it to her absolutely. But the material circumstance is the condition he has annexed to her estate, of paying an annuity to her sister Elizabeth Boreham.

It is objected, "that he has expressly directed the 40s. a year to her sister Elizabeth to be paid thereout:" and it is urged, "that this is equivalent to making it payable out of the rents and profits." And I think it is so. Therefore this is not to be considered as a charge [1542] of a payment of a sum of money in gross. But, by a subsequent clause, he gives 40l. (to wit, 20l. a-piece) to two other grand-daughters, absolutely. Therefore he probably meant that this grand-daughter Elizabeth Boreham should have her 40s. a year upon the same foot; and that the provision he had thought proper to make for her should be a lasting one, to continue during her life; and not, that she should be left to starve, in case her sister Sarah should happen to die before her:\* and consequently he must have intended that the annuity which Sarah was to pay to her sister Elizabeth should be an annuity during the life of Elizabeth. And if so, then it follows, that this charge of 40s. a year to Elizabeth is just the same thing as devising an annuity to her; though it is put in the form of a condition. And Mr. Ashurst very candidly admitted, that if this was an annuity for life to Elizabeth, it would make it a devise in fee to Sarah. And as this could not be effectuated without construing the inheritance to be given to Sarah, it raises a very violent presumption "that the testator intended her an estate of inheritance." He just mentioned, in delivering this part of his opinion, the case of *Shaw and Weigh*.

But the case that comes nearest to the present, he said, though not exactly up to

\* V. post, *Froymorton v. Holliday*, Friday, 1st Feb. 1765.



it, is that of *Read v. Hatton*, 2 Mod. 25, where the estate was given "upon this condition, that the devisee pay unto his two sisters five pounds a year:" and here, the words amount to a condition "that she pay her sister 40s. a year." Indeed that will did not direct it to be paid "thereout," as this does: but that was a devise upon a condition to pay the annuity; (for the words there printed in a different letter from the rest of the case, seem to be the very identical words of John Thatcher's will). And judgment was there given for the defendant: for that "the estate being limited to the devisee, and charged with payments to the sisters during their lives, doth plainly prove the intention of the testator was, that the devisee should have an estate in fee simple."

Mr. Ashhurst endeavoured to answer this case by that of *Ansley v. Chapman*, in Cro. Car. 157, where William Lock, being bound in an obligation "that 40l. should be paid annually to his wife during her life," made his will, and devised to his sons; and added, that his devise to them was to this purpose, "that they all shall bear part and part-alike, going out of all his houses and lands, towards the payment of my wife's 40l. per annum during her life, which I am bound to pay: and which of my sons refuse to bear their part, I will that he or they shall enjoy no part of my bequest given unto them; but my gift given unto them shall go to the rest of my well-willing sons."

[1543] The true answer to that case is, that the charge to the wife is not imposed by the will; but the will gives it an additional security: for, the testator stood previously bound to pay the annuity.

Mr. Ashhurst also contended, that the annuity payable to Elizabeth Boreham would determine upon the death of Sarah Boreham, the devisee; in the same manner as Robert Boreham's annuity would determine upon the death of Clement.

But Clement's death only changed Robert's annuity into an interest in a third part of the estate; for, Robert Boreham the annuitant upon Clement, and Robert Boreham one of the three reversioners after Clement's decease, seem to be the same person. But if not, yet still there is a great difference between the two devises. The devise to Clement was expressly for his life: the devise to Sarah had no such restrictive words. I think the testator did not intend that Elizabeth's annuity should drop with Sarah's life: \*1 if he had intended that, he would have expressed himself otherwise than he has done.

At all events, the plaintiff seems intitled to the estate.

On the 2d point—The case is extremely clear. It depends upon the nature of copyhold estates.

Formerly, copyhold estates were made tenancies at will; a middle estate between freeholders and villains: at length, they acquired stability, by custom. The lord is not intitled to his fine, till admittance: but the admittance is merely \*2 form. On a surrender of a copyhold, the estate remains in the surrenderer, till admittance. The lord, by the custom, has only a customary power to make admittance secundum formam et effectum sursum-redditionis; and therefore it is not like the case of feoffees to uses, at common law. And although the lord grant the land over by copy to another, this is all without any warrant: for, notwithstanding this, the lord may make admittance according to the surrender; and this shall be good; and he who is admitted shall be in, by him who made the surrender. The estate must be according to the surrender, and not according to the admittance. This is a known and common doctrine; and is laid down fully, in Coke's Copyhold Cases, 4 Co. 28 b.

The present admittance was upon a descent: for, the plaintiff and her sister Ellen held in coparcenary. The defendant could traverse nothing here, but the grant [1544] which the plaintiff had alledged in her replication. And if she was not heir, the admittance of her, as such, is void.

He then stated, at large, the case of *Humberton v. Howgil*, in Hob. 72, and observed that there is a material difference between a feoffment and a grant. In a feoffment, the livery is a material part, and transfers the possession. If another person was in possession, both the feoffment and livery would be void; even though the feoffment was by deed. And *Mr. Ashhurst's case* (cited out of Bro. Abr. General Issue 73,)

\*1 Vide post, see p. 1542, in margin.

\*2 V. post, 1958, *Noden v. Griffiths et Al.* 18th Nov. 1766, accord. [Actus legitimi non recipiunt modum. Branch 2, lin. ult.]



applies to this, "that where a feoffment is totally void, it may be given in evidence upon a plea of non feoffavit."

"Non concessit," puts the operation of the grant in question. If a man pleads a grant from the Crown under the Great Seal: and the other pleads "non concessit;" in this case the letters patent are confessed; but the effect and operation of them is denied: the effect of that issue of "non concessit" is, that the Crown had nothing in the land; or, that the tenements did not pass by the letters patent. So is *Hynde's case* in 4 Co. 71 b. and *Eden's case* in 6 Co. 15 b. expressly.

A grant without right is absolutely void.

If Sarah took a fee under the will, then the admission of the plaintiff in fee is good, and all is right: but if Sarah took only an estate for life under the will, then the grant to the plaintiff was void, and the grant to the defendant Leppingwell would be substantiated; he claiming under the heir at law of the testator; and Leppingwell would not, in that case, be a wrong-doer.

Therefore if it had rested on that, I should think that the validity and operation of the grant would have come in question upon this issue.

On the other hand, if she took an estate of inheritance (as we hold that she did,) this totally varies the case. For, then the plaintiff had a good title under her devise and the subsequent descent; and Leppingwell could have none under the heir at law: and possession alone would be sufficient for her to maintain this action against Leppingwell; though it would not have been so, in case the real title had been in Leppingwell.

Rule—That the postea be delivered to the plaintiff.

[1545] BIDLESON, ESQ. Administrator, &c. *versus* WHYTEL, ESQ. Tuesday, 10th July 1764. [S. C. 1 Black. 506.] No bail is requisite on error of a judgment in an action of debt on judgment.

Upon Monday the 8th of November 1762, the following question came before the Court, (upon an adjournment over from the preceding Trinity term;) viz. "whether the plaintiff in a writ of error brought upon a judgment obtained in an action of debt commenced in this Court, upon a former judgment obtained here by the administrator-plaintiff's intestate, in an action of debt upon a bond conditioned for the payment of money only, (which former judgment was confessed by warrant of attorney,) was or was not obliged to put in bail on suing out such writ of error; upon the statute of 3 J. 1, c. 8;" (for it was agreed not to be within the statutes of 13 C. 2, st. 2, c. 2, or 16, 17 C. 2, c. 8, which extends only to writs of error after verdict).

The rule was upon the administrator-plaintiff, to shew cause why the return of the writ of *capias ad satisfaciendum* issued in this cause should not be set aside, and the proceeding against the bail of the defendant stayed, with costs to be taxed by Mr. Owens: and in the mean time, further proceedings to be stayed.

The case was this, as to the facts—The administrator-plaintiff's intestate had brought an action of debt in this Court, for 340l. upon a bond conditioned for payment of money only; and obtained judgment for the penalty, by confession, upon a warrant of attorney given for that purpose; (so that there was no bail then put in;) and afterwards died. Then his administrator (the now plaintiff) brought a second action of debt, in this Court, grounded upon that former judgment obtained by his intestate: to which second action the defendant put in bail; and then pleaded "that the intestate had not bona notabilia, &c. and therefore the prerogative administration was void." This plea was over-ruled, on demurrer: and the administrator thereupon had judgment.

Upon this second judgment, the defendant brought the present writ of error; without entering into such a recognizance as is required by 3 J. 1, c. 8. The attorney for the plaintiff (the administrator) conceiving that execution was not stayed by this writ of error, for want of such a recognizance, proceeded to get the *ca. sa.* returned, and went on against the defendant's bail, in the same manner as if no writ of error had been brought. And the question was "whether he was or was not regular in so doing."

[1546] The words of 3 J. 1, c. 8, (intituled "An Act to Avoid Unnecessary Delays of Execution") are—"That no execution shall be stayed or delayed upon or by any

writ of error or supersedeas thereupon to be sued, for reversing any judgment in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract, sued in any of His Highness's Courts of Record at Westminster, or, &c. &c. unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, &c. shall first, &c. be bound, &c. by recognizance, &c. to prosecute with effect, &c. and also to satisfy and pay, &c. all and singular the debts, damages and costs upon the former judgment, and all costs and damages to be also awarded for the same delaying of execution."

Mr. Solicitor General, Sir Fletcher Norton, on behalf of the plaintiff in error, argued, that he was not obliged to enter into any recognizance, in the present case; and that the writ of error (when allowed) being a supersedeas at common law, the plaintiff's subsequent proceedings were consequently irregular, and must be set aside as being so: for, this was not within any of the four cases specified in 3 J. 1. He confined himself to this statute: for that it could not, he said, be within either 13 or 16 C. 2, because it was not after verdict. And he cited 2 Bulstr. 53, *Gilling v. Baker*, as an authority for him upon the reason of it: where Mr. Justice Doddridge says, "that debt for arrearages of an account before auditors is clearly out of this statute; for, this is a debt grounded upon record." Now, so is the present debt a debt grounded upon record.

He added, that this Statute of 3 J. 1 had been always construed strictly, and never extended by equity: and he urged, that there was the less reason for it in the present case, because an action of debt brought upon a former judgment is a hard and oppressive action, and ought not to be encouraged.

Therefore he prayed to make the rule absolute.

Mr. Stowe and Mr. Wallace, contra, on behalf of the administrator, (who was plaintiff in this Court, and defendant in error,) agreed that the case was not within the Statutes of 13 & 16 C. 2, because there had been no verdict: but they insisted, that the plaintiff in error was within 3 J. 1, c. 8. And that the plaintiff's proceedings were not stayed, for want of the recognizance which ought to have been entered into as is directed by that statute.

[1547] They said, that this was an action upon a contract; and that the practice was to enter into such recognizance, upon suing out a writ of error to reverse a judgment in an action of debt upon a former judgment; and they cited and relied on two cases; viz. 1 Lev. 260, *Sir Theophilus Buddolph v. Temple*, and Lucas, 281, *Hammond v. Webb*, B. R. Hil. 1 G. 1.

They denied, that this Act ought to be construed strictly and not equitably: and they denied that there was any vexation at all in this case: because, the original plaintiff being dead after the first judgment, the administrator was obliged to institute some process to revive it; and this method was safer than a scire facias which might have occasioned the defendant to run away, and then the plaintiff would have had no bail at all, as there was none in the first action, where the judgment was confessed.

Sir Fletcher Norton observed upon the case in 1 Lev. 260, that if it was not a contract in its original nature, it could not be made so by the judgment of the Court.

The Court desired to be informed of the practice; for they thought it a case that must very frequently occur: and they directed the Master to look into it.

To which end, it was, for the present, adjourned.

Upon Wednesday 26th January 1763, Lord Mansfield communicated to the Bar, and particularly to the counsel concerned in this case, that this matter had been considered by the Court, and been very carefully looked into during the recess, particularly by Mr. Justice Denison; and that it appeared to be a vexata quæstio; and had been differently determined, viz. in 10 Ann. B. R. "that there should be no bail: and in 2 G. 1, C. B. temp. Lord Ch. J. King, that there should be bail:" so that there were, upon the same point, contrary resolutions of the two Courts.

Therefore this Court intended now to consult all the Judges: because it is a very wrong thing to have different rules in different Courts, upon the same Act of Parliament. He said, that it had been agitated in C. 2 time; but not determined till 10 Ann.

Cur. advisare vult.

[1548] Lord Mansfield now delivered the opinion of the Court upon this case; declaring, at the same time, that the opinion of all the Judges had been taken upon it.



He premised, that there was no doubt but that, in the present case, the original action require bail. But "whether there ought to be bail on the writ of error brought upon the second judgment or not," there had been different opinions in the two Courts, of King's Bench and Common Pleas: the Court of King's Bench had been of opinion "that bail was not necessary;" the Common Pleas, "that it was." This Court held it not to be necessary, in a case between *Goodwin and Goodwin*,<sup>\*1</sup> in the 10th of Queen Anne: and this was on full consideration. But the Court of Common Pleas were of a different opinion, in a case which came before them in Lord Ch. J. King's time, between *Lepson and Anderson*, in the 2d of King G. 1, there had been judgment in that Court, in an action of debt on a mutuatus, brought there. An action of debt was brought upon that judgment; and the plaintiff obtained judgment in that second action. Upon that second judgment, a writ of error was brought: and the question before them was "whether there should be bail given upon bringing that writ of error." It was objected, "that the statute of 3 J. 1, c. 8, does not extend to writs of error brought upon actions of debt on judgments:" And it was urged, that the statute ought to be literally construed; and that the practice was so. The Court of Common Pleas held, "that the contract was the foundation of the whole; and that if bail might be required in the first action, then there ought to be bail given upon bringing the writ of error: and therefore they were of opinion, in that case, that bail ought to be given." And they took notice, that the practice was not settled; for, this Court did not, in such cases, require bail; but they did.

All the Judges now hold "that bail is not requisite, upon bringing a writ of error upon a judgment in an action of debt founded upon a prior judgment."

For they hold—1st. That the contract is extinguished by the first judgment. 2ndly. That a judgment is no contract, nor can be considered in the light of a contract; for *judicium redditur in invitum*. 3dly. Another reason why bail cannot be insisted upon is, that an action of debt upon a judgment in an action of a superior nature to an action of debt upon bond, or any of the other actions particularly specified in this Statute of 3 J. 1, and therefore shall not be included in it; agreeably [1549] to the reasoning used in the *Archbishop of Canterbury's case* in 2 Rep. 46 b. "That if the makers of the statute had intended that it should have extended to this action of a superior nature to those which are specified in it, they would have begun with it, and would have mentioned it prior to those of an inferior nature." 4thly. Another reason is, that this statute ought rather to be taken literally, than extended. There was a case of *Taylor v. Baker*, in M. 29 Car. 2, B. R. (reported in 3 Keble, 802,) where Holt, upon this statute, prayed bail in error upon a judgment given in an action of debt on judgment: but Mr. Justice Wild said, "that this statute extends not to executors, nor to judgments, but ought to be literally taken; especially, the practice ever since having been not to put in bail: and the enumeration is only of debts of an inferior nature."

If it should be thought strange, that bail should be required when the action was only upon a contract, and should not be required when the action is upon a judgment, which is of so much higher a nature;—the answer is, "that in the former case, the Legislature have required it; in the latter, they have not;" unless a judgment could be esteemed a contract, (which we think it can not).

This is therefore a *casus omissus*: and the statute is not to be extended by construction; because actions of debt on judgment are, in general, oppressive; though there may be some particular cases where they may fairly be accounted for.

For these reasons, all the Judges are of opinion, "that though in the original action bail was requirable, yet it ought not to be required on writs of error upon actions of debt brought on such judgments."

So that this point is now settled for the future.

The rule<sup>\*2</sup> therefore for setting aside the return of the *ca. sa.* and staying proceedings against the bail, must be made absolute; but not with costs.

V. post, 1566, (the first case of the next term, *Trinder v. Watson et Al.*).

<sup>\*1</sup> See S. C. but not S. P. in Viner's Abridgment, title Bail, letter I. p. 34.

<sup>\*2</sup> V. ante, p. 1545.



[1550] WILSON AND ANOTHER *versus* SMITH. Tuesday, 10th July, 1764. [S. C. 1 Black. 507.] Insurance free from average unless general does not extend to the damage received by the goods in a storm.

[Referred to, *Price v. Al Ships, &c., Association*, 1889, 22 Q. B. D. 591.]

This was an action on the case brought upon a policy of insurance, for the recovery of 56l. 19s. 8d. per cent. being the damage received by a cargo of wheat on board the "Boscawen," insured at and from Lancaster to Rotterdam: which wheat was valued, by agreement, at 30s. per quarter. The policy was in the ordinary form. The premium was five guineas per cent. And in case of loss, the assured to abate 2 per cent. And the assurers to be free from average under three pounds per cent. unless (a) general, or the ship shall be stranded.(b)

The policy was thus underwritten—

"N.B. Corn and fish are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent. and all other goods, free from average under three pounds per cent. unless general, or the ship be stranded."

Warranted well in port the 16th day of February 1760.

The defendant underwrote this policy for 100l. on 20th February 1760.

The defendant having pleaded the general issue, the cause came on to be tried at Guildhall, London, on the 15th of February 1764, before Lord Mansfield.

The ship, with her cargo, being wheat belonging to the plaintiffs, sailed from Lancaster the 21st of February 1760.

After her departure from Lancaster, and before her arrival at Rotterdam, to wit, on the 22d day of February 1760, sailing and proceeding on her voyage, she met with a violent storm, and was by and through the force of winds and stormy weather obliged to cut away and leave her cable and anchor, for the safety of the ship and cargo; and was also greatly damaged, and obliged to run to the first port (being Liverpool) to refit; and that the expence of refitting the ship amounted to 38l. 15s. per cent.

That the hatches of the said ship were not opened at Liverpool: but the ship, being refitted, on the — day of [1551] February 1760, sailed from Liverpool for Rotterdam with the cargo and arrived thereon the — day of February, and there landed her cargo of wheat.

That upon unloading the wheat, it appeared that it had received damage by the said storm, to the amount to 56l. 19s. 8d. per cent.

The single question was (upon the true construction and meaning of the words "free from average, unless general, or the ship be stranded,") "whether the plaintiffs can, under the circumstances of this case, recover in this action, for the damage of 56l. 19s. 8d. per cent." (the 38l. 15s. per cent. not being disputed).

On Friday 25th of May last, Mr. Dunning argued for the plaintiffs, the insured: and Mr. Morton, for the defendants, the under-writers.

Mr. Dunning's argument tended, in general, to shew that these words amounted to a condition; which condition would render it free from average, unless in two events, viz. a general average, or the stranding of the ship: but if either of these two events happened, then to be liable to average. Whereas Mr. Morton endeavoured to shew, that they ought to be considered as an exception only; viz. to be free from average in all other cases but these two.

Both agreed in this fact; "that a storm arose; and that the ship was obliged to cut away her cables and leave her anchor; and that the wheat was greatly damaged; and that the average loss on the wheat would amount to a large proportion per cent."

Neither side cited any common-law cases.

Mr. Dunning said, that this clause now in question as to its construction and meaning, was first introduced about the year 1749: before which time, he said, insurers were liable to every injury that happened to the goods insured. This clause, or memorandum was introduced, he said, to deliver the insurers from small averages; and was thought to be a better method of attaining that end, than adapting the

(a) If the word unless had not in this case been construed an exception but a condition, the insured would have been gainers by the ship being stranded

(b) *Magens* 1, v. 76. *Weskett* 244, 535. 7 *Durn.* 216, 220.

premium to the nature of the commodity, as it might happen to be more or less liable to perish or suffer ; (which method would have made [1552] the policy too much complicated, and which the Dutch had at first tried, but afterwards altered).

He said that both the insurers and insured ought to resort to the body of the policy ; from whence the meaning of the parties would appear to be "that no average under 3 per cent. should be demanded upon some commodities ; nor under 5 per cent. upon others ; and that corn and fish should be subject to no average at all, (as being more perishable and damageable commodities,) unless in one or two cases, viz. where there should happen a general one, or that the ship be stranded."

General average must arise from some act done to avert great danger, or some distress, where part is destroyed, to save the whole ; and therefore all ought to contribute.

Here was a general average, within the true meaning and intention of this policy. Ordinances of France, 1681, lib. 3, c. 7, p. 81. Here, one of the events has happened ; namely, a general average : and therefore the warranty "free from average" can not take place at all, in this case.

Mr. Morton argued that the meaning and intention of this policy was, that the insurers should not be answerable for any partial loss or damage to the goods insured.

The words in question carry a plain and obvious sense ; and are an exception out of the contract. Their construction stands upon its own bottom.

A general average is a general contribution of the owners of the goods on board, (where part is destroyed, to preserve the whole,) in proportion to their concern. If another man's goods had been thrown over-board to save the whole cargo, the owners of the wheat must then have been liable to general average, in proportion to the value of their wheat. If the ship had been stranded, the insured might have abandoned. Upon a general average, the insurer stands in the place of the owner of the goods : and upon a total loss, he is intitled to what may be saved. An average is a contribution by non-sufferers, towards the loss of those who have suffered for the preservation of the whole. But there is nothing in the present case that can render the insurers liable to an average of 57 per cent. on this wheat thus insured by them. They are liable only to a general average arising from the loss of the cable and anchor : they can not be liable to a double general average.

Mr. Dunning, in his reply, observed, that this could [1553] not be considered as an exception ; because it was not part of what had been before specified.

*Uterius concilium.*

This case was argued a second time, on Tuesday the 26th of June 1764, by Sir Fletcher Norton (Attorney General) for the plaintiffs, and Mr. Serjeant Burland for the defendant.

Sir Fletcher, first observing that, strictly, the plaintiffs would be intitled to recover upon the general average, yet acknowledged that the question meant to be left to the Court turned only upon the construction of the words N.B. at the bottom of the policy, "free from average, unless general or the ship be stranded."

And he contended, that the true construction must be this—"That wherever there is a general average, or in case the ship be stranded, all other partial averages should (if either of those two events happened) be let in, upon these perishable goods ; just as if there had been no clause of freedom from average, at all." Such clause meant nothing more, he said, than to guard the insurer against such inherent loss as might arise from the nature of the commodity insured. It means, that the insurer shall be free from all such petty losses too, as necessarily arise in the course of the voyage.

But it can never mean to discharge the insurer from special injuries by storms and winds, or from all average-losses arising within the ordinary perils of the voyage ; or that, where there is a general average which the ship, freight and cargo must all be contributory to, he should only be liable to that, be it ever so trifling and inconsiderable. For this would be no insurance at all : the under-writer would, according to this narrow construction, run little or no risque, upon an insurance of perishable goods.

He asserted, that the practice of merchants and the determination of Courts of Justice were (both of them) agreeable to the construction that he contended for : and moreover, that the premium taken upon these insurances bore proportion to this greater risque.

He mentioned a case before Lord Ch. J. Ryder in 1754, between *Cantillon and*

*The London Insurance Company*-[1554]-ny, upon an insurance of corn, with such a clause as this is: and, the ship being stranded, the plaintiff (the insured) recovered an average loss of about 80 per cent. For Lord Ch. J. Ryder and a special jury looked upon this as a condition; and that by the ship's being stranded, the insurer was let in to claim his whole partial average-loss. After which determination, that company (he said) had altered that clause in their insurances, by omitting the words "or the ship be stranded."

Where the ship is stranded, the damage may happen to be such as would render it impossible to distinguish how much of it arises from the stranding of the ship; and how much of it from the perishable nature of the commodity.

Mr. Serjeant Burland, contra, on behalf of the defendant, contended, that these words were to be construed as an exception, not as a condition: the insurer is not to pay any average at all, unless in case of a general calamity. It is a general discharge from all average whatsoever, except in the two cases particularly specified: (which two specified cases are quite distinct and unconnected).

The general contribution, and particular average have no connection with each other.

The stranding of the ship is considered as a total loss: and the insured may abandon.

He alledged, that the premium was paid in proportion to his construction; and not to Sir Fletcher's.

Sir Fletcher, in reply—With regard to the premium—The premium here taken was adequate to the common and ordinary premium: therefore so also ought the risque to be. Whereas, upon their construction, the under-writer would be upon a better and more advantageous foot, upon insuring perishable goods, than upon insuring bale goods, though the premium he receives on each is the same.

Here is a connexion between the average-loss in particular, and the general average: for, the same storm that occasioned the general average, was also the occasion of the particular damage.

Thus far indeed is true, but no further; "that we could have had no claim to any average at all, unless one of [1555] two specified cases had happened." But as one of them has happened, we are thereby let in to claim particular average.

The case was ordered to stand over for the opinion of the Court.

And on this 10th of July 1764—

Lord Mansfield delivered it, to the following effect.

After having stated the case, he repeated the observation and argument insisted upon by the counsel on the part of the plaintiffs, "that the warranty to be free from average ought only to take place, if neither of the two specified events should happen: but if either of the two specified events should happen, (if either the ship should be stranded, or any thing should happen which created a general average,) then the warranty to be free from average was thereby discharged." For it was argued and insisted upon, by them, that the words were in the nature of a condition.

But they are not to be construed as a condition, in the sense that the counsel for the plaintiffs would have it understood.

Policies of insurance, according to their present form, are very irregular and confused: an ambiguity arises in them from their using words in different senses; particularly, in the use of this word average.

It is used to signify a contribution to a general loss: and it is also used to signify a particular partial loss.

Sir Henry Spelman, in his Glossary, under the word *Averagium*, says, "*It is detrimentum, quod vehendis mercibus accidit; ut fluxio vini, frumenti, corruptio, mercium in tempestatibus ejectio: quibus adduntur vecturæ sumptus & necessariae aliæ impensæ. De averagiis mercium é navibus projectarum, distribuendis, vetus habetur statutum, non impressum, cujus exemplar apud me extat.*" (For my own part, I never met with that statute.)

Whether it be considered in one, or other of these senses,(c) it will not serve the

(c) According to 1 Magens, page 10, at the end of the note 73; and note that the form of the insurance in this case, only expressed what was always agreeable to the custom, in many other countries, and ever since 1749, in some instances at least, to the forms of insurances here.



turn of the plaintiffs, in the present case. For if it here signifies contribution, the insurer is to be free from contributing, unless where the contribution is general. If it signifies loss, then plainly it is warranted free from all particular losses. The insurer is liable to all losses arising from the ship being stranded, and in [1556] all cases where there is a general average: all other partial losses are excluded by the express terms of the policy.

The London Assurance Company, do, in all their policies, leave out this clause about the ship's being stranded; and only say, "free from average unless general."<sup>(d)</sup>

The word "unless" means the same as "except"; and is not to be construed as a condition, in the sense that the counsel for the plaintiffs would put upon the word "condition."

The words "free from average unless general," can never mean to leave the insurers liable to any particular average.

It is clear that the plaintiffs ought not to recover; and that the judgment ought to be for the defendant.

Judgment for the defendant.

HARKER ET AL. *versus* BIRKBECK ET AL. Wednes. 11th July, 1764. [S. C. 1 Black. 482.] Trespass and not case will lie for encroaching on a lead mine, though the plaintiff has no property in the soil above the mine, but only a liberty of digging. [See post, 1824 a. Co. Lit. 164 b. and post, 2832.]

[See *Low Moor Company v. Stanley Coal Company*, 1875, 76, 33 L. T. 444; 34 L. T. 186; *Sutherland v. Heathcote* [1891], 3 Ch. 518; [1892], 1 Ch. 475.]

This was a special case from the last Lent-Assizes for the county of York. The verdict was given for the plaintiffs: but

There was a rule, by consent, "that the verdict should be subject to the opinion of this Court; and if that opinion should be for the plaintiffs, then they were to be at liberty to proceed upon it; if for the defendants, then the verdict to be vacated, and instead thereof, a nonsuit returned."

It was an action of trespass upon the case; wherein the plaintiffs declare, that whereas they were and still are lawfully intitled to and ought to have and enjoy the sole liberty and privilege of digging for, getting and raising lead ore, and taking the benefit thereof, within a certain place or plat of ground lying and being in Whitaside, east of the old field called Grena Field, bounded, &c. as is particularly stated in the declaration; the defendants well knowing the premises, but intending to injure the plaintiffs in this behalf, and to deprive them of all the benefit and advantage of getting and raising lead and lead-ore within the said place or plat of ground within the limits above described, and whilst the said plaintiffs were so lawfully intitled to get lead-ore there as aforesaid, did sink for, raise and get a great quantity (to wit 100 ton) of lead-[1557]-ore within the said place or plat of ground within the limits above described, of the value of 200l. and took and carried away the same, and converted and disposed thereof to their own use: whereby the said plaintiffs were deprived of the benefit and advantage which they might and otherwise would have made of their said liberty and privilege.

There was another count, containing the like recital, and charging the like facts of sinking for, raising and getting a great quantity of lead-ore within the said plat and within the limits above described; but omitting to charge taking, carrying away and converting it to their own use; which count lays this as an interruption to the plaintiffs, in the exercise of their said liberty and privilege there, of digging for, getting and raising lead-ore; and thereby depriving them of the benefit and advantage which they might and otherwise would have made of their said liberty and privilege.

The defendants pleaded the general issue, "not guilty;" and thereupon issue was joined.

The case stated and reserved for the opinion of this Court was—

That Mrs. Moore, as executrix of her husband, was solely intitled to the mines and

(d) This is contrary to 1 Magens, page 10, at the end of the note there, where the practice of the London Insurance Company is said to be contrary to what is here mentioned.

veins of lead and lead-ore within the limits mentioned in the declaration, for a term of years yet to come. That she had no interest in the soil, but for the purposes of digging and searching for lead and lead-ore and working the said mines.

That she employed one Rosewarne, as her agent : and that he, on her behalf, and the plaintiff Harker, on behalf of himself and partners, signed a writing upon plain paper without stamps, in the following words—"16th June 1761. Memorandum. — Mr. Thomas Rosewarne, agent to Mrs. Frances Moore, doth let or set to John Harker and partners, to raise lead-ore in a plat of ground lying and being in Whitaside, east of the old field called Grena-Hill. This plat of ground begins at a gill called or known by the name of Long Gill ; and from Long Gill Head to Pickerstone Rigg, which is the south-west boundary adjoining to the Duke of Bolton : the north-east boundary of this plat of ground begins at a gill at the west end of Birks pasture, known by the name of Will Anton Gill Head, and from Will Anton Gill Head, to a boundary called or known by the name of High Barle, adjoining to the Duke of Bolton ; which is the north-east boundary of this plat of ground. John [1558] Harker and partners do agree to pay to Mrs. Frances Moore, or her agent, every sixth pig of lead, both at the ore-hearth and slag-hearth : for which, Mr. Thomas Rosewarne doth agree to let the above partnership have the said ground the length of Mrs. Moore's lease she now has from the Crown : Mrs. Moore to find the above partnership a smelting-mill in good repair, to smelt the ore the partnership shall raise. Mr. Thomas Rosewarne or any other agent Mrs. Moore shall appoint, shall have free liberty or leave to inspect the said workings, whenever they please. The above partners not to cease working the above-mentioned ground for the space of two months ; unless hindered by water or some other unavoidable accident. Mrs. Moore is to carry one eighth part of this bargain."

It further appeared, that the plaintiffs have worked for and got lead-ore there ; and that the defendants had also dug, within the limits mentioned in the declaration, for several times, within the time mentioned in the declaration, to search for, and thereout had raised lead-ore : upon which the plaintiffs had brought this action against the defendants, for disturbing the plaintiffs in their privilege under the said writing.

The above writing was produced and read in evidence, without seal or stamp ; being the usual manner of making agreements for lead-mines there.

The defendants insisted, "that the present action can not be maintained : that if any action could be maintained in this case, it should have been trespass quare clausum fregit."

A verdict was given for the plaintiffs, with a shilling damage ; subject to the opinion of the Court upon the following questions ; viz.

1st. Whether the above action can be maintained.

2d. Whether the writing, not being stampt, could be given in evidence, to prove the plaintiff's right.

This case was first argued on Friday the 18th of May last, by Mr. Clayton, on behalf of the defendants, and Mr. Walker, on behalf of the plaintiffs ; and again, on Tuesday the 26th of June, by Mr. Morton for the plaintiffs, and Mr. Wedderburne for the defendants.

Mr. Clayton, for the defendants—

[1559] 1st point—The distinction between trespass quare clausum fregit, and trespass upon the case, is, that where the act is itself immediately injurious to the plaintiff, he must bring trespass : but where it is so only in consequence, case is the proper remedy. Here, the plaintiffs were in possession ; and if any injury was done them, it was an immediate injury to their possession. Therefore they ought to have brought trespass, and not \* case.

2d point—The plaintiffs could not claim any title, (either as lessees, or grantees or assignees,) but by deed ; and this deed ought to have been stampt ; and not being stampt at the time it was produced could not be received as evidence. 5 W. & M. c. 21, § 3. 9, 10 W. & M. c. 25, § 30. 12 Ann. c. 9, § 21. 30 G. 2, c. 19, § 1.

Mr. Walker, for the plaintiffs—

1st point—He admitted the distinction ; but argued, that the injury here was consequential only ; and therefore case would lie. And we do not bring the action

\* For this distinction, see 2 Ld. Raym. 1402, *Reynolds v. Clarke* ; and in *Haward v. Bankes, Esq.*, Mich. 1760. 1 G. 3, B. R. ante, p. 1114. [Buller, 79.] [3 Wils. 408.]

for breaking the soil, but for what was done in consequence of it. We could not bring trespass for breaking the soil: for, that is the lord's.

2d point—This is only a memorandum; not a lease: it is, at most, but a licence. And it is not necessary that it should be stamped.

Mr. Clayton, in reply—

1st point—The entering, digging and carrying away is an immediate trespass.

2d. This is a lease, though not under hand and seal: a lease may be good, without those circumstances.

Lord Mansfield—The whole question will turn upon what the agreement is: that will go both to the species of action, and to the necessity of stamping.

Ulterius concilium.

Upon the second argument, Mr. Morton, for the plaintiffs insisted—

[1560] 1st. That in fact, no such possession is stated to be in the plaintiffs, as can support them in bringing trespass vi et armis. For, the soil, was not in them, but in the lessor or grantor of Mrs. Moore: and Mrs. Moore's own grant to the plaintiffs is no lease, but only a licence to dig for lead-ore: the plaintiffs themselves would have been trespassers, if they had offered to meddle with the soil for any other purpose than that of digging for lead-ore. Therefore the plaintiffs could not have maintained an action of trespass for breaking the soil; nor for entering their mine, when it was not yet a mine at all: neither could they have brought trespass de bonis asportatis for taking and carrying away their lead. Mrs. Moore could not have distrained it for the rent reserved, if it had been left upon the place: neither could it have been taken in execution as goods and chattels of these persons who had this licence to search for it, in case there had been an execution against them. If an action of trespass would lie for the plaintiffs, in the present case, the defendants would be liable to two actions of trespass, for one single trespass only: for, Mrs. Moore might certainly bring trespass against them, as owner of the soil; or, if not Mrs. Moore, the person who is by law owner of the soil.<sup>(e)</sup>

However, it has never been determined, "that case will never lie, where trespass will lie." The former species of action is not excluded from every instance in which trespass vi et armis may be brought: on the contrary, the plaintiff may in many cases bring either one or the other at his election.

In Style 99, Roll. held, that for rescuing a prisoner out of the plaintiff's custody, he may have an action upon the case, or trespass vi et armis, at his election.

In 1 Ld. Raym. 187, *Shapcott v. Mugford*, against a parson for not taking away his tithes—the Court said, that "though it should be admitted that the plaintiff might have had trespass, yet that was no argument; because, in many cases, the law allows a double remedy." The case of *Thornton and Austen* was there cited and approved; and that of *Stodden v. Harvey*, in 2 Cro. 204, was likewise cited and considered: and yet they held as above.

He likewise cited the cases of *Pitts v. Gaince and Foresight*, in 1 Salk. 10, and *Reynolds v. Clarke*, in 2 Ld. Raym. 1399.

And concluded this point with comparing the property of the present plaintiffs to those uncertain properties which a man may have in the prima tonsura of grass,

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(e) In page 1557, it is stated that she was intitled to the mines of lead, but had no interest but for "digging, searching for and working the said mines," therefore it ought to be (as owner of the lead mines;) and as mines may be, and it appears from what is before stated, that in this case the lead mines in question were, a distinct property from the surface or the rest of the soil; the consequence is that either the plaintiff as owner and in possession of the mines or the general owner of the estate, or as such owner is sometimes called the owner of the surface, might in respect of their several interests maintain an action for trespass against any third person or stranger for digging lead-ore; for such digging and taking lead, is clearly a trespass to the owner of the lead-ore, and the digging at all or coming on the estate, is also a trespass to the owner of the estate, if it be not a digging for lead, by the person having the property of the lead mines; for when the same act is injurious to several persons, each person may have an action; as in 3 Lev. 209, where there is an instance that case may be maintained by him in reversion, and trespass by the tenant in possession for the same trespass.



or [1561] in an inheritance depending upon the future casting of a lot ; and other cases where trespass cannot be brought till the thing is severed.

2d. As to the stamp—He denied this writing to be such a sort of instrument as requires a stamp. It is not a lease, nor an indenture, nor a deed poll : it is only a memorandum, an agreement executory, about a mere contingent interest depending on the will of the plaintiffs, and their election whether they would or would not dig for this lead-ore.

Mr. Wedderburn, contra, for the defendants.

First point—1st. The plaintiffs certainly claim under a lease from Mrs. Moore, of these mines. She was actual lessee of them, from the Crown : and the plaintiffs are her lessees of them. There is no technical form of words necessary to constitute a lease. However, here are the technical terms “let or set” actually used ; and no essential form of a lease is wanting : an ejectment would have lain upon it. This is nothing like a contract with adventurers ; for here was a mine existing, and the rent made payable immediately. A mine is demisable, distinct from any right to the land. This must be more than a licence. A licence is personal : this interest is transmissible. Here is a rent reserved ; and the lessees are bound to continue working the mine, if once they begin at all to do so.

2dly. The plaintiffs were in possession. It is expressly stated “that they have worked for and got lead-ore there.”

3dly. The injury here complained of, is immediate, and not consequential. The act of the defendants which immediately affects the plaintiffs is “digging for the lead-ore within their limits and thereout raising it.” The loss the plaintiffs have sustained, is the value of the lead ; and there is no other consequence whatsoever. Trespass certainly lies for this lead, after the plaintiffs had reduced it into possession ; and so it is in cases of prima tonsura, and herbage. It is true that both actions may lie, where there is both an immediate and also a consequential injury done ; which was the nature of the cases cited by Mr. Morton : and therefore the plaintiffs therein, being intitled to both actions, must have their election to proceed in either. The cases of *Thornton v. Austen*, cited in 1 Ld. Raym. 188, is exactly similar to the present : and that of *Hills and Clerk*, there also cited, was the same point, and determined upon the same reason. And there is a reason for preserving a proper distinction of actions. The statutes concerning costs are, of themselves, [1562] sufficient to render this necessary : and the judgments are also different ; for, in the one, there is a fine to the King ; in the other, none. This ought to be trespass, and not case ; because the injury is determined by the Act itself ; and therefore it is not like cases of commoners, or estovers, and profits a prendre. And as to the defendants being liable to two actions for the same trespass, if an action of trespass vi et armis would lie :—they will in either case be liable to two actions : and it is indifferent to them, who are the plaintiffs in the two actions.

4thly. The distinction is settled “that if the plaintiffs might and ought to have brought trespass, case will not lie.”(f)

Second point—This is a lease, as is before shewn ; and therefore ought to be stampd. He cited two cases at Nisi Prius, viz. *Hall v. Down*, at Easter or after Hilary Sittings, 1735, before Ld. Hardwicke ; and S. P. Tr. 12 G. 1, before Ld. Raymond, *Moor v. Evelyn*, Tr. 12 G. 1, B. R.

The Court having observed, that though Mr. Wedderburn had called this instrument a lease, and Mr. Morton had called it only a memorandum or agreement executory, yet it seemed rather to be an assignment of Mrs. Moore’s whole interest, for and during her whole time : and that if it be a lease, yet it is for the whole of her term ; (g) and that the question would therefore be, “whether it is not necessary that such an assignment should be stampd,” and “whether such an assignment must not be by deed ;” especially where it is an assignment of interest under a lease from the Crown, which is upon record.(h)

(f) This makes it a trifling or no point.

(g) This is a contradiction in terms, for a lease for the whole term is an assignment and not a lease. Lord Raym. 99.

(h) The supposition that the memorandum should be construed either as an agreement or as a declaration of trust, seems not warranted by the words or the intention of the instrument ; for the words of it are apt words for a lease, and are in

Mr. Morton, in reply, took notice that Mrs. Moore might have (for aught that appears to the contrary,) other interests in the soil, under her lease from the Crown, besides this right of digging for lead-ore: she might have had such an interest in this right "to dig for lead-ore," as would pass without a deed, and though the original grant from the Crown must be under the Great Seal, yet an uncertain interest arising under it, may be conveyed and assigned by note or writing under the party's hand; 29 Car. 3, c. 5, § 3.

The plaintiffs here had no such possession as that an ejectment would lie upon it; they had no more than an interest, which they had liberty to pursue or to desert, at their election.

The injury done to them is the finding and taking away the lead-ore: the digging does not affect them, as they were not owners of the soil. Therefore it is a consequential injury.

[1563] Lord Mansfield observed a circumstance that had not been mentioned by the counsel on either side; viz. that Mrs. Moore appears to be \*<sup>1</sup> herself a partner for one-eighth of the lead: and she can neither let nor assign to herself.<sup>(i)</sup> So that the legal estate continues in her; and they come in as equitable partners.

Mr. Justice Wilmot—She lets to seven persons and herself.

The Court having taken time to consider this case—

Lord Mansfield now delivered their resolution, in favour of the defendants.

First—As to the nature of the action.—It appears that the plaintiffs were in possession of the mine: for, they had actually wrought it; and were not to cease working it, unless hindered by some unavoidable accident; and Mrs. Moore's agents were to have leave to inspect their workings. It is clear therefore, that they were in possession of it. And the injury done is a trespass. Therefore the proper action is an action of trespass. Whoever is in possession, may maintain an action of trespass, against a wrong-doer to his possession.

If there be a doubt about the extent of his possession, or what part he is in possession of, a writing relating thereto may be given in evidence, in maintenance of his action of trespass for a wrong done to that part which he is in possession of. The title may be material to be given in evidence, in order to maintain his possession as to that part, and to ascertain the extent of it. Therefore this \*<sup>2</sup> writing (whatever it might be called) might be proper to be given in evidence, in order to support the action. But it is no lease; because nothing is reserved to Mrs. Moore.<sup>(k)</sup> It is not

the present tense, viz. "doth let or set," and there is not any intention expressed, or that can be reasonably inferred that this memorandum was to be preparatory to a future lease; so that the instrument was in terms a lease, but in legal operation an assignment: for where a lessee makes a lease for the whole, it amounts in law to an assignment. Lord Raymond, 99.

A lessee for years might also before the Statute of Frauds have assigned his term by parol, and may now assign it by writing signed by him, though it be not a deed, as well as by deed. Lord Raym. 921. But in this case the thing leased seems to lie in grant. 10 Vin. 292, pl. 9, and if so then it seems that the lease could not be assigned but by deed, Br. T. 2, Grants, pl. 38, and then by conforming the general expressions by Lord Mansfield to the particular case before him, what he is here reported to have said that an assignment must be by deed, may be right. But qu. whether it can be in a Court of Law from thence inferred that it shall operate as an agreement or a trust; or whether it ought not in a Court of Law to be considered as void for others? And qu. if all assignments not by deed, which ought to be so must not be considered in the same light? Which seems too much for a Court of Law to do.

\*<sup>1</sup> Vide ante, 1558.

(i) S. P. 12 Mod. 688. 1 Rol. Abr. 827, (A) 1, n. or 10 Vin. 201 (A). 8 Mod. 304, acc.

\*<sup>2</sup> V. post, *Beck, ex dimiss. Fry v. Phillips*, 7th Feb. 1772, B. R.

(k) This is no reasoning at all, for a reservation is not essential to a lease: upon this there is a case in point as to a feoffment in Perk. sect. 203, and there is no difference as to this point between a feoffment and a lease at common law: so that Perk. sect. 203, is in effect in point. Shep. 267 is also expressly to the point, and the same may be plainly inferred from Lit. sec. 58, and many other authorities, that a reservation of rent is not part of the definition of a lease.

an assignment; because it is not by deed: an assignment must be by deed. It rather seems that the legal property continued in Mrs. Moore. So that it seems to be either an agreement for an assignment, or else a declaration of trust; (1) an equitable interest, leaving the legal property in Mrs. Moore. In a Court of Equity, the plaintiffs would be considered as being in possession from the time of the agreement: and here it is stated, in effect, "that they were in possession." This shews that the action ought to have been an action of trespass. And in an action of trespass, this writing might have been given in evidence: though, if it had been a lease, it could not have been given in evidence without being stampd.

[1564] We are all clear, that the action ought to have been trespass.

Let the *postea* therefore be delivered to the defendants: and let them be at liberty to sign a nonsuit.

MYLOCK *versus* SALADINE. 1764. [S. C. 1 Bl. Rep. 480.] Venue changed where apprehension of a partial trial.

On shewing cause why the venue should not be changed from the City of Chester to the county at large—

Lord Mansfield,\*<sup>1</sup> Mr. Justice Wilmot, and Mr. Justice Yates were all of opinion, that in transitory actions, the Court ought to change the venue, when it appears upon circumstances laid before them, that there is a probable ground to apprehend a fair, impartial or at least a satisfactory trial can not be had.

Accordingly, in this case there having been a trial in the city; and a new trial ordered because the verdict was against the weight of the evidence, and the damages excessive (if it had been warranted by the evidence;) and there being a strong proof given by affidavits, of a general prejudice in the city; they made the

Rule absolute.

REX *versus* PHILIPPS, LUCAS, AND GIBSON. 1764. No information can be granted at the instance of the Crown, the Attorney General having power to issue the same *ex officio*.

Mr. Attorney General having yesterday moved the Court for leave (in the ordinary form of these motions) to exhibit an information against several persons for a most gross misdemeanor in attempting to influence the jury returned to try Mr. Wilkes's cause, by sending them several pamphlets and inflammatory papers; and actually preventing Mr. Wood of Littleton, and Mr. Clitherow of Brentford, two of those special jurors who had been before summoned, from appearing, by sending an express to them in the middle of the night preceding the day of the trial, with a fictitious letter (signed "summoning bailiff,") acquainting them "that the trial was put off," (when in truth it was not put off, but did then come on)—

[1565] Lord Mansfield declared, that the Court would never grant an information upon the application of the Attorney General, in cases prosecuted by the Crown; \*<sup>2</sup> because the Attorney General has a right himself, *ex officio*, to exhibit one: and he may, if he thinks proper, summon the parties, to shew cause "why it should not be exhibited," before he signs it. This is not a case within the Act of 4, 5 W. & M. c. 18, "to Prevent Malicious Informations in the Court of King's Bench." And therefore his Lordship told Mr. Attorney General, "that he must use his own discretion."

(1) Qu. whether a lease or any conveyance, or grant at common law, made to the grantor and others, would not at law be a good lease or grant for the whole, to the others; like a grant to several, where some are capable and agree to it, and others are incapable or disagree; in which case if the grant be joint, the whole will vest in those who are capable, and agree to it: and in common cases there will be no trust; but this being the case of partners there would be clearly a trust for the grantor for the like share in this as in the other partnership effects; and qu. whether in all cases of a conveyance at common law to the grantor and others, there shall not be a trust, which it will be for equity to aid?

\*<sup>1</sup> Mr. J. Denison was absent; and had been so, during this whole term.

\*<sup>2</sup> V. post, p. 2089, 2090, *Rex v. Philips*, 30th May, 1767, accord.



Whereupon Mr. Attorney changed his motion, and prayed a rule to shew cause why an attachment should not issue against Lucas and Gibson (who were two of Mr. Philipps's clerks or agents,) upon the affidavits, which charged them with being concerned in this mal-conduct : which rule he obtained.

Against this rule for an attachment, they now shewed cause. The facts were certain : " whether the persons complained of were concerned in them," was the only doubt. And by their affidavits, they exculpated themselves, to the satisfaction of the Court : who therefore

Discharged the rule.

The end of Trinity term, 1764, 4 G. 3.

[1566] MICHAELMAS TERM, 5 GEO. III. B. R. 1764.

TRINDER *versus* WATSON AND ANOTHER. Wednes. 7th Nov. 1764. Qu. as to special bail on error in Parliament upon judgment in debt, upon recognizance in error is requisite. V. ante, 1545, *Biddleston v. Whytel*.

This was a writ of error returnable in Parliament, brought upon a judgment in this Court in an action in debt upon a recognizance in error. And the plaintiff in error in Parliament not having entered into a recognizance pursuant to 3 J. 1, c. 8, the defendant in the said writ of error moved for and obtained a rule for the said plaintiff in error to shew cause why the defendant in error should not be at liberty to sue out execution, for want of such recognizance.

Mr. Wallace shewed cause, for the plaintiff in error ; and insisted, that 3 J. 1, c. 8, does not require bail on bringing such a writ of error as this is. For, it only requires bail upon writs of error for reversing judgments in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract : whereas this writ is for reversing a judgment in an action of debt upon a recognizance ; which judgment is of a superior nature to any of the judgments specified in the statute. And it is an established rule, " that when a statute begins with specifying inferior means, instances, or persons ; no means, instances, or persons of superior nature or kind, shall be included." 2 Rep. 46 b. *Archbishop of Canterbury's case*. Consequently, a writ of error to reverse a judgment in an action of debt upon a recognizance is not within this statute. This rule was applied to cases arising on this very statute ; in *Taylor v. Baker*, 3 Keble, 802, and in *Biddleston v. Whytel*, last term.\* In Trin. 18, 19 G. 2, C. B. Barnes's notes, vol. 2, p. 161. " After an award of execution, against bail on a recognizance in error, a writ of error was brought by the bail, as to such award of execution. The plaintiff moved for leave to take out execution, for want of bail on the writ of error brought by the bail ; and obtained [1567] a rule to shew cause : which rule was discharged ; no bail, in this case, being required." So, in the present case, the action being brought upon a recognizance in error, as that was ; and this being a like rule with that ; it ought to be discharged, as that was.

Sir Fletcher Norton, (Attorney General) contra, for the defendants in error, argued, that this recognizance in error, upon which the present action was brought, was an obligation with condition for the payment of money only : and therefore, by the express words of this statute, " no execution shall be stayed or delayed upon any writ of error, sued for reversing the judgment therein without putting in bail." The statute does not confine it to bonds ; but speaks of " obligations with condition for the payment of money only." And this is an obligation so conditioned : it is conditioned, " to prosecute with effect, and to pay the debt, damages and costs upon the former judgment, together with costs and damages for the delay of execution." It is indeed conditioned to be defeazanced, in case the writ of error had been prosecuted with effect. But this writ of error has not been prosecuted with effect : it has been nonprosced for want of prosecution. And the recognizance thereby became an obligation conditioned for payment of money only. It was eventually so, from the first : and at the time when the action was brought, it was actually become so. It is true, that it was not an obligation " to pay money, in all events." But in the event that

\* V. ante, 1545. [And 1 Bosan. 249.]

has happened only money is to be paid: there is no alternative, "to surrender the principal." It is like the cases of writs of error brought upon judgments in actions on bottomree-bonds. On these bonds, the money is not absolutely payable in all events: but if the ship comes safe home, it thereby becomes an obligation for payment of money only; and then the Court will require bail on bringing a writ of error. *Pitt v. Coney*, 1 Sir J. S. 476, M. 8 G. 1, B. R. "Per Curiam—The contingency having happened, this is now, in every respect, a bond for the payment of money only: and therefore there must be bail." As to the case of *Bidleson v. Whytel*, it went off, he said, upon another foot. (See it, ante, 1545.) And as to the case in Barnes, 161, he said, it could not have been determined upon the reason there given; viz. "that no bail was in that case required."

Lord Mansfield said, he should have thought "that these cases ought to be liberally construed," as they arise upon remedial laws. But in that case of *Bidleson v. Whytel*, it appeared "that the determinations had been otherwise:" and we must not depart from settled [1568] determinations. In that case, the weight of authorities prevailed.

Mr. Justice Wilmot expressed himself to the like effect.

The Court ordered it to stand over, to inquire into the practice. And on the last day of the term, Mr. Attorney General moved to enlarge the rule: but the rule made upon that motion was never drawn up; nor does any thing further appear to have been done in consequence of it. So that the defendant in error probably gave up his motion, "to be at liberty to sue out execution."

WALKER *versus* PERKINS, Administrator. Tuesday, 13th Nov. 1764. [S. C. 1 Bl. 517.] Bond in consideration of seduction and future cohabitation void.

Sarah Walker brought an action upon a bond. Upon oyer being prayed, it appeared to be a bond from William Perkins the intestate, to the plaintiff, in a penalty. It recites, that whereas the above bound William Perkins (the intestate) and Sarah Walker had agreed to live together, therefore he had agreed to find her meat, drink, washing, and lodging, &c. and to leave her an annuity of 60l. a year, if he quitted her, or she outlived him: and if they had any child, he was to take care of and provide for it. But if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity.

The defendant pleaded, that this was an agreement between the plaintiff and his intestate, "to live together in a state of fornication:" and that such a bond made in pursuance and support of an agreement "to live together in fornication," is void in law.

In reply to this plea, the plaintiff alledged, that she was a virgin, and was seduced by the intestate; and in consideration thereof, this bond was given to her by the intestate; and that it was præmium pudicitiae.

To this replication the defendant demurred.

Mr. Blackstone, for the plaintiff, observed that the condition consists of two parts; one, "to live together in a state of debauchery;" the other, "to leave her an annuity:" the former part whereof, is void; the latter good. That suit may therefore well be upon the [1569] virtuous part, the paying her the annuity. For, it is agreed, in the case of *Chesman et Ux v. Nainby*, 13 G. 1, B. R. 2 Lord Raymond, 1459, and 2 Sir J. S. 744, that the position laid down in Hobart, 14 (in the case of *Norton v. Simmes*), "that the common law, having made that void that is against law, lets the rest stand;" and that where a bond is conditioned to do some things agreeable to common law, and others disagreeable to it; the breach may be assigned upon that part which is good.

And here præmium pudicitiae is a sufficient consideration.

Lord Mansfield—It is the price of prostitution, præmium prostitutionis: for if she becomes virtuous, she is to lose the annuity. It appears clearly, upon the condition, that the bond is illegal and void.

Judgment for the defendant.

REX *versus* BAPTIST REBORD. Thurs. 15th Nov. 1764. Special bail requisite on a popular action.

Action on 26 G. 2, c. 21, § 3, for a forfeiture of 200l. for having unsealed wrought silks found in his custody.

Upon shewing cause why the defendant should not be discharged on common bail, Mr. Wallace for the plaintiff, said, it had been objected "that this was a popular action."

But he answered, that the 8th section of this Act of 26 G. 2, c. 21, (on which this action was brought) expressly authorizes to hold to special bail: it gives a *capias* in the first process, specifying the sum of the penalty sued for; and directs "that the defendant shall be obliged to give sufficient bail, &c."

Mr. Stowe, for the defendant, objected, that though the Act gives a *capias*, &c. yet it is not positively sworn in the plaintiff's affidavit, "that the defendant has committed the offence:" it is only, "that he has cause of action against him for 200l. forfeited by him for so much unsealed silk, &c. found in his custody." This is making the plaintiff a judge of the offence. It ought to be positive, "that the defendant had committed the offence described in the Act of Parliament."

Cur'. It is positive enough: he swears "that he had cause of action against him for 200l. forfeited by him &c."

The Act does not require an affidavit at all.

Rule discharged.

[1570] EVANS, EX DISMISS' BROOKE Bart. *versus* ASTLEY, ESQ. ET AL. Friday, 16th Nov. 1764. [S. C. 1 Bl. 499, 521.] A devise to A.'s three sons in tail male, successively, remainder to all and every other son of A. without naming any estate, remainder for want of such issue to B. in tail male: the after born sons of A. take an estate in tail male. [See 6 Durn. 515. 1 Bosan. 254, 261, n. 1 Brown, 249, 250. 3 Durn. 85. 4 Durn. 49.]

[Referred to, *Surtees v. Surtees*, 1871, L. R. 12 Eq. 407.]

This was a special verdict in ejectment, of lands in several parishes in the county of Chester, found at the Summer-Assizes for that county in 1762.

It is stated, that Sir Samuel Daniel was, on the 19th of February 1762, seised of the premises in question; and being so seised, he, on that day, made his will, duly attested, and written with his own hand: in which will are contained the following clauses and provisoes, viz.—"And whereas I am at this time seised of a fee-simple estate in the County Palatine of Chester, in the several manors and townships of Over-Talby, &c. &c. Now, for preventing and quieting all disputes and controversies touching and concerning who shall hold and enjoy my said estate if I die without issue male or female,(a) I do, by this my last will and testament in writing, under my own hand and seal and published by me in the presence of the witnesses whose names are here written, give, grant, limit, devise, and appoint, all my said manors, lands, and tenements with their appurtenances, in Over-Talby, &c. &c. with their several and respective rights, members, and appurtenances, in the said county of Chester, and all other manors, &c. &c. and hereditaments whatsoever, of what kind or nature soever, wherein I have any manner of estate, situate, lying and being in the County Palatine of Chester, unto Samuel Duckenfield my godson and son of Charles Duckenfield of Mobberley in the county of Chester Esq. during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to Charles Duckenfield, another of the sons of the said Charles Duckenfield Esq. during his natural life, and to the heirs male of his body lawfully to be begotten; and for want of such issue, to John Duckenfield, another of the sons of the said Charles Duckenfield Esq. during his natural life, and to the heirs male of his body, lawfully to be begotten; and for want of such issue, then to every son and sons of the said Charles Duckenfield Esq. which shall be begotten on the body of Sarah his now wife: and for want of such issue, then to William Hulton [1571] of the City of Chester during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, then to Samuel Goldston, of East Ham in the county of Essex, my godson, for and during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, then to James Goldston, brother of the

(a) See 4 Burr. 2165. Cro. Car. 23.



said Samuel Goldston, during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to the right heirs of the said Sir Samuel Daniel for ever."

"Provided always nevertheless, and my express will and mind is, and I do hereby declare, that the estate hereby granted, devised and limited, of the premises, to the said Samuel Duckenfield and others as aforesaid, shall be upon this express condition, that if the uses and estates so granted, devised and limited to him or them and their descendants shall come to him or them and be in possession, that then and thereupon he and they and their descendants, to whom the premises shall come and be in possession, shall procure an Act of Parliament to be past in the first or second Sessions of Parliament, by virtue whereof he and they shall take and use my surname, and bear in chief the arms of the Daniels of Over-Tabley in Cheshire, where my family hath been very ancient: or, otherwise, the uses and estates so granted, devised and limited to them who shall refuse or neglect to take and use my name and arms in chief as aforesaid, to determine."

"I give all my books (except what given to my wife,) both at Tabley and Hollis-Street, in the county of Middlesex and parish of St. Mary le Bon, and all my family-pictures, and all other pictures (except what is given to my wife) at Tabley and Boxton, and all statues, clocks and bells, brewing-tubs, and brewing-vessels, and all vessels belonging to the cellar at Tabley, and all goods at Tabley after my wife's decease, and all the interest, title and remainder of years which shall be unexpired at my death, which I have in the lease from the Dean and Chapter of Christ-Church in Oxford, of the tithes of Over-Tabley and the moiety of the tithes of the parish of Rotherstone (being small tithes) in the county of Chester, unto Samuel Duckenfield aforesaid; and if he happen to die, then to the next in remainder, or any other that by this my will shall enjoy the estate hereby granted and devised: and my desire is, that my executors shall renew the said lease at every seven years end; that it may be kept in the possession of the family at Over-Tabley."

[1572] "Item, I give and bequeath my silver punch-bowl, and silver ladle, and marrow-scoop, and the two large silver decanters which were made of the silver of my two trumpets which I had when major of the horse in Ireland in 1690 and 1691, to the said Samuel Duckenfield; or, if he happens to die, to the next in remainder, or to any other that by this my will shall enjoy the estate hereby granted; and desire my executor to keep them for the family, as abovesaid."

N.B. There was a power, given to make leases; and also a power, to make jointures to the amount of 200l. per annum.

Samuel, John, and Charles Duckenfield, the three sons of Charles Duckenfield of Mobberley, all died without issue.

But Charles Duckenfield of Mobberley had a fourth son, named William, born after the date of the will; who became seised, and took the name and arms of Daniel, according to the directions of the will; and suffered a recovery, and then made his will; (under which will, the defendants claim).

William Hulston, and Samuel and James Goldston, (the other remainder-men,) died without issue male.

The lessor of the plaintiff claims as one of the right heirs of the testator Sir Samuel Daniel: viz. one moiety of the estate under a co-heiress; all the prior remainder-men being dead without issue.

The question was "what estate Sir William Duckenfield Daniel (the fourth son of Charles Duckenfield of Mobberley, Esq;) took, under this will of Sir William Daniel."

This case was argued on Tuesday the 3d, and Friday the 6th, of July last, by Mr. Blackstone, on behalf of the lessor of the plaintiff; and Mr. Eliab Harvey, on behalf of the defendants.

Mr. Blackstone contended, that he took an estate for life only.

He begun with laying down some general rules and principles concerning devises of land. They must be expounded agreeably to the intention of the testator, if such intention be not repugnant to the rules of law: and the intention of the testator must be collected from the whole will taken together. An estate tail shall not be rais-[1573]-ed by implication, unless it be a necessary one: a conjectural or merely probable implication is not sufficient ground for disinheriting an heir at law. If the testator's intention is dubious, the construction shall be in favour of the heir at law.

Upon this whole will taken together, there is no ground to suppose that the testator Sir William Daniel meant to give this devisee any thing beyond an estate for life. The restrictive circumstances attending his particular devises, and his care to preserve the estate in his name and family and in a precise prescribed condition, indicate quite the contrary to such a supposition.

It is not sufficient, to say, that "because the testator has given an estate tail to Samuel, Charles, and John, he must have intended the like for every other son of their father to be begotten on the body of his then wife Sarah." For, there is no appearance of any such intention. On the contrary, it would be more agreeable to his apparent intention, if those three should be continued only estates for life, to render these devises conformable to this. He cited Co. Lit. 42. *Skinner*, 385, 562, *Beveston v. Hussey*. *Skinner*, 339, *Middleton v. Swain*, and Shower's P. C. 207, *Swaine v. Fawcner et Al.*, S. C.

Nor will the subsequent words—"And for want of such issue, then to William Hulton," suffice to create an estate tail, where there was no estate before. *Vaughan*, 259, *Gardner v. Sheldon*. 2 *Vernon*, 546, *Cook v. Cook*. *Forrester*, 18, *Lord Glenorchy v. Bosville*.

Mr. Harvey, on behalf of the defendants, (who were the devisees of Sir William Duckenfield Daniel,) contended that the said Sir William Duckenfield Daniel, who was the fourth son of Charles Duckenfield, Esq; and born after the making of Sir William Daniel's will, must, upon the tenor of the said will, taken all together, and by the manifest intention of Sir William Daniel the testator, have taken an estate tail under it.

He said, it was plain that an estate tail was the least estate that the testator intended for him: and this he had barred by the recovery. But if he took a fee, then the remainder "to the testator's own right heirs" (under which remainder the lessor of the plaintiff claims) never took place.

He agreed to the three principles laid down by Mr. Blackstone; namely, "that devises are to be expounded, if possible, according to the intention of the testator; that [1574] the construction must be collected from the whole will taken together; and that the implication by which an estate tail is to be raised, must be necessary, and not merely conjectural or imaginary."

He said, the true rule of implications, was that which was laid down in the certificate of this Court in the case of *Robinson v. Robinson*,\* and affirmed by the Judges in the House of Lords, on 14th of February 1758, viz. when such implication is necessary "to effectuate the manifest general intent of the testator."

This gentleman intended to have his estate kept entire; and his name and arms preserved. He adopts the line of his eldest sister, who had three sons, with a probability of more. He insists rigidly upon their taking his name and arms: and gives heir-looms, books, pictures and furniture: and he meant to give his three nephews then in being (Samuel, John, and Charles,) no more than life-estates, with contingent remainders to their male-issue; though by legal construction of his words, they took estates-tail. But it is very certain, that he did not intend that any remainder-man should succeed to his estate, whilst any male issue of any son of his sister Duckenfield should remain in being. The estate therefore of this after-born nephew ought to be enlarged by implication; because such implication is absolutely necessary, to effectuate the manifest general intention of the testator.

The Court will therefore make a construction accordingly and will supply the proper words.

And as the proviso directs "that Samuel Duckenfield and the other devisees, and their descendants, shall upon their coming into possession, procure an Act of Parliament to take his name and arms;" and as it is clear, that he meant that these descendants should take his estate, as well as his name and arms; the Court needs only to supply the word "descendants," in this devise to the after-born son and sons; (which is indeed necessarily implied:) and then, (let the words "and for want of such issue" be applied either to Charles Duckenfield Esq; or to his every after-born son and sons,) it must be construed an estate-tail: for those words would be sufficient to create an estate tail in a will; and are rather stronger than the word "seed" or "children."

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\* V. ante, vol. 1, p. 38, (the certificate is at p. 50).



If the words "and for want of such issue," can be referred to the want of issue of the after-born son himself, there can then be no doubt but such after-born son took [1575] an estate-tail: for, a devise "to a man, and for want of heirs of his body remainder over; or, if he die without issue: or, for want of issue;" will create an estate tail, although there be no direct limitation of the estate. And the word "such" may refer to the issue of the after-born son or sons; and mean such sort of issue as that in default of which, from Samuel, Charles, and John, the testator had limited the estate to every after-born son and sons; that is, heirs male of the body.

He intended an estate for life only, to his three nephews that were in being: but he intended a different estate, some estate of inheritance, to his after-born nephews.

He could neither intend, nor would the law permit, that the after-born son should take successive estates for life: that would be contrary to the resolution of the case of *Humberston and Humberston*, 1 Williams, 332, where the Lord Chancellor declared an attempt "to make a perpetuity for successive lives," to be vain.

He could not intend that the 2d and 3d after-born sons should take in preference to the issue male of the first after-born son; and that they and they only should lose the benefit of his devise; and even that they should be excluded in favour of strangers, as the other remainder-men were. And it is merely accidental, that the present claim is set up by a right heir of the testator: for Hulton and the two Goldstons would have had the same claim, prior to him, if they had happened to live.

If it be asked "whether the after-born sons of Charles Duckenfield Esq: should have taken jointly, or in succession, in case there had been more than one;" the answer is—"in succession:" for they were not in being. If they had been in being, then indeed they would have taken jointly. This is the distinction laid down in *Cook v. Cook*, 2 Vern. 545. And this was the manifest intention of the testator. And to aid and effectuate his intention, the Court will supply the deficiency of expression, by adding the word "descendants" or "heirs of the body" of such after-born son; or by applying the words "and for want of such issue," to the want of issue of such son. And this would not be going so far as the like point was carried in the case of *Robinson v. Robinson* before mentioned.\*1 There Lancelot Hicks was construed to take an estate in tail male, he and the heirs of his body taking the name of Robinson: notwithstanding the express estate devised to the said Lancelot Hicks "for his life and no longer."

[1576] The case of *Lomax v. Holmeden*, in Chancery, was very near the present; and would have been almost in point, if it had received a more solemn determination. It came on by petition before Lord Hardwicke, in Trin. 23 G. 2, 1749. Joshua Lomax the petitioner's grandfather, by his will dated 9th December 1720, devised lands in trust &c.; (see 3 Peere Williams, 176). Then to the use of the petitioner's father Caleb Lomax (his son) for life; then to the use of the trustee and his heirs during Caleb's life, to preserve contingent remainders: then to the use of the first son of Caleb's body and the heirs of the body of such first son; and for want of such issue, to \*2 second, third, fourth and fifth sons of Caleb, successively, and in remainder one after another; (without specifying what estate he gave them; the words of inheritance being by mistake omitted, as they are in the present case;) and for want of such issue, to the use of his four daughters and their heirs. Caleb's eldest son (named also Caleb) died without issue, very young. After which, the petitioner was born. Two questions were made: 1st. Whether the petitioner could take as first son of his father Caleb; 2dly. If he could not, then whether he might not, however, take an estate tail by applying the words "such issue" to the issue of his body. It was determined upon the first point. But upon the 2d question, Lord Hardwicke said, he inclined to think that the petitioner might take an estate tail; from the latitude that must be taken in supplying the omission of the word "the" and in construing the words "successively and for want of such issue;" all which must be supplied by some construction or other; however, as he was clear upon the 1st point, he avoided giving any direct opinion upon the second. And it appears by a report of a former branch of the same case in Hilary term 1732, (3 Peere Williams, 179) that Sir Joseph Jekyll, then Master of the Rolls, held "that the now petitioner (and then plaintiff) was intitled to take an estate tail."

\*1 V. ante, vol. 1, p. 38 to 53.

\*2 The word "the" was omitted.



Upon the whole, this after-born son took at least an estate tail: and it may be doubted whether he did even take a fee. For the testator devises "all his manors, lands and tenements wherein he had any manner of estate:" which seems to import that he gives to the respective devisees all the estate that he himself had in them; which was, and which he takes notice to be, "a fee simple estate."

Mr. Blackstone, in reply—Certainly, not a fee-simple: for, the testator intended a less estate than that, to his three eldest nephews.

[1577] The words "wherein I have any manner of estate" only mean to ascertain the locality of the lands devised and render the description of them the more clear. His manifest intention is contrary to this construction.

Nor can it be an estate tail: because both the words and the intention agree that it is only an estate for life. And he intended no more to his three nephews Samuel, Charles, and John; though, in point of law, their's will be construed into estates tail.

Mr. Harvey supposes the condition "to take and use the testator's name and arms," to extend to the defendants of all the sons of Charles Duckenfield, Esq. whereas the testator expressly confines it to such of them as shall come into possession; "their descendants, to whom the premises shall come and be in possession." Their descendants are not required to take the name and arms, unless the estate comes to them. Therefore no argument can be drawn from this proviso. And in fact, the defendant's testator, Sir William Duckenfield, never did take the name and arms of Daniel for himself and his descendants; but only for himself, for life. The bill was objected to, upon that account: and the Act of Parliament was at last settled to extend only to himself for life.

The words "and for want of such issue" can not refer to issue not named in the will; neither is there any colour for expounding them of such sort of issue as that in default of which, from Samuel, Charles, and John, the estate was limited over to their after-born brothers: the same words must be construed in the same manner, in both places. This is now the case of an heir at law; and therefore is intitled to favour upon that account.

In the case of *Lomax v. Holmeden*, there were two questions before Lord Hardwicke; one of which resembled the present case: but that point was not in question before Sir Joseph Jekyll. (See 3 Peere Williams, 179.) And Lord Hardwicke determined the case upon the first point, which had nothing similar to the present: whereas a determination upon the point similar to the present would have been a plain and easy method of getting rid of the whole difficulty of the case, if Lord Hardwicke had holden the second son of Caleb Lomax to have taken an estate-tail under his grandfather's will.

The case of *Humberston v. Humberston* does not affect our case: for Sir William Duckenfield Daniel was born before the devise now in question took place.

[1578] Mr. Harvey has given no answer at all to the two cases cited from Skinner; viz. *Middleton v. Swain*, p. 339, and *Beriston v. Hussey*, p. 562, "that a devise, without the limitation of any estate, carries but an estate for life."

Uterius concilium.

This case was again argued now, by Mr. Serjeant Hewitt for the plaintiff; and Sir Fletcher Norton (Attorney General,) for the defendants.

For the plaintiff it was observed, that there was no devise at all to Charles Duckenfield the father; and those to the three sons are all expressed to be for life: but the unborn sons have no words of inheritance annexed to their estate.

The question therefore is whether the after-born son took an estate for life, or an estate-tail.

He must take according to the intention of the devisor. Perkins, § 555, 556. And this intention is to be collected out of the will itself.

In arguing that the testator meant this to be an estate for life only, he cited 1 Ro. Abr. 844, letter M. pl. 1. Moore, 52, pl. 153. 3 Bulstr. 127, a case put by Mr. Justice Croke, of a devise of Black Acre to his eldest son and his heirs; and of White Acre, to his younger son, omitting the words "and his heirs;" which is very like the present. Cro. Car. 368, \**Sturt v. Benson*. Freeman, 85, *Allen v. Spendlove*.

As to the words "and for want of such issue"—"such" does not mean the issue of the unborn son. 1 Peere Williams, 54, *Bamfield v. Popham*. The word "issue" shall

not, in the same devise, have a double construction, both of description and limitation. And here is no devise to Charles Duckenfield the father: therefore there is nothing to graft the words upon.

The case of *Langley v. Baldwin*, (Pasch. 1707, Eq. Abr. 185,) is not like this; for there, something was given to the father; here, nothing is. So, in 1 Peere Williams, 754, *Attorney General against Sutton and Payman*, something was given to the father, upon which an estate tail could be grafted. So there was in the case of *Robinson v. Robinson*.

[1579] The case of *Lomax v. Holmeden*, 3 Peere Williams, 176, would have been similar to this case, if Lord Hardwicke had determined upon it, "what estate the second son should take:" but that point was left undetermined.

No necessary implication arises upon the present proviso; because it relates only to those of their descendants to whom the estates should come, and who should be in possession. But an implication to disinherit an heir at law must be a necessary one.

As to taking the name and arms—little regard is to be paid to that circumstance. 2 Saund. 384, *Purefoy v. Rogers*. There is nothing more common than for a man to take a name for life only. The meaning was, that the name should go along with the estate. Therefore nothing is to be collected from this circumstance.

Lord Mansfield—Suppose Charles Duckenfield the father had had seven or eight sons born after the will was made, but before the death of the testator: and the three first to be then all dead—What estate were the after-born ones to take? as tenants in common; or, in succession; or how?

The serjeant answered—This uncertainty makes the devise to the after-born sons void. Non constat how they would take: therefore the will falls. If they would take at all, they would take jointly for their lives; as tenants in common, or as joint-tenants.

Sir Fletcher Norton, contra,—for the defendants, said that these after-born sons would certainly take something, by virtue of this devise: and he insisted that they took an estate tail, in succession. The testator happens only to have omitted to add the words of inheritance after the devise to the unborn sons.

As to the intention—the testator requires them and their descendants to take his name by Act of Parliament, and bear his arms; and every taker has a power to make a settlement: \*1 but he could never mean that many after-born sons, taking jointly or in common, should each of them have power to jointure their several wives in 200l. per annum a piece.

[1580] The cases on this head are not to be reconciled: † *Buckhouse v. Wells*; ‡ *Langley v. Baldwin*; || *Loddington v. Kime*; &c.

There is no doubt but an estate tail may be raised, even contrary to the most express negative words: this was done in the case of \*2 *Robinson v. Robinson*; where the words "and for default of such issue" were so construed. So here, "for want of such issue" means all their children. The devise is to "every son and sons of Charles Duckenfield the father, by his then wife; and for want of such issue," then to William Hulton, &c.

As to the cases cited from 1 Ro. Abr. and Moore, 52:—The words of the will are there clear, full, and plain; and were construed according to their natural import: but they do not apply to the present case.

As to 3 Bulstr. 127 (the case put by Mr. Justice Croke) the reporter goes on—"But otherwise it shall be, where a man deviseth Black Acre to his eldest son and his heirs for his part or portion, and White-Acre to his youngest son for his part (omitting heirs:) yet here he shall have it in the same manner as the other hath Black-Acre."

Here, the testator having devised "to every son and sons, and for want of such issue"—such issue must be applied to all their descendants: and nothing but taking an estate tail in succession could answer the intention of the testator.

\*1 The testator gives a power to make jointures to the amount of 200l. a year.

† V. Equ. Cases Abr. p. 184, pl. 27. Lucas, 181. Fortescue, 133.

‡ Equ. Cases Abr. p. 185, pl. 29, erroneously reported. V. ante, p. 22, and see 8 Mod. (the corrected edition), p. 258.

|| Equ. Abr. p. 182, pl. 23.

\*2 V. ante, p. 38 to 53.

Therefore William took an estate tail: and consequently, the recovery suffered by him was good; and the heir at law is barred.

Mr. Serjeant Hewitt, (in reply,) did not insist upon the devise to the after-born sons being void, but chose to keep to his first point, "that the after-born sons took only for their respective lives."

The word "issue" is in this will used as a word of purchase and description: therefore it shall not be, in the same will, construed as a word of limitation.

[1581] Upon Mr. Attorney's construction, the after-born sons would have a different and a greater estate than the prior-born, viz. the former, tail general; the latter, (the prior-born,) only tail male: which could never be the intention of the testator.

Therefore the rule of law ought to take place, in favour of the heir at law: and the judgment ought to be for the plaintiff.

Lord Mansfield first stated the case very particularly; observing, that the will was written with the testator's own hand; and made in favour of his sister's sons by her husband Charles Duckenfield.

The question is, what estate William took under this will.

Nothing is so clear, as that the construction must be agreeable to the intention of the testator, collected from the will.

Whatever construction would have been put in *William Hulton's case*, if he had been living, must be put now; for, subsequent events can not alter the true construction. Therefore all arguments in favour of the heir at law are out of the case; because this must be considered as a question between prior and subsequent remainder-men.

No-body can doubt of the intention of the testator. 'Tis too strong, to suppose that he meant nothing to the after-born sons.

The words of the will make them indeed joint-tenants: but it is impossible that that could be his intention: for, this testator had manifestly a pride in his family. He devises several things specifically, to be "kept for the family;" and desires leases to be renewed for the benefit of the family. They are to have power to make leases and jointures. What? are there to be six or seven jointures, all at once?

It must therefore be admitted, that they are to take in succession. If so, the other circumstances must be taken in, to shew what estate he meant to give them. And there can be no doubt, but that he meant them an estate in tail male.

[1582] Though the will is written with the testator's own hand, he probably copied it from a draught: and he seems, by mistake, to have omitted some words which were inserted in the original draught.

In the proviso, he recites enough to shew that he meant to give it to the after-born sons in tail male, as he had done to the other sons.

I never had the least doubt but that the testator intended the same estate to these after-born sons, by analogy, as he had given to the prior-born.

Mr. Justice Wilmot also declared, that he had not the least doubt. He conjectured, that the cause of the variation between the devises to the born and unborn sons of Charles Duckenfield was, that the drawer of the will conceived he could not give to an after-born son for his life, and graft a limitation upon it to another person not in being, for life.<sup>(a)</sup>

If the testator had intended the latter to be for life, he would have said so: but he left it to the general disposition.

But whatever the words are, it is possible to imagine that he intended to disinherit his own nephews, for the sake of strangers; after he had adopted these nephews, as his own sons, for the support of his family; all the provisions tend to prove the contrary, most clearly. He certainly meant them to take successively, and not jointly. He could never mean, that they should all live in the family-house together, or make several concurrent jointures.

"For want of such issue" means "for want of heirs male of the body:" and this is the true construction.

This case must be considered as if the controversy was between the after-born

(a) And here, according to Blackstone, 523, Wilmot, J. added "nothing is most untrue." See also 3 Durn. 86.



son,(a) and the first remainder-man : so that the plaintiff's being heir at law, and all arguments in his favour on that account, are out of the case.

Mr. Justice Yates likewise declared, he had no doubt. He took notice, that this second argument was allowed on account of the value of the estate in question : not of any doubt that the Court entertained about their decision.

It can not be supposed, that the testator meant a less benefaction to these unborn nephews, than to the three [1583] devisees, his nephews who were in being. The clauses and circumstances prove his intention to be equal and the same to all.

Per Cur. most clearly and unanimously,  
Judgment for the defendant.

SILK *versus* RENNETT, UN. &C. Saturday, 17th Nov. 1764. Attorney has no privilege in the London Court of Requests. [Vide 2 Wils. 42. Doug. 381. Barnes, 158. 1 Bos. 629, from which it seems that this case is not law.]

Sir Fletcher Norton, Attorney General, moved for an attachment against the commissioners of the Court of Conscience in London, for proceeding in this cause, and issuing an execution against Rennett, notwithstanding his having served them with a writ of privilege.

The question was, whether the Court of Conscience in London, (the old City Court, not under the new Acts,) can proceed in a complaint brought before them against an attorney, who has served them with a writ of privilege.

The Court refused the motion. For, this Court of Conscience has a mixed jurisdiction, as well equitable as legal : they proceed *secundum æquum et bonum* ; (which the recorder attested). And (as Lord Mansfield observed) the very principle upon which these Courts of Conscience are founded, is, "that it is not worth while for the plaintiff to be at the expence of bringing his action in a Superior Court for such a trifling sum."

Therefore the Court held, that the writ of privilege did not lie : and consequently, the commissioners had a power to proceed upon the complaint brought before them, notwithstanding their being served with one.

Lord Mansfield observed also, that in the present case, there was the less reason to make a precedent of this kind ; as it appears upon Rennett the attorney's own affidavit, "that he was liable to pay the money."

Per. Cur. Take nothing by the motion.

[1584] HAWES, Executrix, *versus* SAUNDERS. 1764. Executors must pay the costs of a non-pross. [See 4 Burr. 1929, an instance implicitly put to the contrary.]

The question was, "whether an executor shall pay costs upon a judgment of non-pros."

It came before the Court in such a form as may occasion some puzzle, if not particularly attended to, in respect of the places of plaintiff and defendant being reversed : for, as I take it, the executrix was plaintiff in the first action, and defendant in the second ; the state of the facts being (as far as I could collect them) as follows.

The executrix brought the original action ; and was nonprossed for want of declaring within time. The attorney for the original defendant came to the Master, to sign the judgment for non-pros. as in a common ordinary case ; although the plaintiff had brought the action with an *ac etiam* as executrix ; and the clerk of the judgments, as a matter of course, without being apprized of the plaintiff's being an executrix or suing as such, taxed costs against her.

Upon this judgment of non-pros. with costs, the original defendant brought an action against the original plaintiff ; and so became himself plaintiff in this second action.

Whereupon, Mr. Stowe, on behalf of the executrix, moved for a rule to be made upon the plaintiff in this second action, for him to shew cause, "why further proceedings in this second action should not be stayed, with costs : " and in the mean time, further proceedings therein were stayed.

On Wednesday, the 11th of July last, Mr. Dunning, on behalf of Saunders, the

(a) Qu. 1 P. Wms. 55, 56.

defendant in the first action, but now become plaintiff in the second, shewed cause; and insisted "that an executor being non-prossed is liable to pay costs."

This is entirely the executor's own fault: and an executor is only intitled to this privilege, in cases where the fault is not his own.

For this reason, he shall pay costs for not going on to trial according to his notice given.

He cited Mr. Cooke's Book of Practice in C. B. and [1585] Barnes's notes in C. B. part 2, p. 107, *Ogle, Executor, v. Moffat*—"That a plaintiff making wilful default, shall pay costs for not going on to trial; though he sues as executor."

So, in the case of *Eaves v. Mocato*, 1 Salk. 314,\* it was holden "that an executor shall pay costs for not going on to trial according to his notice; though he shall not pay costs of a nonsuit."

His proper method would have been, to have discontinued his action: in which case, he would † not have been liable to pay costs.

Mr. Stowe, contra, would have had it understood, "that not going on to trial according to his notice," was the single instance in which an executor should pay costs.<sup>(a)</sup> And he cited *Baynham v. Matthews*, 2 Strange, 871, where an administrator had leave to discontinue without costs.†

Mr. Justice Yates observed, that the case of a non-pros. and that of a discontinuance differ. The former arises from the executor's own delay: and therefore he thought, and so also did Lord Mansfield, "that it was similar to the case of his not going on to trial according to his notice." However,

The rule was enlarged.

On Saturday, 17th November,

Mr. Stowe, on behalf of the executrix, now said, there was no necessity to sign a judgment of nonpros. because (there being no declaration) the defendant might have got himself discharged for want of prosecution within two terms.

Lord Mansfield—The privilege of executors is too great already. They ought to be properly informed, before they bring actions. The distinction made between a discontinuance and a nonpros. is a very good one: it is very reasonable that the executrix should pay costs in the present case.

Rule discharged.

[1586] So that the determination of the Court was, "that an executor shall pay costs of a non-pros." But

An executor does not pay costs upon a non-suit. V. Cro. Jac. 229, *Haywarth v. David*.

Note—The two late prothonotaries of C. B. Sir George Cooke, and Mr. Borret, held and acted differently, upon the present question (i.e. upon a non-pros.).

This Court now put it upon the foot of the laches in the executor; this being a non-pros. for want of declaring in due time.

So an executor shall pay costs, if he does not go to trial, after having given notice of trial.

COMBE, ESQ. *versus* PITT. Monday, 19th Nov. 1764. [S. C. 1 Bl. 437, 532.]  
Evidence on the Bribery Act.

See the former branches of this case, in pages 1335 and 1423.

The defendant having answered over; and the cause having been now tried, and a verdict found for the plaintiff, but subject to the opinion of the Court—

\* See S. C. cited in 1 Salk. 207, more correctly.

† See the note below.

(a) And sometimes not then, 4 Burr. 1927.

† Yet see Mr. Serjeant Sayer's Law of Costs, 87, who cites a subsequent case, "that an executor who has leave to discontinue must pay costs; the discontinuance being always made necessary by some default of his own." Rep. Pr. in C. B. 79, *Haydon v. Norton*, Mich. 6 G. 2.

‡ V. ante, p. 1451, *Harris, Executor, v. Jones*, H. 1764, B. R. where, the giving an executor leave to discontinue was holden discretionary; and was refused, unless he would consent to pay costs.

And v. post, p. 1927, M. 7 G. 3, *Bennet (Administrator) v. Coker*.

Sir Fletcher Norton, Solicitor General, had, upon Thursday, the 10th of November 1763, moved, on behalf of the defendant, "that the verdict might be entered up for the defendant:" reserving (by consent of the plaintiff's counsel) the liberty of making a future motion, either for a new trial, or in arrest of judgment.

At present, he insisted upon three objections against the verdict for the plaintiff: viz.

1st. That the plaintiff had given no evidence to shew "that the persons bribed or attempted to be bribed were voters, (i.e. had a right to vote,) at the time of the offence being committed."

2d. That it did not appear by any evidence given "that Lord Egmont, (who was charged to be a candidate, and for whom these persons were to give their votes) was then declared a candidate."

3d. That the charge was for bribing or attempting to bribe them to vote for Mr. Lockyer, and the Earl of Egmont, by name: whereas the evidence went no farther [1587] than to prove "that the bribe was given or offered, to vote for Mr. Lockyer and his friend," (generally, and without naming either Lord Egmont or any other friend in particular). So that there is a variance between the charge in the declaration, and the evidence brought in proof of it: and the evidence is not sufficient to support the charge.

And he then obtained a

Rule to shew cause.

But afterwards, upon Monday, the 28th of May 1764,

The Court thought, and the counsel agreed, that this was a hard action, as the defendant had already been punished, in some degree, upon the \* information: and therefore the motion then went off, to see if the matter could not be compromised; to which, the counsel on both sides seemed very well inclined.

However, the parties could not agree upon any compromise; the defendant being unable or unwilling to pay more than 50l. which the plaintiff was not content to accept. Whereupon,

Cause was now shewn by Mr. Serjeant Davy, Mr. Serjeant Burland, Mr. Ashhurst, and Mr. Popham. They thus answered the objections—

1st. The plaintiff was † not obliged to prove "that these persons had a right to vote:" it was enough, "that they did vote." Their right to vote was not traversable. Their being allowed to vote, was evidence proper to be left to a jury, of their right to vote. The defendant has admitted, that they had a right to vote: his agreement was made with them, upon the foot and admission of their having such a right; and they have actually exercised it, by voting. The substance is proved: the circumstances are immaterial. 1 Salk. 284. *Galloway v. Susach*, 2 Ro. Abr. tit. Trial, p. 707, 708.

2d. It is not at all material, "who were the candidates declared at that time:" it is an immaterial allegation, not necessary to be proved: *utile per inutile non vitiatur*. It is not substance, but only a circumstance not necessary to be proved; as in *Batson et Al. v. Sayer*, 1 Stra. 728. And this is a charge, not for a private, but for a public offence: and it is just the same offence with regard to the public, whether Lord Egmont was then declared a candidate, or not. One of the two, (Mr. Lockyer,) was certainly then declared a candidate: and this was undoubtedly a bribe, "to vote for one of the candidates." This alone was criminal, within the Act.

[1588] 3d. The bribe was proved to be, "to vote for Mr. Lockyer:" the rest was immaterial, and therefore unnecessary to be proved. It had been sufficient, if the charge had only been "that the bribe was to induce the person bribed or attempted to be bribed to vote for Mr. Lockyer alone:" for, the corrupting to vote for either, is a crime which the Act of Parliament intended to punish. Besides, it appeared in evidence, "that Lord Egmont was that friend of Mr. Lockyer's, for whom the corrupted person was to give his vote." So that he was properly thus described; and it is tantamount to the witnesses having named him by name.

Sir Fletcher Norton (now Attorney General) and Mr. Dunning, premising, that this was a sort of criminal conviction, and in a severe action for thrice 500l. proceeded to support the objections.

\* V. ante, p. 1340.

† V. *Bush v. Rawlins and the Malden Causes* in C.B.



1st. The plaintiff alleges in his declaration, "that Mr. Lockyer and Lord Egmont had declared themselves candidates; and whilst they were candidates, the defendant Pitt bribed White, who had a right to vote, &c. to give his vote for them." As the plaintiff has averred, "that the defendant bribed this man, who had a right to vote," it was incumbent upon him, to prove "that the man had such right, at the time of his being bribed." If he had no right, nor claimed any, it was no offence within the Act. They have not charged any thing about his claiming a right, nor put the offence upon that foot: they have tied themselves up to his having such a right, by alleging "that he had a right, &c." And this never was referred to the decision of the jury: their verdict was given upon our mutual consent "to refer the points of law to the Court." Whatever offence they might have charged the defendant with, he certainly is not proved guilty of the offence as it is charged. The evidence was contrary to the allegation. They ought to have proved "that at the time of being bribed, he had a right to vote." Whereas, the evidence was, "that at that time he had no right to vote; but was to acquire one in future, by forty days residence." The poll was indeed produced, to shew "that he had voted." But his subsequent voting does not prove that he had a right to vote, at the time when the bribe was given.

2d. They also ought to have proved "that Lord Egmont had declared himself a candidate at the time when the bribe was given or offered." For, they have alleged in their declaration, that it was done "whilst [1589] Mr. Lockyer and he were candidates." They ought to have proved this allegation, as they have set it forth. They should have proved it to be the same offence as they have described; and with so much certainty and precision, that the defendant might be able to plead "auterfoitz acquit," in case of another action's being brought against him for it. The bribing "whilst Lord Egmont was a candidate," is the offence here charged: and this could not be pleaded to an action for bribing, &c. at another time, when he was not a candidate. It is a material substantial part of the charge: and the defendant might have traversed that he did it whilst they were candidates. In fact, Lord Egmont was so far from being a candidate at that time, that he was not then thought of.

3d. The plaintiff alleges in his declaration, "that the bribe was to induce White to vote for Mr. Lockyer and Lord Egmont." It was incumbent upon him to prove this, as laid. But this he neither did do, nor could do: for, in truth, it was uncertain at that time, who Mr. Lockyer's friend would be; and Lord Egmont was not so much as thought on. It was impossible, therefore, that the term "Mr. Lockyer's friend," could mean or be applied to any particular person; much less, to Lord Egmont.

Lord Mansfield—The defendant was convicted upon an information granted by the Court, for this same offence: and when the Court gave sentence upon it, they considered him as remaining still liable to the forfeitures and disabilities directed by the Act of Parliament, and to the civil action which might be brought upon that Act; \* as the time limited for commencing prosecutions upon it was not then expired. The Court will never interpose again, by way of information, whilst the matter remains open to the civil action. However, in this man's case, it did so happen: and the hardship of his being doubly punished for the same offence had some weight at the assizes, in not leaving the matter to the jury. The same inclination has operated with us here: and we wished a compromise. This wish is now desperate: I am sorry for it. But since it is so, the law must have its course: we must not make a precedent in opposition to the statute.

I have no doubt, as to any of the three objections that have been made. In penal actions, the material fact must be charged: and a fact must be proved in such a manner, that all those consequences will follow the verdict, which ought to attend it. But aggravations, and all circumstances that do not vary the offence, are out of the case, as to the necessity of proving them.

[1590] A man who has given money to another for his vote, shall not be admitted to say, "that such other person had no right to vote." However, it appears that this person had a right to vote; unless he should lose it by non-residence: and he appears, upon the poll, to have actually voted.

"Candidate" is a vague term: no certain idea is fixed, by law, to it. But Mr.

\* V. ante, p. 1340.

Lockyer was certainly a candidate: and this was a bribe to induce White to vote for him, at least. Surely, asking a vote for a man, is enough to make him a candidate. Lockyer was clearly a candidate himself: and the bribe was, "to vote for him and his friend."

The bribing to vote for one or both or either of these persons, is criminal within the Act: and, if proved, is sufficient. And here it is proved, "that the bribe was to give his vote for Mr. Lockyer."

Therefore, upon the whole, the verdict ought to stand.

Mr. Justice Wilmot (who tried the cause) owned, he had wished for an accommodation; because the man would be twice punished for the same offence; though that upon the criminal information was inflicted with lenity, on account of the man's remaining still liable to a civil action.

As to the objections, he said, he had not nor had had any doubt, in the least degree.

The giving White the bribe for his vote, admits his having a right to vote: and it was proved by the poll, "that he did vote."

There is no real variance between the material and substantial charge, and the evidence. The material and substantial charge is bribing this man "to vote for Mr. Lockyer, and another, at the election." The material offence is bribing to give a vote for Mr. Lockyer then a candidate: and I think it is pointed out so certainly, that it might be pleaded in bar to any other action brought for the offence of bribing at this election.

Mr. Justice Yates expressed the like sentiments with Lord Mansfield and Mr. Justice Wilmot. He thought it a reflection upon the plaintiff's humanity, to proceed with rigour for a second punishment, for the same offence. But he had no difficulty as to the force of the objections.

[1591] A right to vote is admitted, by bribing him to give his vote. And it was proved by the poll, "that the man did vote:" which is a presumption of his having a right to vote. But it is totally immaterial, "whether he had a right to vote, or not;" because the Act of Parliament says,\* "that if any person who hath or claimeth to have, or hereafter shall have or claim to have any right to vote, &c. shall take, &c. or if any person, &c. shall, by, &c. corrupt or procure any person or persons to give his or their vote or votes, &c." And this man certainly claimed a right to vote, and did vote.

Such a traverse as has been mentioned, "that the defendant did not give or offer the bribe whilst these persons were candidates," would have been bad; because it would not apply to the material offence.

Id certum est quod certum reddi potest. The Earl of Egmont was known, at the time of the election, to be the other candidate. The offence described by the statute is "corrupting or procuring any person or persons to give his or their vote or votes in any election of any member or members to serve in Parliament:"† and the crime and the penalty are the same, whether the bribe be given "to vote for one," or "to vote for both." This is not so tied down by the particular description, that a recovery in this action could not be pleaded in bar to another action for bribing at this election. For, it might be so pleaded in bar: and the fact might be identified to be the same, by proper averments.

Per Cur. unanimously,

This rule was discharged;

And the verdict ordered to stand.

But liberty was reserved (as is above mentioned to have been agreed) for the defendant's counsel to move either for a new trial, or in arrest of this judgment.

And they afterwards moved for a new trial.

V. post, pa. 1682.

[1592] OULTON, THE YOUNGER, *versus* PERRY. Tuesday, 20th Nov. 1764. Proceedings not to be stayed because beneath the dignity of the Court on a defendant's affidavit.

Mr. Barnes, on behalf of the defendant, moved to stay the plaintiff's proceedings,

\* V. 2 G. 2, c. 24, s. 7.

† V. s. 6, and s. 7, taken together.

upon an affidavit "that the defendant owed the plaintiff only nine shillings;" and cited the case of *Machin v. Robinson*, Tr. 28 G. 2, B. R. where the proceedings were stayed, because the cause of action was so trifling, being only for 20s. it was therefore holden to be *infra dignitatem Curie*.

Per Cur. and Master Owen—There, it appeared upon the very face of the declaration. Here, the plaintiff demands more; the defendant alledges it to be less: the Court cannot try the quantum, upon affidavit. The distinction is, where it appears upon the face of the declaration, or not.

Motion denied.

N.B. Master Owen said, that Lord Hardwicke had, at first, made some rules of this kind; but afterwards, would not make any more.

MENETONE *versus* ATHAWES. Thursday, 22d Nov. 1764. The value of repairs may be recovered, though a ship be burnt in dock.

[Referred to, *Appleby v. Meyers*, 1867, L. R. 2 C. P. 660.]

This was an action by a ship-wright for work and labour done and materials provided, in repairing the defendant's ship. And the question was, "whether the plaintiff was intitled to recover, under the following circumstances."

The ship, being damaged, was obliged to put back, in order to be repaired in dock; and was to have gone out of the dock on a Sunday: in the interim, viz. on the day before, only three hours work was wanting to complete the repair, a fire happened at an adjacent brew-house, and was communicated to the dock; and the ship was burnt.

N.B. It was the ship-wright's own dock; and the owner of the ship had agreed to pay him 5l. for the use of it.

This case was argued on Tuesday the 13th of this month by Mr. Murphy, for the plaintiff; and Mr. Dunning, for the defendant.

For the plaintiff, it was insisted that he was not answerable for this event, which happened without his ne-[1593]-glect or default; unless there had been some special undertaking.

Indeed, a tenant is bound to provide the landlord as good a house, in case of its being burnt, if he covenants to deliver up the house to him again, in as good repair as it was then: upon such a special undertaking, an action would lie: but not otherwise. Doctor and Student, dialogue 2, chap. 4.

In the case of waggoners and common carriers, they are bound to answer for the goods against all events, but acts of God, and of the enemies of the King. 2 Ld. Raym. 909, *Coggs v. Bernard*, 1 Strange, 128, *Amies v. Stephens*. And a gaoler is excuseable from escapes in those cases: 1 Ro. Abr. 808, pl. 5, 6. And in like manner, where it is the act of God, the person who has the custody of another man's property, is excused.

The plaintiff here was a general bailee only: therefore not chargeable. 1 Inst. 89. He was only obliged to keep it as he would keep his own.

The case of *Coggs v. Bernard* in 2 Ld. Raym. 909, over-rules *Southcote's case*, in 4 Co. 84.

Even a pawn remains the property of the original owner, 2 Str. 1187, *Sir John Hartopp v. Hoare*: the plaintiff was considered as a mere bailee, for safe custody only.

In insurances made by merchants, it is usual to insert docks. The men were on board of this ship: (though that makes no difference).

The plaintiff therefore was not answerable for this loss of the ship. And if the plaintiff be not liable for the loss of the ship, he is intitled to be paid for his work and materials. The materials must be considered as having been delivered. The merchant always pays 5l. for the hire of a dock: and so he agreed to do in this case. And these materials were delivered on board his ship in this dock.

When tithes are set out, they are thereby vested in the parson; and he may maintain trespass for any injury done to them.

The defendant might have sold this ship, while it was in the dock; and these materials would have been part of [1594] it: the fixing them to the ship was a delivery of them. The adjunct must go with the subject. Dr. Cowell, in treating of the various modes of acquiring property, is of this opinion.

Mr. Dunning, contra, for the defendant.



The question is, "whether the plaintiff is intitled to be paid by the defendant for that work and labour from which the defendant neither did nor could reap any advantage."

The plaintiff was obliged to deliver the ship safe; having undertaken to repair it. The defendant has had no benefit from the plaintiff's labour or materials; neither was the plaintiff's undertaking completely performed.

Carriers and hoy-men can not be intitled to be paid for carrying things that perish before they are delivered: nor jewellers, for setting a jewel, that is destroyed before it is set. So a taylor; where the cloth is destroyed before the suit is finished. So of any unfinished incomplete undertaking.

As there is no express agreement to support this action, the Court will not imply any.

Mr. Murphy in reply. As to the defendant's not having had the benefit of the repair—There is no reason why the ship-wright should not be paid for his work and labour and materials. Digest, title *De Negotiis Gestis*. The defendant might have insured his ship.

Nothing can be due to a carrier or hoyman, till the delivery of the goods at the destined place. But these materials were delivered; and the work and labour actually done.

Suppose a horse sent to a farrier's to be cured, is burnt in the stable before the cure is completely effect'd: shall not the farrier be paid for what he has already done?

A pawn-broker, if the pawn is destroyed by the act of God, shall recover the money lent.

Lord Mansfield—This is a desperate case for the defendant (though compassionate:) I doubt it is very difficult for him to maintain his point. Besides, it is stated, "that he paid 5*l.* for the use of the dock."

[1595] Mr. Justice Wilmot—So that it is like a horse that a farrier was curing, being burnt in the owner's own stable.

Mr. Attorney General being retained to argue it for the defendant—

The Court offered to hear a second argument from him, if he thought he could maintain his case: but seemed to think it would be a very difficult matter to do it.

Mr. Attorney General appeared to entertain very little hope of success; however, he desired a day or two to consider of it. But

Mr. Recorder now moving "that the *postea* might be delivered to the plaintiff,"

The Attorney General did not oppose it.

And a rule was made accordingly,

That the *postea* be delivered to the plaintiff.

SWANN *versus* BROOME. Wednes. 28th Nov. 1764. [S. C. 1 Bl. 496, 526.] If the vouchee die on the return day of the writ of summons, being on a Sunday, the recovery is bad.

This came before the Court, upon a writ of error from the Court of Common Pleas, upon a common recovery suffered there.

By consent, the error assigned was in this, "that the day of the return of the writ of summons was on Sunday the 13th of May 1750: on which said 13th day of May, Edward Swann the Younger, tenant in tail male, and vouchee in the common recovery, died without issue male of his body."

On 3d July 1764, the case was argued, by Mr. Serjeant Hewitt for the plaintiff, and Mr. Walker for the defendant; and on the 9th of November 1764, by Mr. Blackstone for the plaintiff, and Mr. Serjeant Glynn for the defendant.

The Court, from the beginning, shewed a strong inclination to support the recovery if possible.

The questions were two:

1st. "Whether the judgment could relate to the [1596] *essoign*-day of the term: or to any day prior to the 13th of May, the *essoign*-day of the return."

2d. "Whether, by law, a valid judgment could possibly be given on the day of the return, being Sunday."

The arguments at the Bar were of great length; and every authority relative to

judicial proceedings upon a Sunday, ransacked on both sides: but it would be of no use, now, to report them at large.

Lord Mansfield now delivered the resolution of the Court, "that the recovery was bad; because no judgment could be supposed to be given before the death of the tenant in tail. That this judgment could not relate to the first day of the term; because it could not be given before the return of the writ of summons, which appears by the record to be in the term. That it could relate only to the essoign-day of the writ of summons, which was upon a Sunday: on which Sunday, the tenant in tail died."

His Lordship also gave the reasons upon which this opinion was grounded: which were somewhat to the following effect.

This is a writ of error upon a judgment in the Court of Common Pleas in a common recovery. The fact, as it appears upon the record, is, "that a writ of summons was returnable at a return-day within the term: and the tenant in tail died upon the essoign-day of that return; which essoign-day happened on a Sunday." This is all that is necessary to be stated.

Though common recoveries are now considered as common assurances, yet they must be conducted and completed according to certain ceremonies and solemnities which bear analogy to the proceedings in real actions: and the want of such necessary solemnities invalidates a common recovery, as much as the want of a third witness invalidates a will of lands.

A judgment relates to the essoign-day of the term, unless any thing appears upon the record to the contrary, shewing "that the judgment can not have that relation."<sup>(a)</sup>

If the tenant in tail was alive when the judgment was given or may be supposed to have been given, such [1597] judgment is good: if not, then it is a bad judgment, because given after the death of the tenant in tail.

Where it appears upon the face of the record, that the relation could not be on the essoign-day of the term, but to a subsequent day, the presumption of such relation must cease; because it cannot possibly be supposed or intended "that it was given upon that day," when it appears upon the face of the record impossible that it could be so.

Where any such matter is apparent upon the face of the record, the judgment then relates only so far back, as it may, consistently with the record, be intended or supposed to relate.

If the essoign-day of this writ of summons had been upon a week-day, the judgment would, by relation, have been a good one, because it might then have been intended or supposed "that it was really given upon the day to which it related."

But this essoign-day of the writ of summons is upon a Sunday; and from thence the objection arises; it being insisted, on the part of the plaintiff in error, "that judgment could not be given upon a Sunday.

It is clear, that if the Court could not sit on a Sunday, it would be impossible for this judgment to have been given before the death of the tenant in tail; for, he died upon that Sunday.

The single question therefore is, "whether the Court can sit on a Sunday, and give a valid judgment."

No express direct authority has been cited in proof of the affirmative side of this question. Those authorities that have been urged in support of it, have been only argumentative: from whence such a conclusion might, as it is said, be drawn.

But the history of the law and usage, as to Courts of Justice sitting on Sundays, makes an end of the questions.

Anciently, the Courts of Justice did sit on Sundays.

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(a) Contra, 1 Bulstr. 35, where it is a judgment by default, as was this case, for there it relates to the quarto die post, as there held on clear grounds. And the same point was held in the case of a fine, 2 Wils. 115. Yet if the appearance had been in person and not by attorney, the death could not be assigned for error, being contrary to record: but clearly the judgment in the recovery might in that case be set aside on motion for irregularity.

The fact of this, and the reasons of it, appear in Sir Henry Spelman's *Original of Terms*.

It appears by what he says, that the ancient Christians, practised this. In his \*1 chapter of *Law-Days* among the first Christians, using all times alike, he says, "the [1598] Christians, at first, used all days alike, for hearing of causes; not sparing, (as it seemeth) the Sunday itself." They had two reasons for it. One was, in opposition to the heathens; who were superstitious about the observation of the days and times, conceiving some to be ominous and unlucky, and others to be lucky: and therefore the Christians laid aside all observance of days. A second reason they also had; which was, by keeping their own Courts always open, to prevent Christian suitors from resorting to the heathen Courts.

But in the year 517, a \*2 canon was made, "*Quòd nullus episcopus vel infra positus de Dominico causas judicare præsumat.*" And this canon (for exempting Sundays) was ratified in the time of Theodosius; who fortified it with an imperial constitution: "*Solis die, (quem Dominicum rectè dixere majores,) omnium omnino litium et negotiorum quiescat intentio.*" The whole canon is also decreed verbatim, in the capitulars of the Emperors Carolus and Ludovicus.

There are likewise several other canons taken notice of, in Spelman's *Original of the Terms*.†1 One of them was made in the Council of Tribury, about the year 895: "*Nullus comes, nullusque omnino secularis, diebus Dominicis, vel sanctorum in festis, seu quadragesimæ aut jejuniorum, placitum habere, sed nec populum illo præsumat coercere.*" Another of them was made in the Council of Erpfurd in the year 932; and afterwards became general, upon being taken into the body of the canon law, by Gratian; and Sir Henry Spelman takes it, he says, to be one of the foundation-stones of our terms, "*Placita secularia Dominicis vel alijs festis diebus, seu etiam in quibus legitima jejunia celebrantur secundum canonicam institutionem minimè fieri volumus.*" It goes on and appoints vacations. But these vacations were enlarged by the Council of St. Medard: "*Dècrevit sancta synodus, ut à quadragesima usque ad octavam Paschæ, et ab Adventu Domini usque ad octavam Epiphaniæ, necnon in jejunijs quatuor temporum, et in litanijs majoribus, et in diebus Dominicis, et in diebus rogationum (nisi de concordia et pacificatione) nullus supra sacra evangelia jurare præsumat.*" By which expression is meant, that no causes should be tried, or pleas holden, on those days.

These canons were received and adopted by our Saxon Kings.†1 And Edward the Confessor made the following constitution: § "*Ab adventu Domini usque ad octabas Epiphaniæ, pax Dei et sanctæ ecclesiæ per omne regnum; similiter, à septuagesima usque ad octabas Paschæ; item, ab ascensione Domini usque ad octabas Pentecostes; item, omnibus diebus quatuor tempo-[1599]-rum; item, omnibus sabbatis ab hora nona, et tota die sequenti usque ad diem lunæ; item, vigils, &c.*"

These canons and constitutions were all confirmed by William the Conqueror and Henry the Second; \*3 and so became part of the common law of England.

Afterwards, in succeeding times, there happened several alterations and relaxations. The Statute of Westminster the †2 first, and other statutes, were made to this purpose; and usage, or perhaps positive laws not now extant, dispensed with other days that were formerly unjuridical.

The *Mirror of Justices* †2 says, "*Abusion est que tient pleas per dimenches, ou per auters jours defendus, ou devant le soleil levie, ou noctantre, ou in dishonest lieu.*"

Lord Coke, in his 2d *Institute*, p. 264, commenting upon W. 1, c. 51, says, "In the common law, there be dies juridici, and dies non juridici. Dies non juridici sunt dies Dominici, the Lord's days, throughout the whole year."

In Dyer, 168, pl. 17, upon a judgment given in the Common Pleas in a scire facias upon a recognizance, error was assigned in that the teste of a scire facias was upon a Sunday, which is not dies juridicus in Banco; the teste being on the 28th of November, which happening that year on Sunday, the term did not end till the 29th.

\*1 C. 3, p. 75.

†1 V. c. 5, p. 76, 77.

§ V. Leg. Ed. Conf. c. 9.

†2 3 Ed. 1, c. 51.

\*2 V. c. 4, p. 76.

† V. c. 7, 8, p. 77, 78, and c. 9, p. 79.

\*3 V. c. 10, p. 80, & c. 11, p. 81.

†2 C. 5, § 1, artic. 111 [p. 246].



In Sir William Jones, 156, *Becloe v. Alpe*,<sup>(a)</sup> upon an information in the Exchequer, for ingrossing butter and cheese contrary to the Statute of 5, 6 E. 6, and a verdict and judgment against the defendant, and a writ of error brought by him in the Exchequer Chamber to reverse it; and a reference of it by the Court to Hutton and Jones; the first error assigned was "that the information was exhibited in Court on the 13th of October, which, in that year (20 Jac. 1.) was a Sunday and therefore not dies juridicus." But it was resolved by Hutton and Jones "that it was good: for, although it was not dies juridicus for the award of any judicial process, or to make an entry of any judgment on record, yet it was good for accepting an information upon a special law;" (of which kind of informations many precedents were shewn). And upon Hutton's delivering his own and Jones's opinion to the Court, they affirmed the first judgment, notwithstanding the errors. But at the same time that these two Judges held it good for accepting an information upon a special law, they said, "that Sunday [1600] was not a dies juridicus for the awarding of any judicial process, nor for entering any judgment of record." The awarding of process, and the giving of judgment, are judicial acts; and therefore cannot be supposed to be done, but whilst the Court is actually sitting.

As to writs being returnable on Sundays—

Writs were formed in those times when the Courts of Justice might sit on Sundays; and these ancient returns, which were not improper when the writs were first formed, have continued ever since, without being altered in succeeding terms. The canons did not at all interfere, so as to make any alteration in them: for the canons extend their prohibition no further than against awarding process and giving judgment, and such like acts of Court, on Sundays. So that the writs have continued in their primitive form: but no business can be done by the Court, till Monday. The day of their being actually returned, is therefore as certainly known, as if the writs were made returnable on Monday.

Fitz-herbert in his *Natura Brevium*, under the writ de warrantia diei,\*<sup>1</sup> (to excuse the default of appearance in Court at the day assigned, on account of being in the King's service on that day,) specifies one of those writs in these words—"Rex, &c. Sciatis quòd A. fuit in servitio nostro die Lunæ in crastino quinden' Paschæ proxim' præterit': ita quòd eo die interesse non potuit loquelæ quæ est inter, &c."

In 12 Edw. 4, 8, b. pl. 22, upon a demurrer, in an action of trespass brought by the prior of Langton, Pigott said "If the day of a return, scilicet the quarto die, falls in die Dominica, no Court shall be holden, but in the day following."

As to the practice of giving notice "to appear on the Sunday"—

The answer is, that whilst the Courts did sit upon Sundays, the notice must follow that practice then in use; and must, of consequence, be given for appearing on the Sunday: but now, the old practice "of their actually sitting upon Sundays" being altered and at an end, these notices must necessarily relate to the Monday, when the Courts do sit, and before which day they cannot sit; and therefore the defendant cannot be misled by having notice given him "to appear on the Sunday."

[1601] As to the observation "that the Courts of Justice have never been restrained by Act of Parliament, from sitting on Sundays; and that the 29th C. 2, c. 7, does not extend to giving judgments"—

It was needless to restrain them from it by Act of Parliament. They could not do it, by the canons anciently received, and made a part of the law of the land: and therefore the restraining them from it by Act of Parliament, would have been merely nugatory. But fairs, markets, sports and pastimes, were not unlawful to be holden and used on Sundays, at common law: and therefore it was requisite to enact particular statutes, to prohibit the use and exercise of them upon Sundays, as there was nothing else that could hinder their being continued in use.

In *Mackalley's case*, in 9 Co.\*<sup>2</sup> it was objected, that Sunday "is not dies juridicus; and therefore no arrest can be made in it: and every one ought to abstain from secular affairs upon that day." But it was answered and resolved, "that no judicial act ought to be done in that day: but ministerial acts may be lawfully executed in the Sunday."

(a) In Bunb. 177 it is reported that the Court of Exchequer thought this case not law; but there it was cited for another point.

\*<sup>1</sup> Old edition, p. 17. New edit. p. 36.

\*<sup>2</sup> V. p. 66 b.

It has been said, "that a mere ideal relation to Sunday could not come within the notion of a profanation of the day, as it is only a fiction of law, not founded upon an actual fact of the Court's really sitting and giving judgment upon that day."

But the answer to this, is, that if it be impossible for the Court to sit on a Sunday, then there can be no such relation: for, an absolute impossibility can not be supposed.

It has been said, "that the tenant in tail had done all that was essential for him to do: the rest was only form."

The answer is—The law requires, as essentially necessary to validate a common recovery, certain forms, solemnities or ceremonies that have analogy to real suits: it makes these requisites absolutely and essentially necessary to the completion of it. And till it is completed, it is no recovery, no conveyance: the tenant in tail has not regularly and properly executed the conveyance by which he would cut off the intail, defeat his own issue, and bar the remainders. A conveyance not properly executed is the same as no conveyance at all. Here, he died before the return of the writ of summons, and before he either did or could appear to it: for, though the writ is, in words, made returnable on the Sunday; yet, as the Court could not sit on Sunday, he could not possibly appear to it before Monday.

[1602] On the face of this record, it is manifest, that the tenant in tail could not have appeared till Monday: and no judgment could be given against him till he had appeared. It is impossible therefore that this judgment could be given before Monday. But he died on Sunday. Consequently, the judgment appears to have been in fact given after the death of the tenant in tail.

We are very sorry to find ourselves obliged to reverse a common recovery, upon such an objection to it: and we have struggled hard, to try if it could, by any legal means, be supported. But, notwithstanding our inclinations to support it, we can not help declaring our opinion, "that, in point of law, this judgment is erroneous, and ought to be reversed."

Judgment reversed.

A writ of error was brought in Parliament upon this judgment: and after hearing it, upon the 2d of May 1766, the Lords proposed the following question, which was put to the Judges, viz.

"Whether the recovery is good or erroneous; the return day of the writ of summons being on Sunday the 13th day of May: on which day Edward Swann the Younger died."

The Lord Chief Baron delivered the unanimous opinion of the Judges, "that the recovery is erroneous."

Ordered and adjudged, that the judgment of the Court of King's Bench be affirmed; and that the record be remitted; to the end such proceeding may be had thereupon, as if no such writ of error had been brought into this House.

The end of Michaelmas term 1764, 5 G. 3.

#### [1603] HILARY TERM, 5 GEO. III. B. R. 1765.

TIMMINS *versus* ROWLINSON. Friday, 25th Jan. 1765. [S. C. 1 Bl. 533.] Parol notice to quit where there is no instrument in writing sufficient. [1 Wils. 259.]

This was a case reserved from the last Lent Assizes for the county of Stafford.

It was an action in replevin, for taking the plaintiff's goods, cattle, &c.

The defendant avowed; first, for that he was seised in fee, of the locus in quo: and that the cattle were damage-feasant there. Secondly, that the defendant was seised in fee; and on 6th April 1760, demised to the plaintiff for one year from the 5th of the same month of April, at the yearly rent of 19l. 10s. payable half-yearly, on 10th October and 5th April: and that the plaintiff entered, and held under that demise till the 5th April 1761. That before the said 5th of April, to wit, on the 1st of January 1761, the plaintiff gave notice to the defendant, "that he would quit and deliver up possession of the premises on the said 5th of April 1761:" but he did not quit, pursuant to such notice; but held over till the 10th of October in the same year. That the yearly value of the premises was 19l. 10s. And so avows for 19l. 10s.

being double the value of the premises for half a year ended upon the said 10th of October 1761.(a)

The plaintiff, in bar to the first part of the avowry, pleaded a demise from the defendant, of the locus in quo, for one year from the 5th of April 1760; and so from year to year, as long as both parties should please: under which demise, he rightfully put in his cattle, and placed his goods and chattels there; and the defendant wrongfully took them. And as to the second part of the avowry, he pleads the like demise; and traverses "that he gave [1604] notice to the defendant to quit and deliver up the possession of the said premises on the said 5th of April 1761," as is alleged in the said avowry.

The avowant, by his replication to the first part of the plaintiff in replevin's plea in bar to the avowry, denies that he demised to the said plaintiff in replevin, in the manner therein mentioned: and issue was joined thereupon. And as to the second part of the said plea in bar, he takes issue upon the traverse.

The cause was tried, as above. And

It appeared in evidence, at the trial, that the plaintiff held the premises for one year, from the 5th of April 1760; and so from year to year, as long as both parties should please; but that such demise was only by parol: and that the notice proved to be given by the plaintiff to the defendant "to quit on the 5th of April 1761," was only a parol one, and not in writing.

A verdict was found for the plaintiff, on the first issue; and for the defendant, on the second issue (as to the notice to quit,) subject to the opinion of this Court, upon these questions—

1st. Whether the plaintiff was liable to pay double rent for not quitting, after having given a notice to do so, by parol only.

2dly. Whether, as the plaintiff held under a parol demise, as tenant from year to year, this is such a holding as is within the statute of 11 G. 2, c. 19, s. 18, so as to subject the plaintiff to double rent, for his not quitting after having given notice "that he would do so."

This case was first argued on Tuesday the 13th of November last, by Mr. Ashurst for the avowant, and Mr. Stowe for the tenant (the plaintiff in replevin); and again now, by Mr. Price for the avowant, and Mr. Serjeant Nares for the tenant, the plaintiff in replevin.

For the defendant or avowant, cases were cited to prove that statutes ought to be construed liberally; and that the construction should be extended beyond the words of the preamble, in order to advance the remedy and suppress the mischief.

Here the particular mischief was the inconvenience to landlords when their tenants would not quit, after the landlord had agreed with another tenant.

[1605] The double yearly value under the Act of 4 G. 2, c. 28,\* is payable upon notice given by the landlord; and must be sued for. The double rent under the 11 G. 2, c. 19,† is upon notice given by the tenant; and may be levied, sued for, or recovered, in the same manner as the former rent.

Therefore this latter Act means to remedy a substantive mischief, arising from a breach of faith in the tenant. It is not a mere mutual remedy given by this statute, upon the tenant's notice as it was by the former, upon the landlord's notice.

The Act of 8 Ann. c. 14, is also in favour of landlords.

This Act of 11 G. 2, c. 19, is not confined to the case of those leases only, wherein the tenant has liberty to quit at the end of 7, 14, or 21 years: it is general, "in case † any tenant or tenants shall give notice, &c."

The present case is a notice by the tenant. A landlord can not oblige his tenant to give the notice in writing: therefore notice by parol must be within the remedy intended. And here was parol notice given by the tenant, of quitting: yet the tenant did not quit.

2d point. Whether this, being a lease by parol, be such a holding as is within 11 G. 2, c. 19, § 18.

(a) Vid. 3 Wilson, 25, that such a notice would now be bad as to quitting, though it is here adjudged good to entitle the landlord to double the yearly value for the time the tenant holds over, by 4 G. 2, c. 28; but the landlord's acceptance would make it good.

\* Sect. 1.

† Vide sect. 18.

‡ V. sect. 18.



This is clearly a lease and a holding within this Act.

It is not necessary that a lease should be a deed. "Lease" is synonymous to "demise." Litt. § 57. They cited also 1 Strange, 651, *Ryley v. Hicks*; and Sheppard's Touchstone of Common Assurances.

It may be objected, "that this being a penal statute, it ought not to be extended by intendment."

But it is *pro bono publico*; and therefore shall be extended by equity. Plowd. 36 b. expressly. 2 Inst. 648, 649 (an exposition upon 2 Ed. 6, c. 13, of Tithes;) where the case of *Heale v. Spratt* is cited: which was adjudged to be fraud and guile within that Act; although he justly divided the tithes within the letter of it.

This is a lease, both within the words and meaning of this statute. The words are—"the premises by him, [1606] her or them holden:" and it means to advance the remedies of landlords.

For the plaintiff in replevin, it was insisted, that all Acts of Parliament relative to the same subject must be construed together: and it must be supposed, that the Parliament had the former in view, when they made the latter.

The 11 G. 2, c. 19, was made in *pari materia* with 4 G. 2, c. 28. Therefore they must be considered together, as one law or one system of laws. The title of each is alike, very nearly.

The former Act (4 G. 2) requires notice in writing. Therefore, on the second Act (11 G. 2) the notice ought also to be in writing. The words of this latter Act are—"at a time mentioned in such notice;" and "at the time contained in such notice:" which words shew, that the Parliament must have meant "that it should be a notice in writing." The words—"shall from thenceforward pay"—also shew this; because it amounts to a new contract: it virtually makes a new demise, from the time of holding over; and gives the same remedy as for the old rent. Therefore it is right and reasonable that it should be in writing, as being liable to no uncertainty.

Parol notices must be attended with very great inconvenience; and may be extremely difficult to prove.

Requiring a written notice would be better both for landlord and tenant: it would give the former a clearer proof; and make the latter more cautious.

To prove "that these two statutes must be construed together," they cited 1 Ventr. 246, and *Wallis v. Hodson*, before Lord Hardwicke, 24 Jan. 1740, and *Rex v. Loxdale*, Hil. 31 G. 2, B. R.\*

As to the 2d point—they inferred from the words in the preamble—"Landlords whose tenants have power to determine their leases by giving notice to quit the premises by them holden," that the Legislature had in view only such tenants as have, by a clause frequently inserted in leases, an express power to quit, at the end of 7, 11, or 14 years, upon giving notice to their landlords.

[1607] Lord Mansfield, upon the first argument, ordered it to stand for another; because it was a new question.

*Uterius concilium.*

His Lordship, after the second argument, declared, that he had no doubt of the true construction, on the former argument.

The rule that has been mentioned, of construing Acts of Parliament made in *pari materia*, is right: all of them ought to be considered as one system.

But on considering both these Acts together, it will appear, that though the case intending to be provided against under the former Act, is both inconvenient to the landlord, and unjust and vexatious in the tenant; yet on the latter Act, the case is still stronger against the tenant, as being more vexatious, where he himself gives the notice and then departs from it.

And as it is notorious, that an infinite quantity of land is holden in this kingdom, without lease; therefore it is an extensive case, and proper to be remedied.

In the 4 G. 2 the provision was for those cases where the landlord gave the tenant notice to quit. This of the 11th of G. 2 provides for the case of the tenant's giving his landlord the notice of his intention to quit, and not delivering up possession according to it. The title of the Act is almost the same as the former. One is "For the More Effectual Preventing Frauds Committed by Tenants, and for the More

\* V. ante, pt. 4, vol. 1, p. 447, 2d point.

Easy Recovery of Rents, &c.:" the other, "For the More Effectual Securing the Payment of Rents, and Preventing Frauds by Tenants."

There is no reason to confine this power given to tenants by the latter Act, of quitting their leases upon notice, to written notices. The words of it are general: this Act does not say, that the notice shall be in writing. The Legislature were then considering the former Act, which was tied down to a notice in writing, to be given by the landlord: but they purposely left it out here.

It is said, "that parol notice may be very difficult to prove." But the difficulty of proof of a parol notice is not a sufficient answer: for here, the notice is in fact traversed and proved.

[1608] It is clearly within the words; and it is also within the meaning, and within the reason of the Act; and within the justice of the case.

Mr. Justice Wilmut concurred; and was of the same opinion, he said, at the first argument.

The 1st question is, whether the tenant's notice must be in writing.

The 2d question is, whether this is such a tenant as to be subject to pay a double rent for not quitting after he has given the notice.

First. The Act of the 11th year of the late King is penned differently from that of the 4th; and seems to have been designed to lay a less restraint upon the notice to be given by the tenant, of his intention to quit, than the former Act had laid upon the landlord, in obliging him to give notice in writing to his tenant "to deliver possession."

This different penning will appear, if you compare the Acts together.

The former does not give double the rent, as the latter does; but "double the yearly value of the estate;" be the rent what it will: (double the rent might not have been an equivalent). And for that reason, it was necessary that it should be recovered by action, and not by distress.

The former is worded—"after demand made, and notice in writing given." And the reason is much stronger, for obliging the landlord to give notice in writing, than for obliging the tenant to do so: for landlords generally can write; tenants, in the country, very seldom can. And there are other good grounds for requiring the landlord's notice to be in writing, which do not hold with regard to the tenant's notice.

The ease or the difficulty of proving is just the same, be it the one's notice, or the other's.

It has been said, that the expressions of "mentioned in the notice," and "contained in the notice," shew that the Legislature meant a notice in writing. Now the word "mentioned" is equivalent to "contained" in such notice. But neither of them prove that the notice must necessarily be in writing.

[1609] One notice is expressly required to be in writing: the other, purposely (I believe) not required to be in writing.

Secondly—As to the question whether this class of tenants be within the Act of 11 G. 2, c. 19, section the 18th.

I think them both within the preamble, and the enacting part of this section. I should not have confined it to the preamble, even if it had been so restrained as has been urged at the Bar, when the enacting clause was general: but the preamble is not so restrained, as has been supposed; nor will the inference hold, that has been drawn from it.

In the country, leases at will, in the strict legal notion of a lease at will, being found extremely inconvenient, exist only notionally; and were succeeded by another species of contract, which was less inconvenient. At first, it was indeed settled to be for a year certain: and then, the landlord might turn the tenant out at the end of the year. It is now established, that if a tenant takes from year to year, either party must give a reasonable notice, (a) before the end of the year; though that reasonable notice varies, according to the custom of different counties.

This practice, established by Judges upon circuits, does make them "tenants having power to determine their leases, by giving notice to quit," in the words of the preamble.\* And it is immaterial, whether the lease be for one, or more years; or in

(a) It has been settled six months since this judgment, but before Burrows published these Reports; see 3 Wilson, 25.

\* See s. 11.

writing, or not in writing. But the words of the enacting clause are much more large and liberal: the words there used are—"In case any tenant or tenants shall give notice of his, her or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice; and shall not accordingly deliver up the possession thereof at the time in such notice contained: that then, &c." It is, clearly, equally within the mischief intended to be remedied: and, I think it is within the words of the preamble. But, at least, it is within both the words and meaning of the enacting clause.

Therefore I am of opinion, that the landlord must have the double rent.

Per † Cur.—Let the defendant have the postea, in order to enter up his judgment.

[1610] PEART AND ANOTHER *versus* WESTGARTH AND ANOTHER. 1765. Order of sessions for appointing overseers for a part of a parish, bad.

Upon shewing cause against a mandamus "to appoint four overseers for the whole parish of Stanhope in the County Palatine of Durham," the question was, whether the several districts within it were one entire parish, township and village, within the intent and meaning of the several statutes made for the relief of the poor; and for that purpose have had and of right ought to have one joint appointment of overseers of the poor, for the joint relief and maintenance of the poor in and throughout the parish: or, whether the said several districts, being divided into six separate constaberies, constituted four distinct and separate townships or villages, within the intent and meaning of 13, 14 Car. 2, c. 12, § 21.

It was, by consent of the parties, tried upon a feigned issue at the last assizes at Durham: and a verdict was found for the plaintiffs (with 1s. damages and 40s. costs) subject to the opinion of this Court upon the following case.

Case—That from 43 Eliz. to 9 G. 1 (1723) the parish of Stanhope had one joint appointment of overseers of the poor of the said parish; and during all that time, the poor of the said parish were jointly relieved and maintained by entire and general rates upon the whole parish.

During the time abovementioned, there were four churchwardens, and four overseers of the poor: which four overseers were respectively nominated out of each of the four quarters or districts within the said parish called Forest quarter, Newlandside quarter, Park quarter, and Stanhope quarter; viz. one out of each of these quarters: and in each quarter, there was one churchwarden and one of the said overseers who collected the poors rates in the quarter or district wherein they respectively resided; but the money collected by the several churchwardens and overseers was levied under one entire assessment upon the whole parish, and carried to one general fund, and was applied to the joint relief of all the poor of the said parish.

The parish is 20 miles in length, from east to west; and 8 miles, at a medium, in breadth. The Park quarter is one distinct constabery; the Forest quarter, one; and the Stanhope quarter, one: and the Newlandside quarter consists of 3 constaberies; but these three constaberies compose and are considered as one quarter only.

[1611] On 17th July, 9 G. 1, at the General Quarter Sessions holden at the City of Durham, in and for the county of Durham, it was ordered, "that the several townships or constaberies of Stanhope, Fosterley, Newlandside, Eastgate and Westgate should separately maintain their own proper poor."

This order of sessions was thus prefaced—"Forasmuch as this Court has been moved by and on the behalf of the township of Stanhope, and also of the several townships and constaberies of Fosterley, Newlandside, Eastgate and Westgate within the parish of Stanhope, that each and every of them should and might maintain their respective and proper poor distinctly and separately from each other and from any other part of the parish of Stanhope; but the said motion being opposed by the constabery of Forrest quarter within the said parish of Stanhope, but not by any other part of the said parish;" now, after hearing counsel, it is ordered, [ut supra:] unless cause be shewn to the contrary by the constabery of Forrest quarter at the next sessions.

From that time there have been separate appointments of overseers of the poor

† Mr. J. Denison and Mr. J. Yates were both of them absent.



of each of the said four quarters or districts; and each of the said quarters maintained their own poor separately; excepting that about 12 years ago, two townships or constableries called Bishopley and Fosterley, within Newlandside quarter, separated themselves from the rest of that quarter, and have ever since had separate overseers, and maintained their own poor separately.

The case further stated, that orders of removal had from time to time been made since the year 1729 to the year 1761 (exclusive of each of those years) for the removal of the poor persons from one of the said quarters or districts to another; and appeals made by one party against another, concerning orders of justices relating to the poor of each.

The question was general—"Whether the plaintiffs were intitled to recover." But the particular question debated, was—Whether the several places or districts were one entire parish, township or village; or, whether the said several places, being divided into six separate constableries, constituted four distinct and separate townships or villages within the 13, 14 C. 2, c. 12.

This case was first argued on Tuesday 20th November last, by Mr. Walker, for the plaintiffs; and Mr. Dawson, for the defendants.

[1612] Mr. Walker argued against the division of this parish into separate townships.

He stated the 21st section of 13, 14 C. 2, c. 12, which directs, that in the counties of Durham, &c. where, by reason of the largeness of the parishes, they cannot reap the benefit of the Act of 43 Eliz. c. 2, the poor within every township or village shall be maintained and set on work within the respective township and village; and there shall be yearly chosen, according to 43 Eliz. c. 2, two or more overseers of the poor within every of the said townships or villages, who shall execute all the powers for relief of the poor within the said township or village, as the said Act directs.

And he insisted, that in order to intitle themselves to a division, it must be shewn, "that the parish was so large, that they could not otherwise have the benefit of the 43 Eliz. c. 2," to prove this he cited *Rex v. Justices of Middlesex*, relating to the inhabitants of St. Pancras and Kentish Town, Tr. 1754, B. R. and he mentioned a case of *East and West Bradfield near Sheffield, in Yorkshire*: and he said, that in Wolsingham parish, (the next parish to this, and under the same circumstances of seven constableries,) a division was made by consent; not by an order of sessions.

It does not appear that this parish cannot have the benefit of 43 Eliz. c. 2. The contrary rather appears.

There are no facts to warrant this division; nor can it be supported under the 13, 14 C. 2. The sessions had no power to make it. Neither the sessions nor the Court have power to make a division, but upon facts which shew the parish to be so large that it cannot have the benefit of the 43d of Eliz. It shall be presumed "that that Act may be put in force;" unless the contrary appears.

He added, that it comes out, upon experience, that parishes are too small, rather than too large; and that the Legislature should rather, upon principle, collect several into one, than divide one into several parts.

Mr. Dawson, contra, argued for the division; premising that the present point has never been judicially determined,

The question depends upon 13, 14 C. 2, c. 12, § 21, 22, and 43 Eliz. c. 2.

[1613] The plaintiffs ought not to recover: because, 1st. The parish is so large as to be within these statutes; and 2dly. The sessions had a power to make this division.

First—Though it is stated "that this parish was one entire parish from 43 Eliz. till 9 G. 1." Yet it is also stated, that there were four churchwardens and four overseers; one out of each quarter. Indeed it is not expressly stated, "that it is a populous parish." But this sufficiently appears by the circumstances: and it appears that it was so, at the time of making the Act of 43 Eliz.

The present order of sessions was made 9 G. 1 for the separate divisions of this parish to maintain their own poor, unless cause was shewn by the constabulary of Forest-quarter at the then next sessions. No cause was shewn: and they have acquiesced under that order, ever since; and have now maintained their own poor separately for forty years.

As to the cases mentioned on the other side—*Rex v. The Justices of Middlesex*,

relating to the inhabitants of St. Pancras, was for a mandamus to appoint overseers for the north division of Kentish Town: but the mandamus was denied; because it appeared "that the parish could reap the benefit of the 43 Eliz." And it did not appear, that the north division of Kentish Town, was a township or vill. As to *Bradfield's case*—no order of sessions was made there, or any thing done to support a division. And, as to the *Wolsingham case*—it was given up without argument.

Therefore, there has been no judicial determination at all, as far as appears, upon this matter.

The Court, upon this first argument, thought the justices had no power to divide parishes, (to fritter parishes into pieces, as Mr. Justice Wilmot expressed himself;) and Lord Mansfield said he believed that the point of policy was as Mr. Walker said; namely, "that parishes should rather be larger than smaller than they are." It was ordered to stand for further argument.

*Ulterius concilium.*

It was now argued again, by Mr. Wedderburne, for the plaintiff; and Mr. Clayton for the defendants.

[1614] Mr. Wedderburne inforced the arguments which had been urged by Mr. Walker; and observed that all along from 43 Eliz. to 9 G. 1 the parish had only one joint appointment for the whole parish: so that it was manifest, not only that they could, but that they actually had for many years reaped the benefit of 43 Eliz. And no authority for this division appears in the case. The Quarter-Sessions had no power to make it. The truth is, that the rich part of the parish want to separate themselves from the poor part, and throw the burthen upon them.

Mr. Clayton, contra, inforced Mr. Dawson's arguments; and particularly that of the division having been acquiesced under for above forty years; and the annual appointments of overseers by two justices having been accordingly, ever since the year 1723.

Lord Mansfield said he had no doubt, upon the first argument.

The policy of this law of 13, 14 C. 2 was mistaken: it went upon a wrong principle. The divisions ought rather to be enlarged, than diminished.

As to the question itself—Consider, 1st, what was done: 2dly, upon what foundation?

It ought to appear "that there was an inability in the parish, to have the benefit of the Act of 43 Eliz." Now here, no such inability appears; but quite the contrary, for a great number of years: so that there is no foundation for the division.

The acquiescence under it was upon a false notion, "that the sessions had such a power:" which they had not. And there is no inconvenience in setting right this wrong usage which has obtained for forty years.

In the case of *Kentish Town*, all the Judges held, "that the foundation of such a division of a parish must be an inability of having the benefit of 43 Eliz."

Here, the foundation is wanting. Therefore judgment must be for the plaintiffs.

Mr. Justice Wilmot also thought, that the larger the circle, the better: therefore it would be more proper to enlarge than to lessen the divisions.

[1615] The Statute of 13, 14 C. 2 goes upon this basis, "that the parish is so large as that it can not have the benefit of the 43 Eliz." This, therefore, is a fact that ought to be quite clear and certain. Whereas, on the contrary, it appears in the present case, "that this parish actually had that benefit from 1602 to 1723; above 120 years."

The sessions do not seem to have had any sort of power to make such an order: therefore their order is a mere nullity. It was not made upon any appeal; but upon a motion made on behalf of some of the quarters, and opposed by another.

The subsequent usage for forty years can not vary the right. For we can not presume, that "*omnia rite acta sunt*;" because we see that it was founded upon this order of sessions: and it does not appear that the parish is so large that it can not have the benefit of 43 Eliz.

Therefore they ought to appoint running overseers over the whole parish.

Per \* Cur. Judgment for the plaintiffs.

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\* Mr. Justice Denison and Mr. Justice Yates were both of them absent.

REX *versus* SIR WILLIAM TRELAWNEY, Steward and Capital Burgess of West Loe. Tuesday, 29th Jan. 1765. Information quo warranto against a steward of a corporation for acting as a capital burgess refused. [See 4 Burr. 1964. 2 Durn. 83, 84.]

[Observed upon, *R. v. Patteson*, 1832, 4 B. & Ad. 24 ; 1 N. & M. 623.]

A motion had been made for an information in nature of quo warranto against him, for acting as capital burgess, having been steward (a higher office, as was alledged,) when elected capital burgess ; which higher office of steward was said to be incompatible with, and therefore rendered him incapable of being elected into the lower office of capital burgess.

On shewing cause now, it was (inter alia) alledged, that they were not incompatible : but if they were incompatible, it would be the former office that was vacated by the acceptance of the latter ; and not the office which was last accepted.

Lord Mansfield went through the particular circumstances of the present case ; and observed how insufficient the whole amount of them was. Here is no [1616] fact doubted ; no opposition ; no objection ever made. All the evidence that can be traced shews a consistent usage for 100 years back, “that the steward, if a capital burgess before, has remained a capital burgess.” And in point of law, there is no incompatibility in the steward being a capital burgess. If he should be chosen mayor, it may then be a question “whether his acceptance of that office does not vacate his office of steward.” It seems to me very strong, (though it is not now necessary to determine it,) that if these two offices of steward and capital burgess were incompatible, the acceptance of the latter would imply a surrender of the former.

Mr. Justice Wilmot had no doubt. Here is no question, either of law or fact. The fact is agreed “that, being steward, he was chosen capital burgess.” And as to the law—there is no incompatibility, in this case.

The two Acts of Parliament (of 4, 5 W. & M.\*<sup>1</sup> and 9 Ann.†) relate to quite different objects ; and are the reverse of each other. The former restrains the Clerk of the Crown in this Court from exhibiting or filing informations without leave of the Court in cases where all the King’s subjects might, before the making of that Act, have made use of his name without such leave. The latter lets in everybody who desires it, to make use of his name in prosecuting usurpers of franchises ; whereas, before, no subject could have done so : but it provides, that these informations (as well as those for misdemeanors) must be under leave and discretion of the Court. Therefore the Court ought not to give such leave without sufficient reason.

He then entered into the circumstances of the case : upon which he made (amongst others) the following remarks. Here appears to have been an usage for a whole century, “that both offices have actually been in the same person.” The legality of this was never questioned, before ; and it has been several years acquiesced in. The charter does not imply any incompatibility. The steward does not seem to be a part of this corporation.

Per \*<sup>2</sup> Cur. clearly and unanimously,  
Rule discharged.

[1617] REX *versus* GRAINGER. Tuesday, 29th Jan. 1765. Dilatory plea to an indictment, must have an affidavit annexed thereto.

On Tuesday 27th November 1765, Mr. Wallace moved to set aside the defendant’s plea to an indictment ; and that judgment might be entered against him by default ; as the prosecutor had, by reason of this dilatory plea, lost the benefit of trial at the sittings after term.

His objection was, “that the plea is a dilatory one ; and yet is not verified by affidavit ; nor is any probable matter shewn to the Court, to induce them to believe that the fact of it is true.”

The plea was of Michaelmas term 1765 ; and is in these words—“And the said John Grainger, who in and by the said indictment is called by the name and addition

\*<sup>1</sup> Cap. 18.

† Cap. 20.

\*<sup>2</sup> Mr. Justice Denison and Mr. Justice Yates were absent.



of John Grainger late of the parish of Kensington in the county of Middlesex, butcher, in his own person cometh; and having heard the indictment, he saith that at the time of taking the said indictment and long before, he the said John was and ever since hath been, and still is inhabiting, resident and commorant in the parish of St. James Westminster, in the county of Middlesex aforesaid; without this, that he the said John now is, or at the taking of the said indictment, or at any time before, was inhabiting, resident or commorant at the parish of Kensington in the county of Middlesex: and this he is ready to verify. For which reason, and because he the said John Grainger is not called, in the said indictment, John Grainger late of the parish of St. James, Westminster; he the said John prays judgment of the said indictment, and that the same be quashed."

Mr. Wallace relied on 4, 5 Ann. c. 16, § 11, which says that "no dilatory plea shall be received in any Court of Record, unless the party offering such plea, do, by affidavit, prove the truth thereof; or shew some probable matter to the Court, to induce them to believe that the fact of such dilatory plea is true."

Rule to shew cause.

Mr. Ashhurst now shewed cause, on behalf of the defendant; and cited the 7th section of the abovementioned statute; and Mr. Justice Foster's book, p. 16, *Charles Kinlock's case*; where there was no affidavit.

[1618] Lord Mansfield—That was at the Bar: it is not like the present case; nor does the 7th section of the Act extend to this 11th. It is usual to annex affidavits to pleas of this sort, in the Crown-Office: and I do not see why they should not be annexed.

Rule made absolute, to set aside the plea,\* for want of an affidavit.

FROGMORTON, EX DIMISS. BRAMSTONE, *versus* HOLYDAY ET AL. Friday, 1st Feb. 1765. [S. C. 1 Bl. 535.] A devise apparently for life, may be construed under circumstances to be a devise in fee. [See also 3 Wils. 414. 5 Durn. 414. 1 Bl. Rep. 499. 3 Durn. 359.]

[Applied, *Doe d. Wright v. Cundall*, 1808, 9 East, 403; *Toovey v. Bassett*, 1809, 10 East, 467; *Chorlton v. Taylor*, 1813, 3 V. & B. 164. Distinguished, *Spry v. Bromfield*, 1839, 9 Sim. 537. Applied, *Burke v. Annis*, 1853, 11 Hare, 239; *Warren v. Rudall*, 1858-61, 4 K. & J. 609; 9 H. L. C. 420; *Yarrow v. Knightly*, 1877, 8 Ch. D. 741.]

This was a special case, upon an action of trespass and ejectment, from the last Assizes for the town and county of the town of Kingston upon Hull.

Margaret Hasselwood, being seised in fee of the premises in question, by her will dated 28 October 1719, amongst other things, devised as follows—"As for my worldly affairs and estate, &c.—I do dispose thereof in manner following. Imprimis, I give, devise and bequeath unto my son David Hasselwood and his heirs (a) for ever, my malt-kiln standing and being in Black Friar Gate. Item, I give, devise and bequeath unto my son John Hasselwood, all that house and garden now in the tenure and occupation of Edward Gibson, mariner, (a) charged and chargeable, nevertheless, with the payment of the sum of 50l. of lawful British money: which said sum of 50l. I give, devise and bequeath unto my daughter Margaret Holyday, payable and to be paid to her out of the yearly rents, issues and profits of the said house; to be paid unto and received by my said daughter Margaret Holyday yearly and every year, until the said sum of 50l. be fully paid and satisfied. And if the said John Hasselwood shall happen to die in his minority or before he comes to age, then I give, devise and bequeath the said house and garden unto my three daughters Elizabeth Locking, Margaret Holyday, and Hannah Hasselwood, equally, share and share alike." Then she gives small specific personal legacies, of money, silver, salvers, &c. and concludes thus—"All the rest and residue of my goods, chattles, rights, and credits, (not mentioning her real estate I give, devise and bequeath unto Mr. G. H. and E. L.)"

The testatrix soon afterwards died; leaving issue David her eldest son, and John her youngest son, and the three daughters abovementioned.

\* N.B. They did not at all enter into the merits of the plea.

(a) The different pennings did not in this case make different constructions as it sometimes does; for which see 8 Vin. 134, pl. 35.

At the time of making and executing the said will, her son David was of the age of 23 years; and her son John, of the age of seven years. The premises in question, which were devised to John, were then of the yearly value of 10l.

The said John entered upon and was seised of the same until the time of his death; which happened in 1762.

In the life-time of John, the abovenamed David, (the eldest son and heir at law of the said Margaret,) died intestate, leaving issue David his eldest son; who, by deed of bargain and sale inrolled, dated 20th Sept. 1758, conveyed the premises in question to Stephen Bramstone (the lessor of the plaintiff) in fee-simple.

The maltkiln devised to David was, at the time he took possession of it, let at 10l. a year, and has been since sold for 220l. being the value thereof.

David was set up in the business of a grocer and tallow-chandler, by David Hasselwood his father: who advanced to him, at different times, upwards of 500l. and also gave him a messuage and shop and staith, of the yearly value of 20l. and another messuage and garden of the yearly value of 12l. and by his will, dated 16th July 1716, devised to the said David his eldest son ten shillings, in full of all he might claim out of his estate, having provided for him in his life-time. And the said David Hasselwood the father did, by his said will, devise to Margaret his widow, (the present testatrix,) a freehold estate at Cottingham in the county of York for life; and after her decease, to the before mentioned John his son in fee: which estate, at that time, was of the yearly value of 40l. and he devised other estates to his said wife; some for life, and others in fee, and directed his said wife to bring up and educate all his said children, and find and provide them all manner of necessaries at her own charge, during their respective minorities.

Upon the trial of this cause, a verdict was found for the plaintiff; subject to the opinion of this Court, upon the following

Question—"Whether an estate for life, or in fee, in the premises in question, passed to the abovenamed John Hasselwood by the said will of Margaret his mother."

It was first argued on Tuesday 20th November last, [1620] by Mr. Wallace for the plaintiff, and Mr. Hotham for the defendant; and again now, by Mr. Blackstone for the plaintiff, and Mr. Wedderburne for the defendant.

The counsel for the plaintiff insisted that John the second son took an estate for life only.

The words, in legal strictness, import an estate for life: and no intention appears to the contrary. The intention must be collected out of the words. *Cro. Car.* 368, *Spirit v. Bence*.

*Collier's case*, 6 Co. 16 a. proves, "that a charge of so much per annum does not give a fee." And the reason is, because the devisee may pay it out of the profits. It is true, wherever the devisee may suffer, it makes a fee. But here, the devisee could not be a loser: for the charge is not upon him, but upon the estate, and is payable out of the profits. Now this estate being 10l. per annum, a charge of 50l. would have been discharged in about five years: consequently, here is no possibility of a loss. Therefore the case of *Read v. Hatton* in 2 Mod. 25 was not, they said, against them: for, there was a possibility of loss. And there is no case substantively determined on an introductory clause only.

No inference can be drawn from the contingency of John's dying under twenty-one: for in that event, the three daughters were to take; who were not his heirs at law. So that it is not at all similar to the case of *Purefoy v. Rogers*, nor affected by the note at the end of that case, in 2 Saunders, 388. That note itself is only the opinion of the reporter. There the devise was—"I give my inheritances, &c.: and if he die before he come to the age of twenty-one, then I give my inheritances &c. to my heirs for ever." There, the substitution was "to the testator's own right heirs;" who would have taken without that clause: but here, the substitution is to third persons. Therefore John had a life-estate only. And so it appears, by *Comyns*, 353, *Fowler v. Blackwell et Al.* in C. B.

The testatrix might, with good reason, give a fee to the eldest son, of twenty-three years old; and only a life-estate to her younger son, of seven years old: the savings during his infancy might make this devise equal to his brother's. This is a devise "to John" in general, without adding any particular limitation, and there is no reason to suppose it to be intended any more than for his life.



[1621] The counsel for the defendant argued this to be a fee in John, by the apparent intention of the testatrix.

Any charge of a gross sum gives a fee: so does every annual payment. So is Moore, 853. And this is a charge of a greater value, than can probably leave any benefit to the devisee.

*Collier's case* only proves, that where it is payable out of the profits, it is only a life-estate. But this is a charge of a great proportionable value. The devisee can receive nothing during five years at least, whilst the 50l. is paying off: and there is a strong improbability of his being at all a gainer by the devise. Therefore it must be construed a fee. It is a principle, "that the devisee must be meant to be benefited:" it is not enough, "that he probably can be no loser." *Read v. Hutton*, 2 Mod. 25, 26, was cited, as a proof of this: and as shewing that the benefit to the devisee is the spirit of the rule. But there was an event in which he must have been a loser; namely, that of his mother's living till he came of age, and then his own death happened before he could have received 50l. out of the profits.

Here was a mother of several children, without partiality to any of them. She gives a fee to the first; and certainly intended the same benefit to the second son.

The devise over to her three daughters,—“if John dies before twenty-one”—is an argument of the intention of the testatrix. Why should this clause of restriction to dying under twenty-one be added, if she meant only a life-estate? And if he had died before the end of the five years her daughter Margaret Holyday would not have reaped the fruit of the 50l. legacy; though her mother certainly meant that she should. In this respect, it is within the reason of the case of *Baddeley v. Leppingwell* \*1 in Trinity term last; where if Sarah Boreham had not taken an estate in fee, the annuity to her sister might have failed.

The testatrix professes to dispose of all her worldly estate; and considers the residue as consisting of personal estate only. These words “all her worldly estate” shew her intention to dispose of the inheritance. *Ibbetson v. Beckwith*, Forrester, 157, 160. In Comyns, 337, *Scot v. Alberry*—a devise “to my cousin Thomas Scrape, of all my lands in Waltham-Abbey, with all other my estate whatsoever and wheresoever,”—was holden to comprehend “all that he had, real or personal.”

[1622] And there is no case negatively determined, “that this expressing the payment to be out of the rents and profits does not admit of its being the testator's intention to give an estate in fee.” The Court must judge upon the circumstances: and the circumstances of this case shew, that a fee was intended.

The counsel for the plaintiff replied, here is a very considerable chance of a benefit: and no possibility of loss. It is not necessary, that it should be a certain benefit: a probable chance of benefit is sufficient.

In the case of *Read v. Hutton*, there was a possibility of loss: and the annuity to the devisee's sisters was for life.

As to *Scott v. Alberry*—it does not apply to the present case; because the words there are so very strong—“all my estate whatsoever and wheresoever.”

As to the charge of 50l.—it is settled, that if the charge is payable out of the rents and profits, it does not give a fee. The present case is a valuable and beneficial devise, upon the balance of the rents and the charge: and therefore it shall not be construed to carry a fee.

As to the devise over to the three daughters, in case of John's dying before twenty-one—if this clause had not been added, it would, in that case, have gone to the elder brother (John's heir at law:) whereas the testatrix meant it for other persons, and not for the heir at law; and therefore this foundation of her intention to give a fee to John, entirely fails. And no intendment can be drawn, but from the words of the will.

Lord Mansfield—The testator's intention must be taken and collected from the whole will: and it must prevail, if consistent with law.\*2 *Coryton v. Hellier* was a construction taken from all the parts of the will considered together, to imply the usual qualification “if he live so long,” after the limitation of a term for 99 years; which had been omitted by the negligence and inaccuracy of the writer, contrary to the manifest intent.

\*1 V. ante, p. 1542, 1543.

\*2 10th Aug. 1745, before Lord Hardwicke, in Chancery, post, 1631.



The question is, "whether John Hasselwood took an estate for life, or in fee, under this will."

There are no words of limitation added to the devise to him. Many people do not know what words of limita-[1623]-tion are necessary to be added to devises of land, any more than to bequests of personal estate. If nothing else appears, the devise must be construed according to law; and the devisee, without words of limitation, can take an estate for life only.

Here are many other clauses in this will, from which, taken all together, the intention of the testatrix may be collected.

She has declared, that she did not mean to die intestate, as to any part of her real estate. She has specifically named each part of it; and her sweeping residuary clause does not mention her real estate. Therefore she thought she had fully disposed of that before: and consequently, she meant this devise to her son John to be a devise in fee. Then she charges this devise with 50l. Let the sum charged upon a devise be ever so small, it shall give a fee: but if it be made payable out of the annual profits, it is otherwise. This therefore is a middle case. For, here, John was but seven years old; and she appoints him guardians during his minority: therefore he did not want the whole profits. "If he should die under twenty-one," there is a devise over to the three daughters of the testatrix. This shews her intention to give a fee. For if he lived to twenty-one, he might then dispose of it himself; if he died before, he could not; and then she disposes of it.

If John was barely to take an estate for life, the time of his death must be immaterial to the devise over. But limiting it over, only upon the contingency of his dying in his minority, shews that she intended to give him an absolute estate in fee, which he might dispose of if he came of age: and unless he lived to be of age, (when he might dispose of it,) she meant it should go to her daughters.

A question applicable to this part of the argument was pleaded in the days of ancient Rome, by <sup>1</sup>\* Scævola and Crassus, in the famous cause between *Curius and Coponius*; and much agitated in modern times, in the Courts of Westminster-Hall, in the case of *Jones and Westcombe*.

A man, taking for granted that his wife was with child, devised his estate to the child his wife was enseint of: and if such child died under age, then he devised it over. The woman was not with child. The [1624] question was, "whether the devisee over should take."

The <sup>2</sup>\* Roman tribunals, at once, and the English, at last,† finally determined,

\*1 Tully de Oratore, lib. 1, fo. 175.

\*2 Oratio pro Cæcina.

† In *Jones v. Westcomb*, it came before Lord Harcourt upon a bill for an account of the personal estate. And there were several questions; particularly, "whether the surplus was disposed of or not." The case is reported in *Precedents in Chancery*, 245, in *Equity Cases*, abridged, and *Reports in Equity*, called *Gilbert's*, 74. The deeds and writings, as to the real estate, were ordered to be brought into Court.

In Trinity term 1738, the case came on, for the opinion of the Court of King's Bench, upon an ejectment brought for the leasehold estate: and the Court gave judgment for the wife, to whom one-third was devised over.

An ejectment was afterwards brought in the Common Pleas, by the representatives of the wife, and two sisters, devisees, for the freehold estate. It came on to trial before Lord Chief Justice Eyre; and a case was made. This case was several times argued in the Common Pleas. The 13th of February 1741, the opinion of the Court was "that the devise over never took effect." Judgment for the plaintiffs, for two-thirds only.

Afterwards, another ejectment was brought for the freehold, in the King's Bench: and the judgment of the Court was for the devise over. The first case was *Jones v. Westcomb*; the second, *Andrews, on the demise of Jones v. Fulham and Others*: the third, *Roe, on the demise of Fulham v. Wicket*: the fourth, *Gulliver, on the demise of Fulham, v. Wicket*, in the King's Bench, Mich. 19 G. 2. And Lord Chief Justice Lee, in delivering the opinion of the Court, mentioned, as one reason of their opinion, "that the intent of the testator was apparent and express that the estate should not descend; and that the contingency was not a condition precedent; but a limitation preceding the estate to the wife."

that the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it. Consequently, no posthumous child having ever existed, the substitute was intitled.

The argument holds equally, from a limitation over, "if the first taker dies in his minority," to infer that he was intended to have the absolute property if he attained his majority.

[1625] This is a family provision for all her children; without hampering them with intails and limitations. There could be no intention to make a difference between the two sons.

Therefore sufficient appears upon the face of the will, to shew that the intention of the maker of it was, "that John should have the estate, unless he should die in his minority."

Mr. Justice Wilmot—Here is such an intention clearly manifested by the will. The statute only requires a will in writing; but requires no technical words. Therefore if by sound (not indeed arbitrary) construction, it appears that the intention was "to devise a fee," it is immaterial what words are made use of. And all the circumstances and clauses are to be united and taken together, in order to collect this intention.

Now upon this will, the intention does sufficiently appear. The introductory clause is very material. It shews the object of her consideration to be her whole worldly estate: and it is much the same as if it was repeated in each clause.

She had two sons and three daughters. She meant to provide for them all. She meant to give the same value and the same interest to both of her sons: only that John's part should be subject to the 50l. charge: and in case of his death in his minority, she gives his part to her daughters. If she had intended it to have gone, in that event, to her son David, such a devise over "to him," would have been unnecessary and idle; a devise "to an heir at law" being nugatory.

As to the charge upon this devise to John—though it is made payable "out of the rents and profits," yet it is accompanied with such other clauses, as take it out of the distinction laid down in *Collier's case*, 6 Co.

If the testatrix had lived till John had come of age, and then died; and John had also died within five years after his mother's death; this devise would have been no benefit to him, but possibly the contrary. Therefore she, probably, did not mean it to him for life only; when it might have been disadvantageous to him, if his interest in it had ceased with his life.

He concurred with Lord Mansfield's manner of reasoning upon the residuary clause; wherein she has made no mention of her real estate; having fully disposed of it before.

[1626] The only circumstance that could prevent his enjoyment of the estate so as to have the disposal of it himself, was the contingency of his dying under twenty-one. For, upon the whole, it appears that she meant to give him an estate of inheritance.

Per \* Cur. unanimously,

The plaintiff to be nonsuited: and

The postea to be delivered to the defendant.

CHAPMAN, EX DIMISS. OLIVER ET AL. *versus* BROWN, ET AL. 1765. To support the intention of a testator, the word "son" construed as a word of limitation.

[Applied, *Robinson v. Hardcastle*, 1788, 2 T. R. 254. Discussed, *Routledge v. Dorril*, 1794, 2 Ves. jun. 364. Referred to, *Fry v. Capper*, 1853, Kay, 171.]

This was a special verdict, upon an ejectment brought by Cornelius Chapman, on the several demises of Richard Oliver and Isabella his wife (the testator's heir at law:) and of Thomas Battersbee and John Cooke, two trustees; found at the Lent Assizes 1763 for the county of Lancaster. It was found on the demise made by Oliver and his wife: and was to the effect following.

Joshua Brown,(a) being seised in fee of the premises in question, by his last will

\* Mr. J. Denison and Mr. J. Yates were absent.

(a) See 3 Brown, 414. 2 Ves. jun. 343, 364. 1 East, 450. 4 Ves. 297. 2 Brown,

dated 4th of May 1694, devised the same to his wife for life: and after her death, to his brother Thomas Brown, until such time as William the eldest son of his brother Reginald Brown should attain the age of twenty-four; and from and after the said William's attaining that age, he gave the same to his said nephew William Brown and his assigns for and during the term of his natural life; and from and after his death, then to the first son of the body of the said William Brown, lawfully begotten or to be begotten, and to the heirs male of the body of such first son, lawfully to be begotten; and for want of such issue, then to the second, third, fourth, fifth, and every other son and sons of the said William, according to their seniority, and to the heirs male of their bodies, the eldest of the said sons of the said William Brown and the heirs male of his body, always to be preferred before the younger and his heirs male; and for want of such issue of the body of the said William Brown, then to the second son of his said brother Reginald Brown, for and during the term of his natural life; and after the death of the said second son of his said brother Reginald Brown, then to the first son of the body of such second son of his said brother Reginald Brown, lawfully begotten or to be begotten, and to the heirs male of the body of such second son, lawfully to be begotten; and for default of such issue, to the third, fourth, fifth, and every other son or sons of [1627] the said second son of the said Reginald (according to their seniority) and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said Reginald, lawfully to be begotten, the eldest of the said son and sons and their several heirs male according to the seniority and priority of birth, to be preferred before the younger of the said sons and their heirs male; and for want of such issue, then to the eldest or next son or sons of the said Reginald Brown for the time being, for the term of his natural life: and after his or their deaths, to the heirs male of the body of such eldest and next son of his brother Reginald: and for want of such issue, then to the first son of his brother Samuel Brown, for and during the term of his natural life; and from and after the death of such first son of his brother Samuel Brown, then to the first son of the body of such first son of the said Samuel Brown, lawfully begotten or to be begotten, and to the heirs male of the body of such first son of the said Samuel Brown lawfully begotten: and for want of such issue, then to the second, third, fourth, fifth, and every other sons of the eldest son of Samuel, in tail male; and for want of such issue, then to the second, third, fourth, fifth, and each other son and sons of Samuel for their respective lives; and after their respective deaths, to their respective sons, in tail male; and for want of such issue, then to his own right heirs for ever. Then comes this article, "and I do declare that the reason of my settling and limiting my said messuages, lands and hereditaments as aforesaid, is because I desire to have the same continue in my name and blood, so long as it should please God to permit the same."

54. 2 Durn. 241, 247, 251, 252. 4 Durn. 740. 4 Brown, 533. 1 P. Wms. 332, and note, if this had been the case of what is frequently called a trust executory, then the second son of Reginald would have taken an estate tail, even though the words that seem to have been accidentally omitted had been supplied, as contended for by the plaintiff's counsel in page 1630. This is clear from the cases of *Humberston v. Humberston*, 1 P. Wms. 232. 2 Vern. 737, and Prec. in Ch. 455, which case has been often approved of, 1 Atk. 593. 2 Vez. 568.

It has been a notion entertained for some years by the Judges of the B. R. as well before as since this case, that there is no difference between the devise of a trust and of a legal estate, and that all trusts are executory according to the determination in *Bagshaw v. Spencer*, 1 Collec. Jurid. 378, and therefore there is no solid distinction between a trust executed, and a trust executory: this appears in 2 Burr. 1108, and many other late cases in B. R.; and if this notion be well founded, then not only the Court of B. R., but the House of Lords spent a great deal of time unnecessarily, in considering this case; for at all events, the second son of Reginald must be tenant in tail, and it was trifling to argue whether the Court should supply the omission or not; for if not, it was clear and admitted that the second son of Reginald was tenant in tail male, and if the words contended to be supplied, had been in the will, and there is no difference between the devise of a legal estate, and a trust executory, it is equally clear, from the authorities already referred to, that he would have been tenant in tail male in that case also.



On the 1st of August 1694, Joshua Brown the testator died seised of the premises without any issue; leaving Ann his widow; his three brothers Thomas, Reginald, and Samuel; and his nephew William Brown, the only son of the said Reginald at the time of the testator's death and also at the time of making his will, and who was born on 29th March 1682.

Upon the testator's death, Ann the widow entered; and so did Thomas his brother; (on their respective parts devised to them;) and on 29th March 1706, the nephew William having attained his age of twenty-four years, he also entered upon the tenements devised to him.

After the death of Joshua the testator, but during the life of William his nephew, Reginald the testator's brother had issue a second son, namely Thomas Brown; who was born 13th of March 1695: and on 16th of January 1696, Reginald died, leaving issue the said William and Thomas, and had no other sons.

[1628] On 12th of January 1712, Ann the widow died; and William, the first son of Reginald, entered upon the premises; and died seised thereof, on 20th of December 1722; leaving issue Isabella, now the wife of Richard Oliver the plaintiff. Upon his death, Thomas his brother (the second son of Reginald) entered; and in 1727, 1 G. 2, obtained an Act of Parliament to enable him to grant building-leases of the premises in question; having then a son named Reginald, and a daughter, both under age: this Reginald was born 4th October 1718, and was the only issue male of Thomas; and died 26th April 1736, without issue and unmarried, and under the age of twenty-one.

In 1747, a common recovery was suffered of the premises, by Thomas Brown, who was the vouchee: which, by indentures of bargain and sale and of release, dated the 1st and 2d of April in the same year, was declared and agreed by all the parties to the said indenture to be and enure to the use and behoof of the said Thomas Brown his heirs and assigns for ever, and to or for no other use, intent, or purpose whatsoever.

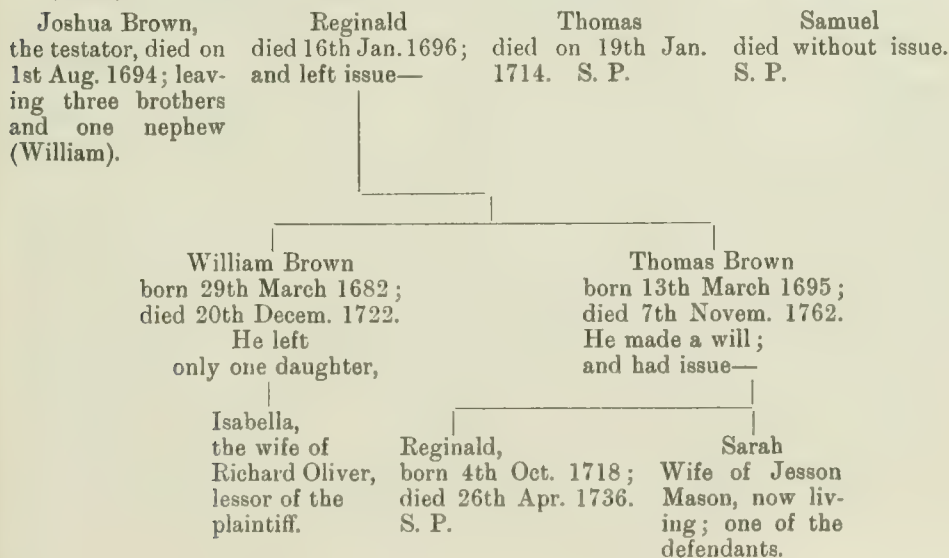
Thomas Brown, being so seised, on the 5th of June 1762, made his will, whereby he devised the premises in question (after the death of Margaret his wife and Sarah Barlow [now Mason] his daughter,) to his grandson John Barlow his heirs and assigns for ever; and on the 7th of November in the same year, died; leaving the defendant Sarah Mason, the wife of the defendant Jesson Mason, his daughter and heir at law.

Thomas and Samuel Brown, the brothers of Joshua the original testator, died without any issue.

Isabella Oliver, the plaintiff, is heir at law of William Brown, the first son of Reginald Brown; and is also heir at law of Joshua Brown, the original testator.

The defendant, Sarah Mason, is heir at law of Thomas Brown, the second son of the said Reginald.

[1629] The following pedigree will give a clearer conception about the parties.



The question was "whether Thomas, the second son of Reginald (which Thomas was not born till after the death of the testator Joshua Brown,) took an estate tail under Joshua Brown's will, or only an estate for life."

On the part of the plaintiff, it was insisted to be an estate for life only : on the part of the defendants an estate tail.

Mr. Wedderburne argued for the former : Mr. Wallace for the latter.

The substance of the arguments on either side amounted to the general effect following.

The plaintiff's counsel argued, from the whole scope of the will and particularly from the testator's express declaration "that the reason of his settling and limiting his estate in the manner he had done, was because he desired to have the same continue in his name and blood," and likewise from the express words, "for and during the term of his natural life," that the manifest intention of the testator Joshua Brown was to give to the second son of his brother Reginald an estate for life only ; and to make all the sons (either born or unborn) of his brother Reginald, and of his brother Samuel (after his brother Reginald) tenants for life successively ; with remainders in tail, to the first and every other sons of such respective tenants for life.

An estate for life may be limited to a person unborn, as [1630] the first taker. And here, the estate first given to the second son (not then born) of his brother Reginald is expressed to be an estate for life : and no words of limitation were meant, or can with any propriety of construction be applied to the second son of Reginald ; and consequently, none that can operate so as to enlarge the estate for life expressly devised to him.

It must be confessed, that there is an inaccuracy or confusion in the wording of the devise that is to take place immediately after the death of Reginald's second son. The words are "and from and after the death of the said second son of my said brother Reginald Brown, then to the first son of the body of such second son of my said brother Reginald Brown, and to the heirs male of the body of such second son ; and for default of such issue, to the third, fourth, fifth, and every other younger son or sons of the said second son of my said brother Reginald Brown, and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said Reginald Brown."

But there can be no manner of doubt, that this is owing to a mere accidental omission in transcribing the fair copy of this will from the original rough draught of it. It is evident, that a line is inadvertently left out : and it is most clear, what that line must have been. The devise immediately after the death of Reginald's second son is "to the first son of such second son's body, and to the heirs male of the body of such"—thus far the transcriber copied the draught right. But here he has plainly omitted the following words—"First son lawfully to be begotten ; and for want of such issue, then to the second son of the body of such second son of my said brother Reginald Brown lawfully to be begotten, and to the heirs male of the body of such."—If these words had been inserted, the clause had been quite clear, sensible, and methodical. By supplying the omission of them, the limitation in favour of Reginald's second son and his descendants will be precisely the same as the testator had before expressly made with regard to Reginald's first son and his descendants : which must have been the testator's intention, and appears beyond doubt, upon fairly considering the will, to have been so. He certainly intended to give no estate tail, till he came down to his grandchildren. And if these omitted words are supplied, the second son intended by the will is not the second son of Reginald, but the second son of the second son of Reginald ; not son, but grandson to Reginald Brown : which is agreeable to the testator's intention "to limit his estate in succession to the several descendants of the then unborn son of his brother Reginald, in the like manner as he had be- [1631]-fore limited it to those of Reginald's first son, which first son was then born." And to prove that the Court might supply this omission, the case of *\* Coryton v. Hellier* was cited ; where the words "if Sir John Coryton shall so long live," were supplied. But whether this omission can or can not be supplied, yet still it shews that the "second son" meant in this clause could not be Thomas the second son of Reginald : for the very next limitation, to take place in failure of the issue of that second son, is "to the third son of Reginald's second son." Now there can be no failure of the

\* In Chancery, temp. Lord Hardwicke, 10th Aug. 1745.

issue of the person who had a third son alive. The event therefore which the testator had in contemplation, and in which event he intended that this third son should take, could not be a failure of the issue of the father of that third son; but of some other person concerning whom the questionable words "second son" must be understood and to whom they must relate.

On the part of the plaintiff, it was further observed, that Thomas Brown, the second son of Reginald, had himself decided the present question, by applying for and procuring an Act of Parliament, wherein he is, upon his own suggestion, recited to be tenant for life, with remainder to his first and other sons in tail male successively. His petition for this private Act, and the recital in it "that the devise to him was only for and during the term of his natural life," is a bar to him and those who claim under him, and precludes them from claiming as tenants in tail. And it was said, that Lord Hardwicke had solemnly declared so, very lately, in the House of Lords, in *Sir James Mackenzie's case*.

Note—This private Act of Parliament recites the will, as if it had really been as Mr. Wedderburn now supposed that it was meant to have been; and as if it went on, to give an estate in tail male to all and every of the sons of the second son of Reginald; and proceeds upon a supposition "that Thomas, the second son of Reginald, was tenant for life."

The counsel for the defendants laid it down as an established rule of law, "that if a devise be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the devisee takes an estate tail."

Now here the devise is "to the second son of Reginald Brown, for life; and after his decease, to the first son of his body and the heirs male of the body of such second son."

[1632] This is a clear estate tail therefore in the second son of Reginald Brown. And the inserting a limitation "to the first son of such second son" must be understood as only directing the order of succession according to the laws of primogeniture and the ordinary course of succession: not as a *designatio personæ*: for the word "son" is, in this place, a *nomen collectivum*. Nor was this unborn first son of an unborn father (as the second son of Reginald then was) capable of taking as a purchaser; because a devise "to the first son of a person unborn" is too remote to take effect by way of purchase: and then the case is no more than a devise "to one for life, and to the heirs male of his body;" which is, unquestionably, an estate tail.

As to the intention of the testator—Even supposing it to have been clearly what has been contended for, on the other side; and supposing (though not admitting) "that the imagined omission in the will might be supplied by construction;" yet that intention could not take effect: for it is a limitation of a possibility upon a possibility; and manifestly tends to a perpetuity, by a suspension of the inheritance from vesting, and consequently rendering the estate unalienable for a longer time than the policy of the law allows: which has not yet been permitted to last longer than the compass of a life or lives in being, and one and twenty years beyond.

Though the limitations to the issue male of unborn sons can not vest in them as purchasers, yet they need not be totally rejected. They shew the testator's intention "that such issue should succeed to the estate:" and the only way for that intent to take place, is, by construing the unborn sons of Reginald himself to be tenants in tail male; and then their issue will inherit. Whereas, the construction contended for by the plaintiff would totally preclude them from taking, and defeat the intention of the testator "that the estate should continue in his name and blood." The exposition of a will should be such as will best serve to effectuate the general intent of the testator; and whenever a Court supplies, by construction, any seeming defect in the language, it is always in order to support, not to defeat the testator's intention: whereas if the supposed omission in the present will were to be supplied by construction, in the manner proposed on the part of the plaintiff, it would be only for the purpose of rejecting it the next moment, as void, and defeating the general intention of the testator.

As to the Act of Parliament—It can not vary the real rights of the parties, with respect to persons not claiming [1633] under it. It could not make any alteration in the limitations of the testator's will. It was solely intended to protect, in all events, the persons who should become lessees, upon the terms of rebuilding and



laying out their money, upon the faith of it. It can not affect a question of right between the claimants under Joshua Brown's will.

On the part of the defendants, were cited the cases of *Coulson and Coulson*, *The Duke of Marlborough and Lord Godolphin*, *Hopkins and Hopkins* (Forrester, 44), and *Robinson v. Robinson*, (ante, 38).

Reply—As to the limitation "to the heirs of the body of the second son of Reginald," which, uniting (as they say) with the former devise "to the said second son, for his life," enlarges his life-estate into an estate-tail.—The answer is, that here is no such limitation: none was meant, nor can any words of limitation be with any propriety applied to the second son of Reginald, so as to enlarge his life-estate.

They have argued, that though the law will not permit the unborn issue of an unborn ancestor to take that very same estate which the testator intended to give them; yet, in order to effectuate, as far as may be, the testator's intention, it will give their ancestor a larger estate than was intended for him; namely, an estate tail (under which his issue may take,) instead of a life-estate.

Answer. This construction would be ineffectual to attain the end proposed: because the tenant in tail would thereby have it in his power to defeat the order of succession. (b) And if the policy of the law will not allow the sons of Thomas (Reginald's second son, unborn when the will was made,) to take that estate which the testator designed they should take, it affords no reason for giving to their father an estate which the testator certainly did not design that he should take: and so, by a disposition which the testator never meant nor thought of, put it in his power to disinherit his issue, and frustrate the testator's declared wish and desire.

The Court (namely, Lord Mansfield and Mr. Justice Wilmot, the other two Judges being absent,) held that Thomas the second son of Reginald took an estate-tail.

[1634] They could not insert the limitations which the plaintiff's counsel supposed to be left out: and as the will now stood, there was no question in the case.

But if the omitted limitations could have been supplied by construction, they thought the unborn sons of an unborn son could not have taken; and that, to effectuate the general intention of the testator, the word "sons" should be construed a word of limitation; and an estate-tail given to the second son of Reginald.

This was the substance of their general opinion.

Their particular expressions were somewhat to the following effect.

Lord Mansfield—A Court of Justice may construe a will; and, from what is expressed, necessarily imply an intent not particularly specified in words; but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omissions.

Lord Hardwicke, though generally liberal in construing the intent of testators, would not supply a contingency omitted, in the most favourable case that could exist. A mother devised her real and personal estate to her daughter (who was an only child;) "and if she die before she is of age to dispose thereof," then devised it over. The daughter lived to be married; and died, leaving a daughter between twenty and twenty-one. Lord Hardwicke decreed for the devisee over, as to the real estate.\*

But if words are rejected, or supplied by construction, it must always be in support of the manifest intent.

Here, adding the words would defeat the general intent: which certainly was "that the issue male of the second son of Reginald should take, before it went to the others in remainder." But if the words were added, the limitation, by the rules of law, would be void (d.) A possibility cannot be devised upon a possibility. The intent cannot be effectuated, unless the second son of Reginald has an estate-tail.

(b) This is a strong reason though over-ruled; and 1 Burr. 38 is an authority for over-ruling it.

\* *Bellasis v. Urthwaite and Others*, 11th Feb. 1737-8.(c)

(d) See 16 Vin. 461, pl. 2 b.; and vid. 3 Co. 51 a. that if a lease be made for life, remainder to the right heirs of J. S. if there be no such person as J. S. born at the time of the limitations of the remainder, it is void: and that applies to the present

(c) S. C. 1 Atk. 426. But there are other words in the state of the case there, shewing the testator's intention that it should go over notwithstanding the daughter's marriage.

The blunder of expression is here favourable to the [1635] real meaning; and therefore cannot be supplied by construction: the constant object of which is, "to attain the intent." For this purpose, words of limitation shall operate as words of purchase; implications shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest. But here, to supply the words omitted by mistake or blunder, would introduce a blunder in law, and defeat the testator's general view and intention. As the words stand, the second son of Reginald took an estate-tail. The intent of the testator cannot be answered, but by giving him an estate-tail. Therefore the literal construction is most agreeable to the intent, and must prevail.

The private Act of Parliament cannot affect this question.

Mr. Justice Wilmot—The question is, what this testator intended? and whether we can give it effect, in part?

He intended it to remain in his name and blood. Two of his brothers are dead without issue.

At the time of the testator's death, William the first son of Reginald was born: Thomas, the second, was not. He certainly meant the same estate to Thomas as to William. But that intention cannot take effect, according to the rules of law: you cannot limit a non-entity upon a non-entity (e) a possibility upon a possibility. (f) It was necessary that the second son should be tenant in tail, in order to give the intention of the testator an effect. If the devise to the son of Reginald's second son should be a nullity, the general heirs at law of the testator would take, though never so many heirs male from Reginald should be living. Let his intention therefore take place, as far as it can go: but it can go no further.

The clause of his name and blood is, in effect, saying "that the blood of Thomas shall inherit, before it goes to his daughters."

Besides, how can we make wills, and insert words arbitrarily and by conjecture? Words in a will are to be construed as words of limitation, or as words of purchase, as they will best effectuate the intention of the testator: whereas the correcting this blunder (if it be one) must render the will abortive; and disappoint the intention of the testator, to a very high degree.

As to the Act of Parliament—It is nothing at all: it is only to empower him to make building-leases: and was intended for the security of the purchasers. The will is there recited, different from what it really is. (g)

[1636] This is clearly an estate-tail. And therefore

Per Cur. unanimously—

Judgment must be for the defendant.

On the 26th of February 1767, this judgment was affirmed by the Lords; agreeably to the unanimous opinion of the Judges, delivered by Lord Chief Baron Parker.

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case so far as to prove that a devise to the second son of Reginald would have been a void devise to him as a purchaser, because Reginald had no second son at the time of the devise, or even at his (the testator's) death; but there is another reason for it, that it was going nearer to a perpetuity than the law will admit of. The expression used by the reporter is wrong: he means that a remainder can not be devised upon a possibility of a possibility. Vid. 16 Vin. 461, pl. 2 b. and 3 Levinz, 410.

(e) Qu. If the persons unborn be sons, even then it hath been determined that the second cannot take, 6 Durnf. 613.

(f) That there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself, but the contrary. Rule given by Lord Popham, in *The Rector of Chodington's case*, looks like a reason of art, but in truth has no kind of reason in it, and that rule has been often denied in Westminster Hall, 3 Ch. Cas. 29.

(g) It appears from the printed case in Dom. Proc. that there was a recital in the Act, that Thomas who was afterwards vouchee in the recovery, was only tenant for life, and the Act was obtained upon his petition; and yet it was determined that he was tenant in tail, because the object of the Act was only to remove doubts; for doubts would have been sufficient to prevent any person from contracting for building leases, which by the Act he was enabled to make.

REX *versus* JOSEPH HALL. 1765. Commitment as a vagrant for deserting a family, must state that they were chargeable, and be for a limited time.

The defendant was brought up by habeas corpus, from Guilford; having been convicted by two Surry-justices, as a rogue and vagabond, upon 17 G. 2, c. 5, § 7, (to amend and make more effectual the laws relating to rogues, vagabonds, &c.) for running away from his parish, and leaving his wife and children to be maintained by the parish.

Mr. Hall, on behalf of the defendant, objected to the commitment.

1st. That he was not convicted: which he ought to have been.

2d. It is not alledged, "that his wife and children were chargeable to the parish."

3d. He is not committed for any limited time; but—"till he shall be discharged according to the laws and customs of this realm."

Mr. Mansfield, *contra*, endeavoured to support the commitment; by 1st, denying that a conviction was necessary; 2dly, by arguing, that the words used were tantamount to an allegation "that they were chargeable to the parish;" 3dly, by attempting to shew that these words of the commitment are equivalent to the direction of the statute, which is, "there to remain until the next General or Quarter-Sessions, or for any less time as such justice or justices shall think proper."

Lord Mansfield observed, that the 2d and 3d objections were sufficient to invalidate the commitment: and it was better not to give any hasty opinion about the necessity of a formal conviction.

The man was discharged.

[1637] SHUBRICK *versus* SALMOND. Tuesday, 5th Feb. 1765. An express covenant shall bind to performance. (Mr. Justice Denison and Mr. Justice Yates, were absent.)

This was an action of covenant upon a charter-party of affreightment, by the merchant who hired the ship, against the master of the ship, for a breach of contract in not going to the port of Winyaw in South Carolina, as he had covenanted to do.

The declaration set forth, that the defendant, being shortly after bound on a voyage to the island of Madeira, by charter-party under hand and seal dated 22d October 1762, covenanted that he would, directly as wind and weather would permit, after the discharge of that outward bound cargo at the island of Madeira, sail and proceed to Winyaw in South Carolina, or as near thereto as he could safely get; and there stay forty running days from the time of such arrival, if not sooner dispatched; and load his ship with such rice and other goods as the plaintiff's agents, &c. should tender to be laden: in consideration whereof, the plaintiff agreed to pay him freight at the rate of 4l. 10s. per ton for every ton delivered at the port of London, and also two third parts of port charges and pilotage, &c.

In this charter-party is the following proviso—"That if the said ship should not be arrived at Winyaw aforesaid by the first day of March next ensuing the date of the said charter-party, that then and in such case it should be in the option of the said Richard Shubrick his factors or assigns on the said ship's arrival at Winyaw, either to load the said ship on the terms aforesaid, or not; or at the then current freight given to ships loading at Winyaw for the voyage aforesaid; or to refuse the said ship entirely: so always that such the intention of the said Richard Shubrick his factors or assigns was declared to the master of the said ship within forty-eight hours after his application to the factors or assigns of the said Richard Shubrick at Winyaw." And for the performance of the covenants, they bind themselves, each to the other, in the penalty of 1200l.

The declaration assigned two breaches—1st. That the said ship did not sail and proceed to Winyaw or as near thereto as she could safely get, in order to load, &c.; but on the contrary, the defendant did wilfully absent himself therefrom. 2d. That the defendant did not, on the said 1st of March or at any time since, arrive at Winyaw; but wilfully absent himself therefrom.

Plea (in bar of the action)—That he did proceed with all convenient speed, and sail to the island of Madeira; but by reason of contrary winds and bad weather and from no other cause, was prevented arriving there till the 16th [1638] of February 1763; so that it was impossible for him to discharge his outward bound cargo to Madeira.



To the second breach he made the same plea; and that it was impossible, after the discharge of his cargo, to arrive at Winyaw by the 1st day of March.

To this, the plaintiff demurred generally: and the defendant joined in demurrer.

Mr. Ashhurst, for the plaintiff, objected, that these were bad pleas; for the defendant was not discharged from his engagement; but bound to perform it. It is a contract by deed: and there was a sufficient consideration at the time of the agreement; though, upon a deed, it is not so necessary that there should be a sufficient consideration.

He compared it to the case of *The Earl of Chesterfield v. The Duke of Bolton*, in the Exchequer, reported in Comyns, 627: where there was a covenant to repair: and though the house was burnt down, the tenant was obliged to rebuild it. And whenever a man covenants to do a thing, he is bound to perform it. So is *Jeakill v. Linne*, Hetley, 54. And *Paradine v. Jane*, Aleyn, 26, 27. And *Monk v. Cooper*, 2 Str. 763, which was upon a covenant to pay rent; and there was also a covenant to repair, except in case of fire: the house was burnt; and though the landlord did not rebuild it, nor did the tenant enjoy, during the time for which the rent was demanded; yet the tenant was obliged to pay the rent, according to his covenant.

As the defendant did not arrive at Winyaw before the 1st of March, the plaintiff was to have his option "whether to load him or not."

Mr. Dunning, contra, for the defendant. Here was a positive engagement to sail to Winyaw in South Carolina. On the other hand, there was a positive engagement to pay the freight; with this proviso, that "if the ship did not arrive before the first of March, the plaintiff was to have his election, whether to load the ship, or not."

The ship did not arrive: and it is admitted, that it was not the defendant's fault. And therefore, as it did not [1639] arrive, the plaintiff was not obliged either to load the ship or pay any freight. Therefore the consideration fails. The proviso is an express discharge from the reciprocal engagement: and the contract is void.

The cases that have been cited were lately considered in Chancery, and determined not to be law; the case about Prince Rupert, particularly, *Pardine v. Jane*, in Aleyn.

The case between *Mr. Garrick and Mr. Barry* in C. B. was on articles for Barry's performance on the stage. Garrick and Lacey had covenanted to pay him 2l. 12s. 6d. each night that he should act, and to give him a benefit, &c. in case Mrs. Cibber should, &c. &c. The Court held \* the contract to be void; because there was no reciprocal obligation.

Some consideration is necessary, to support the plaintiff's action. And here the consideration of paying the freight fails. Therefore there is a great inequality in this contract between the parties: it is a covenant on one side only. Therefore the plaintiff's action is not to be supported.

Mr. Ashhurst—in reply. The proviso was introduced in favour of the plaintiff; not to prejudice him, or to excuse the defendant.

The cases I cited do not turn upon the having a remedy over.

In *Garrick's case* against *Barry*, there was a want of mutuality from the first entering into the contract. Here, was a good consideration for the defendant's entering into a positive contract. He did do so: and he was obliged to perform it.

Lord Mansfield—Upon the true construction of this agreement, there is no foundation of fact, for arguing this point of law.

The distinction between implied covenants by operation of law, and express covenants, is, that express covenants are taken more strictly. A man may, without consideration, enter into an express covenant under hand and seal.

Here, each has bound himself by express covenant under hand and seal: and the defendant has broken the covenant on his part.

The plaintiff wanted a ship at Winyaw in Carolina, to load with rice: and therefore he covenanted with [1640] the defendant "to freight his ship there." And the defendant covenants absolutely "to go thither;" and in order to quicken the ship's arrival there, there is a proviso that if he gets there by the first of March, he is to be certain of a freight: but if he does not arrive there before 1st of March, then the plaintiff was to declare in forty-eight hours, whether he would freight the ship or not." The defendant therefore thereby became the insurer of the risque of his getting there

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\* I believe this case was never determined.

before the first of March : in which event, he was sure of a freight : but he still had a general chance of getting a freight even though he should not arrive there till after that time.

The words are positive and express "that he should go thither." The parties plainly meant that the ship was to go thither. And the consideration fails by his not going.

There was another case arising upon a fire, besides what has been mentioned : and all the opinions from the Bar were "that though it was a hard case, yet the tenant who had covenanted to pay the rent, was bound to pay it."

Mr. Justice Wilmot was of the same opinion.

If the defendant had not expressly covenanted to go to this port ; and had been unavoidably prevented, without any default in himself ; it might have been a different case.\*1

In the case of the exception of fire, the tenant undertook to pay the rent in all events : and was therefore obliged to pay it.

Here, the freighter had rice at Winyaw. He agrees with the defendant "to go thither." He expressly covenants to go, at all events. In order to quicken him, it is stipulated by a proviso "that if he do not arrive before the first of March, the freighter is to have his option, to load his ship, or not." The consideration to him is his being sure of a freight, in case he got there by the first of March. But this proviso can not excuse him for not going thither at all, because he could not get there so soon as that day : when he had expressly covenanted to go to that port.

Lord Mansfield—The demurrer must be overruled.

Judgment for the plaintiff.

#### [1641] *REX versus THE INHABITANTS OF SPOTLAND.*

This case is already printed and published, in the quarto edition of my *Settlement-Cases*, No. 170, p. 527.

*REX versus HOLMES*, Mayor of Wigan. Thursday, 7th Feb. 1765. A return to a mandamus filed after the death of the officer, seems to be irregular.

On Thursday, 22d November last, Mr. Serjeant Aspinall and Mr. Dunning moved to take off of the file the return to a mandamus directed to the defendant Holmes, commanding him to restore Leatherbarrow \*2 to the office of an inn-burgess of Wigan ; on affidavit "that Holmes was dead at the time of the return being filed : " (which was upon the last day of last Trinity term, on the motion of Mr. Clayton). The import of it was, "that Holmes was dead before the motion was made for filing the return."

Lord Mansfield and Mr. Justice Wilmot—It turns upon this—"Whether the Court could have admitted the return to have been filed, if the fact had been disclosed to them."

Note—The mandamus issued in 1759 : and Holmes died about three years ago.

The difficulty was, against whom to grant the rule ; both Holmes and Leatherbarrow being dead.

The motion ended in this—To stand over till the first day of the present term ; Mr. Clayton undertaking to shew cause then, and file his affidavit in answer to the present affidavit, a week before the term.

Accordingly—Mr. Clayton, Mr. Morton, and Mr. Wallace, on Thursday 24th January last, shewed this cause why the writ of mandamus and the return thereof should not be taken off the file ; viz. that the return was duly made in 1759, and then actually signed by the mayor, at a common hall ; and in July 1760, delivered over to Mr. Holt Lee, [1642] the agent for the prosecutors of the writ : and the persons commanded by the writ to be restored always afterwards acted as in-burgesses, in consequence of such restoration. Holmes died in 1762. And Bromley, the present agent for this motion, knew all this ; but has suppressed it. We did not indeed then think it necessary to file it : but we had a right to file it, even after Holmes's death : and it was no irregularity to do so.

\*1 See the distinction, in *Aleyn*, 27. [Also 1 H. Bl. 36.]

\*2 He was now dead, since the filing of the return ; but was alive at the filing of it.

Mr. Serjeant Aspinall and Mr. Dunning contra, for the rule.

The return ought not to have been filed after the mayor's death. It can not now be traversed. The mayor gave no authority to file it. And he signed it contrary to the opinion of the corporate assembly.

The only question is, "whether the Court would have ordered the return to be filed, if they had been apprized of the real state of the facts." If they would not, in that case, have ordered it to be filed, they will now order it to be taken off the file.

A bishop's certificate of an excommunication is null and void and of no effect, if not received in the bishop's life time: and his successor must certify. 8 Co. 69 a. *Trollop's case*.

Lord Mansfield asking "whether there was any limitation to the time of filing returns; and whether a return can be filed after the death of the party who made it."

Mr. Serjeant Aspinall, to prove, "that the return must come into Court by the hands of the mayor," cited 12 Mod. 308, *The King v. Borough of Abingdon*. The words there used are—"And the return must come by mayor's hands into Court."

Mr. Justice Wilmot—The return was signed in 1759, and kept in the mayor's custody: in July 1760, he delivered it to one Holt Lee, who kept it in his hands till after the mayor's death, without filing it. It was filed indeed afterwards, at a time when the mayor could neither civilly nor criminally be answerable: neither was it filed at the application of any of the persons restored; nor even any claiming under them.

Therefore I have great doubt. I am afraid of the precedent.

[1643] Lord Mansfield—It is a return of an act really done: and the persons commanded to be restored ought not to lose their right, merely because the mayor did not file the return. Therefore it would have been a mere matter of form, if the mayor had been alive. The question is, "whether his death makes any difference."

Convictions are never drawn up, till some occasion calls upon the prosecutor to draw them up. There were many at St. Margaret's Hill, which are not drawn up yet.

I suppose, the persons who have now filed this return have some interest in it.

Mr. Athorpe (Secondary of the Crown-Office) informed the Court, that the prosecutor might, at any time, have called for the return. And

Mr. Barlow said there were two returns drawn at the time; one, as the mayor's; the other, as by the corporation: but neither was then filed.

Curia advisare vult.

The opinion of the Court was now moved for.

Mr. Justice Wilmot—I think, this return ought not to stand upon the record.

The mandamus was moved for, as of course: and was directed "to the mayor" alone. I think it ought to have been directed to those who had power to return it. If so, the writ and return seem to be a nullity. But I do not go upon that.

The writs were delivered to the mayor in 1759; he called a common hall; the common hall restored the persons named in the writs; the mayor then signed a return, "that he had restored them;" in July 1760, he delivered this return to Holt Lee, their agent; the mayor died in 1762: in Trinity term 1764, the writs were filed.

The question is, "whether they ought to have been filed after the mayor's death, under these particular circumstances."

If the return ought not to have been received, it ought to be taken off the file.

[1644] In general, every return is ambulatory, and in the breast of the person to whom the writ is directed, till it is filed. Signing is not necessary, nor material.

The only way of getting off of a return, is by an action or an information against the person who returns it. There was a case in M. 7 G. 2, *Rex v. Wilkes*, in Calne; which went upon this principle, "that it can only be controverted by action or information, if it be once received." But this man was dead before it was received.

Though this mandamus is directed to the mayor only; yet he himself understood the return to be made with the consent of the corporation or common hall.\*

This return, if it should stand, may be urged as a conclusive evidence, not only "that it was made by him:" but also "that it was made with the consent of the corporation." So that, if it is permitted to stand, it will preclude the entering into the question "whether it was with or without the consent of the corporation:" for, this can never be disproved by any evidence: the question cannot be inquired into,

\* V. ante, p. 1486.



either directly or collaterally. It can not be examined in any action or information against him, being dead before it was received.

As long therefore, as this return stands, the question, "whether the restoration was or was not with the † consent of the corporation," is bound down, and can never be entered into; for no evidence can now be received to controvert this fact of the corporation's consent.

And as it may be applied to this purpose, I therefore think the return ought to be taken off the file.

If such intention be waved, and that question lies open, it may answer my difficulty.

If that question is left open, I am entirely satisfied.

Mr. Attorney General offered to come into any rule for leaving that question open.

Mr. Serjeant Aspinall—But nevertheless, other people hereafter may make that use of it.

[1645] Lord Mansfield—Undoubtedly, that question ought to be left open.

Mr. Dunning continued to insist on the return being taken off the file; and offered to admit the fact "that the mayor himself did make such a return."

Lord Mansfield and Mr. Justice Wilmot—If a returning officer was to die immediately after signing a return and before the filing it, the Court might direct an issue to try the validity of it.

Mr. Justice Wilmot. The reason of the \*case which has been cited upon the bishop's certificate, is, "that the succeeding bishop may have absolved the man: and therefore the certificate must be signed by the successor."

I consider this return, now, as standing upon the admission of the prosecutors of the writ, "that no other use shall be made of it than barely that the mayor did restore him in fact;" without prejudice to the question concerning the legality of this restoration; or entering into the question about the corporation's concurring with him, or not.

Lord Mansfield—Let this be taken down, as by the consent of counsel on both sides, in all the causes.

REX *versus* FELIX MAC DONALD. Friday, 8th Feb. 1765. Indictment does not lie for receiving unmarried women into a house to be delivered of children.

On Monday last (the 4th of February) Mr. Morton moved to quash an indictment against the defendant for converting his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women; who after their delivery went away, and deserted their children, whereby the children became chargeable to the parish.

Lord Mansfield took notice, when it was first moved, of the narrow impolitic principles upon which the prosecutors had proceeded; and expressed his surprize, how such a bill could ever be found.

Mr. Attorney General now shewed cause. He said, all that the prosecutors desire, is, "that the parish may be indemnified:" for, at present, the parish are burthened with all these bastard-children.

[1646] Lord Mansfield—But by what law is it criminal to deliver a woman when she is with child?

Cur. To be sure, this is not indictable.

Rule made absolute, to quash the indictment.

The end of Hilary term 1765, 5 G. 3.

[1647] EASTER TERM, 5 GEO. III. B. R. 1765.

[1 Black. Rep. 543.]

The Court was now full; Sir Richard Aston, late Lord Chief Justice of the Court of Common Pleas in Ireland, was called a Serjeant on the first day of this term; and took his place on the Bench in this Court, the next day; Sir Thomas Denison having resigned, on the 14th of February last.

† V. ante, p. 1486, *Rec. v. Latham et Al.*

\* *Trollop's case*, 8 Co. 69 a.

REX *versus* VICE-CHANCELLOR, &c. OF CAMBRIDGE. Thursd. 25th April 1765.  
[S. C. 1 Bl. 547.] Mandamus lies to compel the university to put their seal to their appointment of their high steward. [Vide Vin. Abr. tit. Officer (O).]

Upon the death of the late Earl of Hardwicke, a warm contest arose in the University of Cambridge, between the Earls of Sandwich and Hardwicke, for the office of high steward.

That officer is elected by a grace : which must pass the caput unanimously, and be assented to by the houses of non-regents and regents.

A grace passed the caput, for the Earl of Hardwicke, and was assented to in the house of non-regents, by a majority of two : on the 30th of March 1764, it came on in the house of regents. The two proctors mark the votes, in two lines ; under "placet" and "non placet" when cast up they were equal.

The case was new : and they were at a loss, what to do.

[1648] The senior proctor (in the interest of Lord Hardwicke) insisted on a second scrutiny ; supported by the order of the vice-chancellor. The junior proctor (in the opposite interest) refused going to a second scrutiny ; because they both agreed, "that the votes were equal." He insisted on reporting, in form, "that the votes were equal ;" which the other refused : and the report must be made by both concurring.

Upon this, the vice-chancellor dissolved the congregation, without any report having been made.

Afterwards, it was discovered, that Mr. Thomas Pitt, who voted in the regents house against the grace, was a master of above five years standing, and therefore ought to have voted amongst the non-regents.

If this vote was bad, the placets had a majority of one.

Mr. Pitt was admitted to the degree of Master of Arts, on 17th July 1758, by virtue of a mandate from the King. On the 18th of July 1758 (the next day) leave of absence was granted to him, as to a person actually created Master of Arts.

The proctors had, (at first) made a mistake ; each having omitted to mark the vote of the other ; so that, in the paper of the senior proctor, the placets had a majority of one ; and in the junior proctor's paper, the non placets had a majority of one. But they soon discovered the cause of the difference ; and concurred in setting it right ; which made the votes agree, in each paper.

A mandamus was applied for, on Lord Hardwicke's behalf : and a rule to shew cause was granted : which rule was drawn up in the manner which will immediately appear ; viz.

Cause was now shewn, why a mandamus should not issue to the Vice-Chancellor and others, of the University of Cambridge, to complete the election of the Earl of Hardwicke, into the office of high steward of that university.

The rule was made, first, upon the vice-chancellor, to shew cause why a writ of mandamus should not issue, directed to him, requiring him to convene and hold a congregation or convention of the university ; to the end and for the purpose, that the proctors of the said university may declare whether the majority of the votes in the regent-house of the said university upon [1649] a grace proposed to the said house on the 30th day of March last past, for the election or appointment of Philip Earl of Hardwicke to be high steward of the said university, was against or in favour of the passing of the said grace.

The second part of the rule was upon Daniel Longmire, clerk, and Ralph Forster, clerk, proctors of the said university. To shew cause why the like writ should not issue, directed to them, requiring them to declare whether the majority of the votes in the regent-house of the said university, upon a grace proposed in the said house on the said 30th day of March last, for the election or appointment of Philip Earl of Hardwicke to be high steward of the said university, was against or in favour of the passing of the said grace.

The third part of the rule was upon the said vice-chancellor, Daniel Longmire, Ralph Forster, William Roberts, and Henry Talbot, keepers of the common seal of the said university, to shew cause why the like writ should not issue, directed to them, commanding and requiring them to put and affix the common seal of the said university to an instrument or letters patent appointing the said Philip Earl of

Hardwicke high steward of the said university, pursuant to the tenor of a grace passed in senate on the said 30th day of March last.

The counsel who now shewed cause on the part of the non placets, were Mr. Attorney General (Sir Fletcher Norton), Mr. Morton, and Mr. Blackstone.

In the first place, they argued that this mandamus would not issue, upon the foot of a mandamus "to hold a court-leet:" for, this was not the university's case.

By a charter of Hen. 1, the town had the court-leet.

By another of Hen. 3, the town had it: not the university.

In 4 Ric. 2, the town's people committed outrages against the university: and, the year after, viz.

In 5 Ric. 2, (17 Feb.) the university had their first grant.

In 8 Ric. 2, the university had another grant: which gives them their first power "to summon a jury to make presentments."

In H. 6 they had another grant: (giving them power to remove lewd women, &c.).

[1650] In 17 H. 8 an award was made by a Judge of the King's Bench and two serjeants at law—"That nuisances should be corrected in the town-leets."

In 3 Eliz. a charter (like that of H. 6) makes the first mention of the office of steward.

Therefore they have no prescriptive court-leet; nor have they a grant of any. Therefore the high steward is not steward of a court-leet; but only an officer at will of the chancellor.

To prove "that the Court will not issue a mandamus nugatorily" they cited Style, 457, *The Proctor and Craford*: and 1 Shower, 217, 251.

Secondly—There is no reason, they said, in the present case, to grant a mandamus; because the University of Cambridge is not like an ordinary corporation; but is visitable by the Crown, and subject to statutes to be given by the Crown, being of Royal foundation.

In 3 Ed. 6, the Bishop of Ely and others were appointed visitors; and King Edward the Sixth gave statutes, which the university accepted. So did Queen Elizabeth. In the 12th year of her reign, she gave them a new body of statutes under which they are now governed; and in which, there is no provision for the office of steward: but they direct "that all officers not particularized shall be chosen as the vice-chancellor is to be chosen."

The university, having accepted these statutes, are therefore bound by them. And yet the election now in question was not as the election of a vice-chancellor. Therefore it is null and void.

Thirdly—On another ground, this mandamus should be refused. Lord Hardwicke's grace did not pass. Therefore this mandamus for enforcing it ought not to go: Mr. Pitt voted in the house where he ought to vote. He could not vote in any other place; his quinquennium was not expired.

Regents were, in their origin, preceptors.

Regency was originally for one year: it was then enlarged to two, three, four, five, years. Now from the [1651] nature of regency and the onus annexed to it, Mr. Pitt continued a regent. A Royal mandamus can only confer a privilege; it cannot exempt the onus of disputations; and throw it upon others.

The *ordo senioritatis* is now, as it always was. And from the *ordo senioritatis* and the combination-paper, Mr. Pitt's quinquennium could not be expired, nor the onus of the *cursus disputationum* taken off from him. He could not be in the combination-paper of his college till 2d July 1759. If so, he voted in his right house.

Fourthly—Lord Hardwicke was not elected: because five others \* voted for him in the regent-house, who had no right to vote there; namely, three persons upon resumed graces, (which are seldom used but for the sake of a job,) dispensing with their standing, and continuing their regency; which dispensing power is contrary to the statutes. The two squire beadles also voted, as being in that office: now they were past the time of voting in the regent house, as Masters of Arts: for their quinquennium was expired. Therefore they ought to have voted in the non-regent house. These facts will be proved.

Lastly, from the nature of the present rule, there can be no effect of it. For no

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\* Dr. Roger Long, Henry Hubbard, B.D., Ralph Forster, M.A., Zachariah Brook, D.D., and Samuel Carr, M.A.



other congregation can do the act. The then proctors are now out of office, and cannot tell (by looking at scratches without names) how Mr. Pitt voted; nor have they any thing whereby to refresh their memories.

Either the former proceedings were a nullity by the sudden dissolution of the congregation by the vice-chancellor, without proroguing or adjourning it: or else, the Earl of Hardwicke was rejected. If either be true, no mandamus ought to issue; nor even if the votes were equal.

The only return that can be made must be "that the votes were equal:" and in that case, the election was null and void.

The counsel on the other side, for the mandamus, were Mr. Yorke, Mr. Solicitor General (de Grey) and Mr. Ashhurst: but the two last declined adding any thing to what Mr. Yorke had said; as he had been so copious in his argument: which, indeed, was very full and elaborate, and too long to be minutely here particularized. What follows may perhaps convey a general view of it.

Mr. Yorke first discussed these two previous points: [1652] 1st. Whether the university have a court-leet, whereof the high steward is a necessary officer; 2dly. What was the nature of his office as steward of the leet.

1st. He argued, that they have such a franchise. They may have it by prescription; and yet may also have a charter confirming it. The 13 Eliz. c. 29 confirms courts-leet and view of frank-pledge to them.

Upon the 2d previous point, he argued that the office was incident to the court. Consequently, a mandamus to admit him to it, is a proper method.

The general question he said, is, "whether the person elected has a corporate right."

The present question is not upon the right of the electors, but of the elected. The Court will support such a right by a mandamus, if it appears.

As to the merits—The question will turn upon the right, and upon the remedy.

First—as to the right—he proposed to consider,

1st. The mode of election.

2dly. Mr. Pitt's vote.

3dly. The other five votes (objected to by the other side).

1st. As to the mode of election—He entered into it at large. First, as to the construction of the Statute of 40 Eliz. "De Nominatione, &c." It does not take in superior officers to those enumerated. And the usage is of above 240 years.

Besides, this new charter does not affect the old prescriptive rights.

The two universities are now considered as lay-corporations with temporal rights; not as eleemosynary foundations, as particular colleges are.\* This puts an end to the right of the Crown "to visit them."

The usage shews only a partial acceptance of the Statutes of Queen Elizabeth.

[1653] 2dly. As to the unqualified votes—He agreed that the regents were originally teachers of the younger part of the university: and that they were discharged of this onus, after they had performed it a sufficient time.

Masters of Arts became so by three different methods. (And he went through the three sorts.) In ordinary cases, the admission is at various times. Mr. Pitt was created on the 17th of July 1758, and on the 18th had leave of absence. He was bound to perform exercises; and in October following, did so. And he was capable of bearing offices, and even of being proctor: for he was created, as well as admitted. And the *ordo senioritatis* is no authority against Mr. Pitt's special admittance by Royal mandate on 17th of July; nor the combination-paper: for, Mr. Pitt was created upon his admission, by the words "*Magister incipe*"; and was a graduate on 18th of July 1758. He therefore was disqualified to vote in the regent-house, after his five years were expired.

Then he answered the objections to the proctor's oath of secrecy upon collecting the votes in the separate houses.

As to the two beadles and the three resumed graces—The beadles vote in the regent-house, as being attendant upon the vice-chancellor in that house. And the resumed regencies are common for various reasons: and the usage of doing it is established; and is consistent with the 42d Statute of Queen Elizabeth.

Second point—The remedy—

The question is "whether the officer has been elected by a majority of lawful votes."

Here, a stranger interfered and voted, so as to prevent a declaration by the presiding officer.

If *paria sint suffragia*, there is evidence "that a second scrutiny, that is, a second collection (not a counting only) of votes ought to be entered upon." There has been no fault either in the electors, or in the presiding officer.

Even if a negative had been declared, the Court would have granted a mandamus, if the rightful title had appeared to be in the person negatived. Much more, if nothing is wanting but a formal positive declaration.

[1654] Upon informations in nature of *quo warranto*, the defendant must either make a title or disclaim. But there is no need of a corporate declaration of his election. He then cited several cases from the MSS. of the late Lord Harkwicke; one of them was in † Honiton; another in the ‡ Devizes, and a third in § Penryn. From which cases, he inferred, that if the party elected has a substantial right, the Court will grant a mandamus, though there was no formal declaration of his election.

A mandamus to admit may go to the officer, or to the corporation. The return must be the same; it must be either "electus;" or "non electus;" that is, it must answer to the suggestion of the writ. 1 Siderf. 209, 210, *Hereford's case*.

The return could not be "that the election was not declared." The case of *Stoughton v. Reynolds*, 2 Strange, 1045, shews that there was no need of a declaration.

Lastly, he argued *ab inconvenienti*.

As to the accidental change of the proctors—The declaration, he said, would be only ministerial.

Adjourned till to-morrow.

Sir Fletcher Norton (Attorney General) replied, on the part of the non placets.

I could not be present till he was far advanced in his reply. What I heard, was to the following effect.

He denied that there could be a partial acceptance of a charter. It must either be accepted in toto, or not at all: the corporation to which it is given can not garble it as they please, taking part, and leaving part.

As to Mr. Pitt's vote—he insisted that he could not commence regent till 1759; and could not be a non-regent till five years after.

As to the three resumed graces—they are intitled to no favour, and are contrary to the Statutes of Queen Elizabeth. And there can be no bye-law or provisions contrary to an accepted charter.

[1655] As to the two 'squire-beadles—They have no right to vote in either house, *virtute officij*: they must vote according to their degrees. And by their degrees, they were undoubtedly non-regents.

The register (a superior office to the 'squire-beadles) has a chair in the regent-house; and yet goes to the non-regent house, to vote. And the usage pretended is of no more than twenty years.

If any one of these five voted in an improper house, it makes an end of the question.

As to Mr. Yorke's cases about informations in the nature of *quo warranto*, and the manner of pleading in them, and about the returns of writs of mandamus—I see no need to answer them; because they do not apply to the present case.

As to the necessity of a declaration of the election—It depends upon circumstances: in some cases, a declaration is necessary, by the constitution; in others, not. Here, a declaration was necessary, in order to give a complete right.

I rely on the merits only: and I say, that on the merits of this case, no mandamus can go.

Here is no evidence of a leet, nor of any steward of a leet: the election was carried on rightly; Mr. Pitt voted in the right house; a second scrutiny would have been improper; the two proctors agreed in rectifying their mistake; many of the members were gone, when the second scrutiny was demanded; it was demanded on the sole foot of the proctor's mis-counting; (for Mr. Pitt's vote was not then thought

† P. and Tr. 13 G. 1.

‡ Tr. and M. 4 & 5 G. 1.

§ V. 1 Strange, 582.

of as an objection:) the five votes were in the wrong house: upon the whole, a mandamus ought not to go, upon the merits.

Lord Mansfield thought the matter lay in a narrow compass, and was not attended with any great difficulty.

He then stated the case, from the affidavits: and explained the reasons upon which the Court granted the present rule "to shew cause," in the manner they had done, with particular directions for notice to be given to all parties who had any right or concern in the question.

The university, as a body, have not thought fit to oppose it.

[1656] But it is opposed by all the non placets, and by some of those persons who have the custody of the common seal of the university.

There are three questions that arise upon this case: 1st. On the validity of Lord Hardwicke's election; 2d. If his right be clear, then whether a mandamus is a proper remedy: 3d. If it is, then how it ought to be directed.

First—As to Lord Hardwicke's right.

There does not seem to be the least contradiction, as to matters of fact, amongst the witnesses on the two different sides; though they differ in opinion as to the right resulting from them.

The mode of election is traced back to the year 1524, (240 years ago). The affidavits expressly swear "that the mode of electing the high steward has been by a grace, &c. &c." And to this, there is no contradiction: no one doubted it on the 30th of March, the day of the election.

But it is now contended "that the election of high steward ought to have been in the same mode as the election of a vice-chancellor." And this is rested on the Statutes of Queen Elizabeth.

But there is a vast deal of difference between a new charter (*a*) granted to a new corporation, (who must take it as it is given;) and a new charter given to a corporation already in being, and acting either under a former charter or under prescriptive usage. The latter, a corporation already existing, are not obliged to accept the new charter in toto, and to receive either all or none of it: they may act partly under it, and partly under their old charter or prescription. (*b*)

Whatever might be the notion in former times, it is most certain now, "that the corporations of the universities are lay-corporations: and that the Crown cannot take away from them any rights that have been formerly subsisting in them under old charters or prescriptive usage."

The validity of these new charters must turn upon the acceptance of the university.

[1657] When Queen Elizabeth gave these statutes, the University of Cambridge was of ancient establishment, and had many prescriptive rights, as well as former charters of very old date. And there was no intention to alter and overturn their ancient constitution. These statutes undoubtedly meant to leave a vast deal upon the ancient constitution of the university; without repealing or abrogating their old established customs, rights, and privileges: nor could the university mean to accept them upon any such terms.

Therefore I am clear, that the Statutes of Queen Elizabeth can not be set up, to invalidate establishments subsisting long before she was born.

The office of high steward was a very high office in the university, long before she was born; and was possessed by very great men; a much higher office than stewards of courts leet: she never intended to alter the mode of election to it: nor was the mode of election objected to by any body, at the time of this election.

Therefore I am clear that the mode and manner of this election was right.

Then as to the right of Lord Hardwicke, under it.

The election was quite fair. The little mistake in the marking was immediately set right. The proctors declared the votes to be equal. No one then thought of the objection to Mr. Pitt's vote. But disputes arising upon another matter, the congregation was dissolved.

(*a*) 6 Vin. 286, and S. P. acc. per Wilmot J. post, 1661, and per Yates J. post, 1663, and qu. Salk. 190. 12 Mod. 247, and see 2 Durn. 532.

(*b*) Buller J. was inclined to think that a charter must be accepted in toto, if at all in a subsequent case—See Doug. 517.



It is now objected, by Lord Hardwicke, "that Mr. Pitt, being a stranger in the regent-house, obtruded his bad vote: which vote being disallowed will give Lord Hardwicke a majority of one."

This depends upon the validity of Mr. Pitt's vote: on which there is no contrariety of evidence, as to the facts.

(He then stated the facts relating to it.)

The whole turns upon the commencement of his inauguration to the degree of Master of Arts. This depends upon the usage of the university. And it is sworn "that the [1658] degree begins from the day of creation, when it was conferred under a Royal mandate:" and many circumstances of the present case confirm this.

1st. The leave of absence given the next day, infers that he was then a master complete.

2dly. He appears to be obliged to dispute, in October 1758: for he then pays for dising (a barbarous term for disputing;) the fees for it being accounted for between the beadles, in October 1758; whereas the fees of those graduates whose right commenced at the next general commencement were not accounted for till 1759.

3dly. What shews "that the degrees of such as take them by Royal mandate must commence from their inauguration," is the combination-paper, and the ordo senioritatis. Mr. Pitt's name is not in the former: but it is in the latter, being made after the general commencement in 1758. And the names therein contained are either noblemen, or such as took their degrees by Royal mandate. This suggests strongly "that the degrees of those who take them by Royal mandate commence from their creation." And there is no evidence to the contrary. And the expiration of the quinquennium depends upon the commencement of it.

If so, there is a majority of one for Lord Hardwicke; unless the other side can disqualify some of those who voted for him.

Five of them are objected to.

But as to the three resumed graces—There is no pretence that that transaction was done with any improper view or design. And in respect of essential voting, it is quite indifferent: for it is not material, whether they give their vote in one house, or in the other. And it is agreeable to the usage of the university, "that they should vote where they have voted." Therefore there is no objection to them.

As to the squire-beadles—The usage appears to be, "that they do vote in the regent-house." And it is quite indifferent in itself, what house they vote in: and as they are attendant upon the vice-chancellor who votes in the regent-house, it seems that there is some small reason for their doing so too.

However, the constant usage is sufficient to shew which house they ought to vote in; without assigning the particular reasons upon which such an usage has been founded.

[1659] Thus stands the right to the office.

The next question is as to the remedy.

There is no other than what is now applied for. And this is the very reason of the Court's issuing the prerogative writ of a mandamus; because there is no other specific remedy.

It is admitted, that a mandamus would lie, if it can be considered as the case of a steward of a court-leet.

But it is said, "that the franchise of the court-leet is in the town of Cambridge, and not in the university."

But the university have enjoyed it long; and they are now in possession of it: and they have elected Lord Hardwicke under this claim of many ages standing. And the town do not appear, to us, to dispute it.

But if it was not so, I should still think that, as here is no other specific remedy the Court ought to grant the writ. And so they will do in ecclesiastical cases, where it appears that there is no other specific remedy.

The last question is, how the mandamus ought to be directed.

Mr. Yorke has gone fully into the argument "that the rule for a mandamus ought to be founded upon the merits of the election, and not upon the declaration of the proctors."

The declaration of the proctors can not affect the substantial right. The right of election appears to be in Lord Hardwicke. And I am very clear, that the foundation of the rule should be the election.

Even if the proctors had declared contrary to the truth of the election, yet the writ ought to have gone. But here was no declaration at all.

It now appears, that Lord Hardwicke was duly elected: and the last part of the rule will procure him the proper remedy, without meddling with the two former parts of it.

Therefore the mandamus ought to go to the keepers of the seal for the time being, requiring and commanding [1660] them to put the seal of the university to the instrument of his appointment: and the two former parts of the rule ought to be discharged.

Mr. Justice Wilmot, having first opened the case, entered into the reasons of wording the rule as it now stands: and he thought that it ought to go, as Lord Mansfield had proposed.

If there is a clear right in Lord Hardwicke, the Court ought, he said, to find out a suitable and adequate remedy; and (in his opinion) even to have made a precedent, if they could not have found one: for where there is a right, law and justice require that there should be some remedy or other. And he declared that he never saw a clearer case both as to the right, and as to the remedy, than this appeared to him to be.

This remedy is undoubtedly proper for this right.

Here are vestiges, in the records laid before us,<sup>(c)</sup> "shewing that there was a court-leet in the town of Cambridge three or four centuries ago." But it does not appear that they have enjoyed or claimed any such franchise for a century or two last past: and they do not appear to be now in possession of any such franchise.

On the contrary, the university are in possession of a court-leet ever since 1690, at least seventy-five years, exercised by their deputy-steward. Therefore it may be presumed that there has been some grant, surrender, forfeiture or assignment from the town to them: or something of the like kind: and we cannot therefore presume any to be at this time in the town.

But if the presumption was not so strong upon such a possession; yet how could we say, that the university have usurped a franchise which does not appear to be in any one else?

However, I do not think it material, "whether the university have a right to a court-leet, or not." For they have a right to such an officer as a high steward, with a stipendium: and he has a right to come here for this writ, this great prerogative writ of mandamus, (a remedy which turns more, in my opinion, upon principle than upon precedent;) and we ought to grant it, because there is no other adequate remedy.

The office of high steward appears to have been of two hundred and forty years standing: and the greatest men appear to have been chosen into it. If the Earl of Hardwicke has been now duly and regularly elected into [1661] it, he ought to have a mandamus to admit him to his right.

The next question then is, "whether Lord Hardwicke was regularly elected, and had a majority of voices in the regent-house."

As to the mode of election—it is objected "that he ought, by the Statutes of Queen Elizabeth, to have been chosen as the vice-chancellor is chosen."

But this seems to be an after-thought. The non placets all voted in a different manner from that in which a vice-chancellor is elected; namely, by a grace: and they made no objection to the mode of election, at the time when they gave their votes, though they do object to it now.

It is the concurrence and acceptance of the university that give the force to the charter of the Crown. And they may take and accept the body of statutes or code of laws, separately and distinctly: they are not bound to take all, or leave all. And it appears that they here have in fact done so: for they have always chosen this office (their high steward) by way of grace. I do not think that this superior office of high stewardship is included in this statute, which begins with specifying persons of much inferior rank: but if it had been so, we could not have overturned an usage of two hundred and forty years standing, upon words of this statute which might seem contrary to such settled usage. It certainly did not intend to repeal the old customs and usages of

(c) Note, that a court leet may be forfeited by non user. 2 Hawk. 73. Andr. 14, 15.

the university, except in those cases where the university chose it. And, from filial piety to my alma mater, (the place where I had the honour to be a member and receive my education,) I can not help rejecting the attempt to overturn such an ancient usage, with the utmost indignation.

As to the declaration of the proctors—I think it immaterial: for the question depends not upon that, but upon the real majority of legal votes. Their declaration cannot alter or affect that. If they had made a declaration; and even if such their declaration had been contrary to the truth of the fair and real right, the Court must have taken up the matter upon the true and real merits: for the right to the office attached in Lord Hardwicke, upon his having a majority of legal votes. The circumstance of there being “no declaration at all,” can not put him in a worse case than if there had been a declaration against him, a non placet declaration. If he had a real right, this Court ought to give activity to it: and the omission of a [1662] declaration by the proctors, or the falsity of it, can not affect their judgment concerning the legality of the right.

He then expressed his sentiments about the oath of secrecy, which though it had been much discussed, did not perhaps materially concern the present point, so much as it did the private conscience of the proctor: and he (as Lord Mansfield had before done) declared “that such an oath could not defend the taker of it from giving evidence before a Court of Justice;” even if it were necessary to understand it in a stricter sense than it seemed to them to import.

As to Mr. Pitt’s vote—there is a general commencement, and a special one. “Incipe magister,” is what makes the commencement of the right to the degree, in both cases: he thereby commences Master of Arts. The difference between the degree by Royal mandate, and the ordinary degree is, that an ordinary graduate commences at the general commencement; one under Royal mandate commences upon the words “incipe magister,” pronounced at the time.

The combination-paper and the ordo senioritatis evince this: and the leave of absence consists with it, and confirms it; as it shews that he was then considered as a complete Master of Arts, and subject to the onus of that degree.

He therefore commenced complete Master of Arts by the word “incipe.” Consequently, he was a non-regent when he voted; and therefore his vote was thrown away, and of no validity.

As to the resumed graces and the ’squire beades—the usage is sufficiently proved; and it is consistent with the statutes, in such cases as are not particularly provided for by them. And these resumed graces do not at all appear to have been made with any improper view or design, or with any relation to the occasion of this election.

Therefore Lord Hardwicke had a majority of legal votes.

It follows that we ought to grant the mandamus in the manner it was originally prayed; viz. a mandamus to be directed to the keepers of the common seal of the university, commanding and requiring them to put and affix the common seal of the said university to the diploma or instrument appointing the Earl of Hardwicke high steward of the university, pursuant to the tenor of the grace passed in senate on the 30th of March last.

[1663] Mr. Justice Yates and Mr. Justice Aston were unanimously of opinion with Lord Mansfield and Mr. Justice Wilmot, “that a mandamus ought to go; and that it ought to be directed to the keepers of the university-seal, commanding them to affix it to the diploma of Lord Hardwicke’s appointment to the office of high-steward.”

They delivered their opinions at large; and founded them upon the like reasoning as has been already expressed. They agreed, that the question turned upon the real merits of the election: not upon the declaration of the proctors. They agreed also, that Mr. Pitt voted in the wrong house; his five years being expired: for that, being an honorary graduate, by Royal mandate, he commenced Master of Arts upon the vice-chancellor’s saying “incipe magister,” i.e. from the time of inauguration, and before the general commencement; whereas ordinary, regular graduates do not commence so, till the general commencement. And his duty commenced with his degree. They also agreed, that Lord Hardwicke appeared to have a clear right; and that all the objections to it were sufficiently answered: and if he had a right, he certainly ought to have a remedy. And Mr. Justice Aston mentioned the case of *The King* against *Dr. Bland, Provost of Eton*, Mich. 1740, 14 G. 2, B. R. who was commanded by a



mandamus to affix the college-seal to a presentation by the fellows to a vicarage. Mr. Justice Yates inclined to think that the university appeared to have the court-leet. And he held, that an old corporation, who accept a new charter, may still act under their former charter, or under prescriptive usage.

Lord Mansfield—Let the rule be taken in the manner we have directed.

PILLANS AND ROSE *versus* VAN MIEROP AND HOPKINS. Tuesday, 30th April 1765.

An undertaking to honour a bill of exchange, is binding upon the party so undertaking. [See 6 Ves. 9. 2 Ves. jun. 117. 5 Ves. 148, 868. 7 Durn. 351. 1 East, 101. 4 East, 68. 2 East, 327. And note, that the ground of decision in this case was the consent which the Court very properly decided to be sufficient.]

On Friday 25th of January last, Mr. Attorney General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict against evidence: the substance of which evidence was as follows.

One White, a merchant in Ireland, desired to draw upon the plaintiffs, who were merchants at Rotterdam in Holland, for 800l. payable to one Clifford; and proposed to give them credit upon a good house in London, for their reimbursement; or any other method of reimbursement.

[1664] The plaintiffs, in answer, desired a confirmed credit upon a house of rank in London; as the condition of their accepting the bill. White names the house of the defendants, as this house of rank; and offers credit upon them. Whereupon the plaintiffs honoured the draught, and paid the money; and then wrote to the defendants Van Mierop and Hopkins, merchants in London, (to whom White also wrote, about the same time,) desiring to know "whether they would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said Van Mierop's and Hopkins's house here in London, for 800l. upon the credit of White:" and they, having received their assent, accordingly drew upon the defendants. In the interim White failed before their draught came to hand, or was even drawn: and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them. Which they, nevertheless, did: and therefore the defendants refused to pay their bills.

On the trial, a verdict was found for the defendants.

Upon shewing cause, on Monday 11th February last, it turned upon the several letters that had respectively passed between the plaintiffs, and defendants, and White. The letters were read: 1st. Those <sup>\*1</sup> from White and Co. in Ireland, to the plaintiffs in Holland; (by which it appeared that Pillans and Rose had then accepted the bills drawn upon them by White, payable to Clifford;) then those of the plaintiffs to the defendants; and also White's to the defendants; then those of the defendants to the plaintiffs,† agreeing to honour their bill drawn on account of White; the letter from the defendants to the plaintiffs, informing them "that White had stopt payment," desiring them not to draw, as they could not accept their draught; and lastly, that which the plaintiffs wrote to the defendants, "that they should draw on them, holding them not to be at liberty to withdraw from their engagement."

The counsel for the defendants were Mr. Serjeant Davy and Mr. Wallace. They observed that the plaintiffs had given credit to White, above a month before the defendants had agreed to accept their draught. For it appears by White's letter of 16th February 1762, that Pillans and Rose had then actually accepted Clifford's bills: but Van Mierop and Hopkins did not agree to honour their draughts till 19th of March 1762. Therefore the consideration was past and done, before their promise was made. And they argued, and principally insisted, that for one [1665] man to undertake "to pay another man's debt," was a void undertaking; unless there was some consideration for such undertaking: and that a mere general promise, without benefit to the promiser, or loss to the promisee, was a nudum pactum. And they cited 1 Bulstr. 120, *Thorner v. Field*. Dyer, 272, pl. 31, *Hunt v. Bate*. 2 Vern. 224, 225, *Cecil et Al' v. Earl of Salisbury*. 1 Ro. Abr. 11, pl. 1, letter Q. "Consideration Executed." Yelv. 40, 41, and 2 Strange, 933, *Hayes v. Warren*; where a past consideration was holden insufficient to raise an assumpsit.\*2

\*1 Dated 16th Feb. 1762.

† Dated 19th March, 1762.

\*2 See likewise, *Hardres*, 72, 73, 74.

The counsel for the plaintiffs were Mr. Attorney General, Mr. Walker and Mr. Dunning. They denied this to be a past consideration; and insisted, that the liberty given to the plaintiffs, "to draw upon a confirmed house in London," (which was prior to the undertaking by the defendants,) was the consideration of the credit given by the plaintiff to White's draughts; and that this was a good and sufficient consideration for the undertaking made by the defendants. It relates back to the original transaction.

If any one promises to pay for goods delivered to a third person; such promise, being in writing, is a good one. And here White had had 800*l.* from the plaintiffs, upon this assurance: and the defendants undertake in writing, in pursuance and completion of this original assurance, to be answerable for White's reimbursing the plaintiffs. And a promise in writing, is out of the statute.

This case does not fall within those that have been cited: for Van Mierop and Hopkins had made themselves originally liable. An *ex post facto* event cannot alter the nature of an original promise. Their original promise made them liable, and bound them. And they are obliged, both by law, and in honour and honesty, to perform it.

It is a mercantile transaction: and it must be considered, upon the whole of it, as an admittance "that the defendants either had or soon would have effects of White's in their hands."

Lord Mansfield — The objection is, "that the letter whereby Van Mierop and Hopkins undertake to honour the plaintiff's bills, is *nudum pactum*." The other side deny it.

This is the only question, here.

But this is quite different from what passed at the trial: the *nudum pactum* was not mentioned at that time. The grounds [1666] it was argued upon there, were, 1st. That this imported to be a credit given to Pillans and Rose, in prospect of a future credit to be given by them to White; and that this credit might well be countermanded before the advancement of any money: and this is so. 2dly. That there was a fraud; for that Van Mierop and Hopkins had reason to think that White had sent goods to Pillans and Rose; whereas this was a mere lending of credit. 3dly. That if Pillans and Rose had received goods from White, and retained them till he failed, the defendant's undertaking was revocable.

I was then of opinion, that Van Mierop and Hopkins were bound by their letter; unless there was some fraud upon them: for that they had engaged under their hands, in a mercantile transaction, "to give credit for Pillans and Rose's reimbursement." And I did not see it to be future, as had been objected: nor did I see any fraud. And nothing was then urged about its being *nudum pactum*.

I have no idea, that promises "for the debt of another," are applicable to the present case.

This is (as Mr. Walker said) a mercantile transaction; and it depends upon these letters from merchant to merchant about honouring bills, to such an amount: and this credit is given upon a supposition "that the person who is to draw upon the undertakers within a certain time, has goods in his hands, or will have them." Here, Pillans and Rose trusted to this undertaking: and there is no fraud. Therefore it is quite upon another foundation than that of a naked promise from one, "to pay the debt of another."

Mr. Justice Wilmot — I own, the want of consideration, at first, occurred to me. But I now am satisfied, that this case has nothing to do with the cases of undertakings by one "to pay the debt of another." In those cases, it is settled, "that where the consideration is past, the action will not lie:" and yet this seems a hard case. The mere promise "to pay the debt of another," without any consideration at all, is *nudum pactum*: but the least spark of a consideration will be sufficient. It seems almost implied, that there must be some consideration: but if there be none at all, it is a *nudum pactum*. The statute must mean such a special promise as would have supported an action.

But all this is out of the present case. So also, I think, is all the precedent correspondence.

[1667] It lies in a narrow compass.

White, Pillans and Rose, and Van Mierop and Hopkins had all a correspondence together: they have intercourse together, mutually, in mercantile transactions.



Pillans and Rose write to Van Mierop and Hopkins, to know "whether they will honour their draughts for 800l. in about a month's time." They say, "they will." Now it strikes me (as Mr. Walker said) that it admits "that they either have assets or effects of White's in their hands," or "that they have credit upon him." Now by this undertaking of a good house in London, and relying upon it, they are deluded and diverted from using any legal diligence to pursue White, or even not to part with any effects of his which they might have in their hands. Therefore this seems to be an irrevocable undertaking by Van Mierop and Hopkins: and they ought to be bound by it. Consequently, there ought to be a new trial.

Lord Mansfield—A letter of credit may be given as well for money already advanced, as for money to be advanced in future.

Let it be argued again the next term: and you shall have the opinion of the whole Court.

Uterius concilium.

Yesterday, this matter accordingly came on again; and was argued by Mr. Wallace, for the defendants; and by the same counsel as argued last term, for the plaintiffs.

The latter repeated and enforced their arguments. They said the consideration moved from White to the defendants; not from the plaintiffs Pillans and Rose, to the defendants: and as the defendants have undertaken for White, they can not revoke or retract their engagement.

This case is not like the cases cited: some of which are strange cases, and not founded on solid or sufficient reasons: and in others of them, there was no meritorious consideration at all. And Mr. Walker cited *Hardres*, 71, *Reynolds v. Prosser*; where the consideration was adjudged sufficient, notwithstanding all the reasoning of Sir Thomas Hardres, and all the cases cited by him. That was an assumpsit by a stranger, in consideration that the plaintiff would forbear to prosecute Lord Abergavenny upon a judgment, in the name of the original plaintiff, by virtue of a letter of attorney "to receive it to his own use."

[1668] Serjeant Davy was heard, this morning, on behalf of the defendants; and urged, that the plaintiffs gave credit to White, upon his promising to reimburse them: and he said, there was a fraudulent concealment of facts.

White's first letter could have no influence on the plaintiffs. For they afterwards desired a confirmed credit upon a house of rank in London: so that they did not rely on White's first letter which offered credit on the defendants, or any other method of reimbursement. And nothing had then passed between White and the defendants. For the first letter between them was on the 16th of February (a fortnight after:) and then the defendants were deceived into a false opinion "that it was for a future credit, and not to secure a past acceptance of White's bills by the plaintiffs." And this concealment of circumstances is sufficient to vitiate the contract. The plaintiffs had accepted a bill of 800l. of White's, a fortnight before the defendant's letter of 16th February: which bill the plaintiffs had accepted upon assurance of credit on a house in London, to reimburse them. And this transaction was fraudulently concealed, both by White and the plaintiffs, from the defendants. If this had been disclosed, the defendants would have plainly seen "that the plaintiffs doubted of White's sufficiency;" by their requiring further security for his already contracted debt.

All letters of credit relate to future credit; not to debts before incurred; nor can the advancer of money thereupon, include an old debt before incurred.

A bill can not be accepted before it is drawn. This is only a promise to accept: for it is only a promise "to honour the bill;" not a promise "to pay it."

A promise "to pay a past debt of another person" is void at common law, for want of consideration: unless there be at least an implied promise from the debtor "to forbear suing the original debtor." But here was a debt clearly contracted by White with the plaintiffs on the credit of White: and there is no promise from the plaintiffs "to forbear suing White." A naked promise is a void promise: the consideration must be executory, not past or executed.

Lord Mansfield asked, if any case could be found, where the undertaking holden to be a nudum pactum was in writing.

[1669] Serjeant Davy—It was anciently doubted "whether a written acceptance of a bill of exchange was binding, for want of consideration." It is so said, somewhere in *Lutwyche*.



Lord Mansfield—This is a matter of great consequence to trade and commerce, in every light.

If there was any kind of fraud in this transaction, the collusion and mala fides would have vacated the contract. But from these letters, it seems to me clear, that there was none. The first proposal from White, was “to reimburse the plaintiffs by a remittance, or by credit on the house of Van Mierop :” this was the alternative he proposed. The plaintiffs chose the latter. Both the plaintiffs and White wrote to Van Mierop and Company. They answered “that they would honour the plaintiffs’ draughts.” So that the defendants assent to the proposal made by White, and ratify it. And it does not seem at all that the plaintiffs then doubted of White’s sufficiency, or meant to conceal any thing from the defendants.

If there be no fraud, it is a mere question of law. The law of merchants, and the law of the land, is the same : a witness can not be admitted, to prove the law of merchants. We must consider it as a point of law. A nudum pactum does not exist, in the usage and law of merchants.

I take it, that the ancient notion about the want of consideration was for the sake of evidence only : for when it is reduced into writing, as in covenants, specialties, bonds, &c.\*<sup>1</sup> there was no objection to the want of consideration. And the Statute of Frauds proceeded upon the same principle.

In commercial cases amongst merchants, the want of consideration is not an objection.

This is just the same thing as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs : it had been nothing to the plaintiffs, whether Van Mierop and Co. had effects of White’s in their hands, or not : if they had accepted his bill. And this amounts to the same thing :—“I will give the bill due honour,” is, in effect, accepting it. If a man agrees that he will do the formal part, the law looks upon it (in the case of an acceptance of a bill) as if actually done. This is an engagement “to accept the bill, if there was a necessity to accept it ; and to pay it, when due :” and they could not afterwards [1670] retract. It would be very destructive to trade, and to trust in commercial dealing, if they could. There was nothing of nudum pactum mentioned to the jury ; nor was it, I dare say, at all in their idea or contemplation.

I think the point of law is with the plaintiffs.

Mr. Justice Wilmot—The question is, “whether this action can be supported, upon the breach of this agreement.”

I can find none of those cases that go upon its being nudum pactum, that are in writing ; they are all, upon parol.

I have traced this matter of the nudum pactum ; and it is very curious.

He then explained the principle of an agreement being looked upon as a nudum pactum : and how the notion of a nudum pactum first came into our law. He said, it was echoed from the civil law :—“Ex nudo pacto non oritur actio.” Vinnius gives the reason, in lib. 3, tit. De Obligationibus, 4to edition, 596. If by stipulation, (and à fortiori, if by writing,)(d) it was good without consideration. There was no radical defect in the contract, for want of consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty : and in that view, either writing or certain formalities were required. Idem, on Justinian, 4to edit. 614.

Therefore it was intended as a guard against rash inconsiderate declarations : but if an undertaking was entered into upon deliberation and reflection, it had activity ; and such promises were binding. Both Grotius and Puffendorff, hold them obligatory by the law of nations. Grot. lib. 2, c. 11, De Promissis. Puffend. lib. 3, c. 5. They are morally good ; and only require ascertainment. Therefore there is no reason to extend the principle, or carry it further.

There would have been no doubt upon the present case, according to the Roman law ; because here is both stipulation (in the express Roman form) and writing.

Bracton (who wrote \*<sup>2</sup> temp. Hen. 3) is the first of our lawyers that mention this. His writings interweave a great many things out of the Roman law. In his third

\*<sup>1</sup> V. ante, p. 1639.

(d) This was denied by Baron Eyre in Cam. Scac. Nov. 27, 1776 ; and so it was by all except the Ch. Bar.

\*<sup>2</sup> Sub ultima tempora Regis H. 3.

book, cap. 1, De Actionibus, he distinguishes between naked and clothed contracts. He says that "obligatio est mater actionis;" and that it may arise ex contractu, multis modis; sicut ex conventionione, &c. sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita, &c. &c.

[1671] Our own lawyers have adopted exactly the same idea as the Roman law. \*1 Plowden, 308 b. in the case of *Sherington and Pledal v. Strotton and Others*, mentions it: and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base,) and contracts or agreements in writing, (which are more high,) and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said. "Words pass from men lightly:" but where the agreement is made by deed, there is more stay: &c. &c. For, first, there is &c. &c. And, thirdly, he delivers the writing as his deed. "The delivery of the deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed, to the other. And therefore a deed, which must necessarily be made upon great thought and deliberation, shall bind without regard to the consideration."

The voidness of the consideration is the same, in reality, in both cases: the reason of adopting the rule was the same, in both cases; though there is a difference in the ceremonies required by each law. But no inefficacy arises merely from the naked promise.

Therefore, if it stood only upon the naked promise, its being, in this case, reduced into writing, is a sufficient guard against surprize; and therefore the rule of nudum pactum does not apply in the present case.

I cannot find, that a nudum pactum evidenced by writing has been ever holden bad: and I should think it good; though, where it is merely verbal, it is bad; yet I give no opinion for its being good, always, when in writing.(e)

Many of the old cases are strange and absurd: so also are some of the modern ones; particularly, that of *Hayes v. Warren*.\*2

It is now settled, "that where the act is done at the request of the person promising, it will be a sufficient foundation to graft the promise upon."

[1672] In another instance, the strictness has been relaxed: as for instance, † burying a son; or ‡ curing a son; the considerations were both past; and yet holden good. It has been melting down into common sense, of late times.

However, I do here see a consideration. If it be a departure from any right, it will be sufficient to grant a verbal promise upon. Now here, White, living in Ireland, writes to the plaintiffs "to honour his draught for 800l. \$ payable ten weeks after." The plaintiffs agree to it, on condition that they be made safe at all events. White offers good credit on a house in London; and draws: and the plaintiffs accept his draught. Then White writes to them, "to draw on Van Mierop and Hopkins:" to whom the plaintiffs write, "to inquire if they will honour their draught:" they engage "that they will." This transaction has prevented, stopt, and disabled the plaintiffs from calling upon White, for the performance of his engagement. For, White's engagement is complied with: so that the plaintiffs could not call upon him for this security. I do not speak of the money; for, that was not payable till after two usances and a half. But the plaintiffs were prevented from calling upon White for a performance of his engagement "to give them credit on a good house in London, for reimbursement:" so that here is a good consideration. The law does not weigh the quantum of the consideration. The suspension of the plaintiffs' right "to call upon

\*1 This probably was Plowden's own argument. I suppose, he was himself that apprentice of the Middle Temple who argued for the defendants.

(e) This was denied by the Judges and three Barons in the Exchequer Chamber, Nov. 27th, 1776.

\*2 V. 2 Sir J. S. 933. I have a very full note of this case. The reason of the reversal of the judgment was, "that it did not appear by the declaration, to be either for the benefit, or at the request of the defendant."

† *Church and Church's case*; cited in Sir T. Raym. 260.

‡ V. 2 Leon. 111.

\$ For, between Ireland and Holland, each usance is one month.

White for a compliance with his engagement" is sufficient to support an action; even if it be a suspension of the right, for a day only, or for ever so little a time.

But to consider this as a commercial case. All nations ought to have their laws conformable to each other, in such cases. *Fides servanda est*; *simplicitas juris gentium prævaleat*. *Hodierni mores* are such, that the old notion about the *nudum pactum* is not strictly observed, as a rule.

On a question of this nature, "whether by the law of nations, such an engagement as this shall bind—:" the law is to judge.

The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having or being supposed to have effects in hand; but for the convenience of trade and commerce. *Fides est servanda*. An acceptance for the honour of the drawer, shall bind the acceptor: so shall a verbal acceptance. And whether this be an actual acceptance, or an agreement to accept, [1673] it ought equally to bind. An agreement to accept a bill "to be drawn in future" would (as it seems to me) by connection and relation, bind on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn. Here was an agreement sufficient to bind the defendants to pay the bill: agreeing "to honour it," is agreeing to pay it.

I see no sort of fraud. It rather seems as if the defendants had effects of White's in their hands. And it does not appear to me, that the defendants would have honoured the plaintiffs' draughts, even though they had known that it was future credit.

But whether the plaintiffs or the defendants had effects of White's in their hands, or not; we must determine on the general doctrine.

And I am of opinion, that there ought to be a new trial.

Mr. Justice Yates was of the same opinion. He said it was a case of great consequence to commerce; and therefore he would give both his opinion and his reasons.

The arguments on the side of the defendants terminate in its being a *nudum pactum*, and therefore void.

This depends upon two questions.

1st question—"Whether this be a promise without a consideration;"

2d question—"If it is, then "whether this promise shall not be binding, of itself, without any consideration."

First—The draught drawn by White on the plaintiffs, payable to Clifford, is no part of the consideration of the undertaking by the defendants. The draught payable to Clifford is never mentioned to the defendants. They are asked "whether they will answer a draught from the plaintiffs upon them:" they answer "they will honour such a draught on them."

Whether the defendants had or had not effects of White's in their hands, is immaterial.

Any \*damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding; though no actual benefit accrues to the party undertaking.

Now here, the promise and undertaking of the defendants did occasion a possibility of loss to the plain-[1674]-tiffs. It is plain that the plaintiffs would not rely on White's assurance only: but wrote to the defendants, to know if they would accept their draughts. The credit of the plaintiffs might have been hurt, by the refusal of the defendants to accept White's bills. They were or might have been prevented from resorting to him, or getting further security from him. It comes within the cases of promises, where the debtee forbears suing the original debtor.

Second question—Whether, by the law of merchants, this contract is not binding on the defendants; though it was without consideration.

The acceptance of a bill of exchange is an obligation to pay it: the end of their institution, their currency, requires that it should be so. On this principle, bills of exchange are considered, and are declared upon as special contracts; though, legally, they are only simple contracts: the declaration sets forth the bill and acceptance specifically: and that thereby the defendants, by the custom of merchants, became liable to pay it.

\* *V. Coygs v. Bernard*, 2 *Ld. Raym.* 919. [See also 2 *Hen. Bl.* 315. 4 *East*, 461.]



This agreement "to honour their bill" was a virtual acceptance of the bill. An acceptance needs not be upon the bill itself: it may be by collateral writing. *Wilkinson v. Lutwidge*, 1 Strange, 648.

A promise "to accept" is the same as an actual acceptance. And a small matter amounts to an acceptance; and so says Molloy, lib. 2, c. 10, § 20, and an acceptance will bind, though the acceptor has no effects of the drawer in his hands; and without any consideration. *Symons v. Parminter*,\* Hil. 1747, 21 G. 2, B. R. And a bill accepted for the honour of the drawer, will also bind.

Then he applied these positions to the present case. It was an acceptance of this very draught, by relation and connexion; though the bill was not then drawn by the plaintiffs on the defendants.

But even if it did not amount to an actual acceptance, yet it would equally bind the defendants: they would be equally obliged to perform the effect of their undertaking.

The plaintiffs apprized the defendants of their intention to draw; and the defendants promised "to honour their draught;" and the plaintiffs, of course, would regulate their conduct accordingly.

[1675] Therefore upon the whole circumstances of this transaction, 1st, there is a consideration: and 2dly, if there was none; yet, in this commercial case, the defendants would be bound.

Mr. Justice Aston—I am of opinion "that there ought to be a new trial."

If there be such a custom of merchants as has been alledged, it may be found by a jury: but it is the Court, not the jury, who are to determine the law.

This must be considered as a commercial transaction and is a plain case. The defendants have undertaken to honour the "plaintiffs' draught." Therefore they are bound to pay it.

This cannot be called a nudum pactum. The answer returned by the defendants is an admission of "having effects of White's in their hands," if that were necessary. And after this promise "to accept" (which is an implied acceptance) they might have applied any thing of White's that they had in their hands, to this engagement; even though White had drawn other bills upon them in the interim. The defendants voluntarily engaged to the plaintiffs; and they could not recede from their engagement.

As to its being a nudum pactum (which matter has been already so well explained)—if there be a turpitude or illegality in the consideration of a note, it will make it void, and may be given in evidence: but here nothing of that kind appears, nor any thing like fraud in the plaintiffs. Here was full notice of all the facts; a clear apprehension of them by the defendants; a question put to them, "whether they would accept;" and their answer, "that they would."

Upon the whole he concurred, "that an action will lay for the plaintiffs against them: and that the plaintiffs ought to recover."

By the Court, unanimously,

The rule "to set aside the verdict, and for a new trial," was made absolute.

[1676] LOCKWOOD *versus* DR. COYSGARNE. Thursday, 2d May 1765. A domestic physician not protected by an ambassador retainer.

Upon shewing cause (on Saturday 27th of last month) why execution should not be set aside, and the goods taken in execution by the plaintiff, restored to the defendant.

The facts appeared upon the affidavits, to be as follows, as nearly as I could take them, upon the reading.

The defendant had been protected by the Morocco Ambassador: upon whose departure from England, the plaintiff proceeded against the defendant, being then unprotected; and obtained judgment against him. The defendant brought a writ of error. Whilst this writ of error was depending, viz. on 14th of June 1764, he was hired to Count Haslang, the Bavarian minister, as his physician at 40l. a year salary; though Dr. Redmond then stood upon the list, as physician to Count Haslang; and

\* This was on a motion in arrest of judgment. The judgment was affirmed (ex parte) in Dom. Proc. with 100l. costs, upon or soon after 20th Feb. 1748. [1 Wils. 185.]

even still remains upon the said list, as such. The defendant swore, that he had prescribed to some of the count's servants: and he also swore, that since the said 14th of June 1764, he never prescribed to any other persons but the count's family. It appeared that the defendant kept a coach, and had livery servants of his own. It appeared that he had formerly been a trader; but had left off; but it was not ascertained where, or for how long time, he had practised as a physician. Soon after he was hired to Count Haslang, the count's own secretary sent to the Sheriff of Surry (who had an execution against the defendant,) to acquaint him "that the defendant was protected by Count Haslang."

The question was, "whether the defendant was intitled to the \* privilege of a foreign minister's domestic servant, viz. physician to Baron Haslang;" that is, whether he was really and bonâ fide his servant; or, whether it was only a collusive hiring, a colourable service, a mere sham and pretence, in order to screen him from paying his just debts.

It was then adjourned.

Lord Mansfield now observed upon the Act of 7 Ann. c. 12, that there is not an exception in it, but what is agreeable to and taken from the law of nations.

The privilege of a foreign minister extends to his family and servants; and this privilege has been long [1677] settled, to extend to the servants who are natives of the country where he resides, as well as to his foreign servants, whom he brings over with him.

By the law of nations, a foreign minister cannot give a protection to a person who is not bonâ fide of his family.

The question therefore is, "whether this defendant is bonâ fide a domestic physician to a foreign minister;" (I do not mean that it is necessary that he should lie in his house).

His Lordship occasionally took notice of the negligent manner in which the lists are kept at the sheriff's office; and then proceeded, to the purport following.

As to the question "whether this is a bonâ fide service, or merely colourable."—It does not appear, that this defendant ever prescribed to any one person in the world, as a physician, before he was hired by Count Haslang. Then he was hired on the 14th of June last, just when he found it necessary to be protected from this debt. And Dr. Redmond then was and now remains upon the list, as the count's physician. This man's very retainer is in the form of a protection from his debts: which is a suspicious circumstance. Then what has he done, as a physician? He swears he has prescribed to some of the servants; but no particulars are specified. He lives at Vaux-hall; and keeps a coach and livery servants.

Binkershoek, de Foro Legatorum, says, "that a person in debt cannot be taken into the service of a foreign minister, in order to protect him." And indeed this would give a foreign minister a power to dispense with the private debts of the subjects of this country.

Now here was actually judgment against him; only suspended by a writ of error. He was before protected by the Morocco Ambassador; and when he went home, then the defendant got this protection. Kellerhoff, Count Haslang's secretary, soon after sent to the Sheriff of Surry, who had an execution against him; acquainting him "that this man was protected by Count Haslang." The secretary himself swears this: which shews the view to have been the protection. But a foreign minister cannot protect, by way of screening a debtor from paying his just debts. He has no such privilege.

Then his salary is but 40l. a year; and he swears "that [1678] he never since the 14th of June prescribed to any other person but the ambassador's family." And yet he lives in splendor, and keeps several livery servants. This dilemma is clear: either he had no patients before; or it was not really and fairly worth his while to quit his profession for a temporary salary of 40l. a year.

Therefore his Lordship was clear, that this was not a fair bonâ fide transaction; and, consequently, that the defendant was not intitled to the privilege he now claimed.

At the same time, he declared, that the Statute of 7 Ann. was only declaratory of the law of nations, and that the law of nations was in full force in these kingdoms.

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\* V. 7 Ann. c. 12, and v. ante, p. 1478, *Bath's case*, S. P. fully discussed.

Mr. Justice Wilmot concurred with Lord Mansfield, as to observing the Act of 7 Ann. c. 12, in all cases properly and fairly brought within its true meaning and intent. But he was clear, that Dr. Coysgarne was not what he pretends to be; that is, a real physician. He owns he has been a trader; (though he has left it off;) but he does not ascertain when or where he practised as a physician. If he was not, why should the count retain him as a physician? And he is to have but 40l. a year, for board and service as a physician. Here is no proof of any of his prescriptions being ever taken by any of the count's family; nor even of their being made up; neither is it usual to retain physicians. Domestic physicians are not the custom of modern ages: though it was customary amongst the ancients. Therefore I have no doubt about this character that he claims, of a domestic servant. The profession of a physician is honorary: and the retainer should come from the ambassador; whereas this man offered himself; and it is plain enough that it was done with a view to this protection.

Therefore he does not appear to me to be the domestic servant of a foreign minister. He was before protected by the Morocco Ambassador; he is gone home. Then after his departure, and when that pretence could no longer serve him, and the plaintiff had got judgment, he brings a writ of error, and gets this protection. But an ambassador can not protect; it is the law that gives the protection. Whereas here, the secretary sends notice to the sheriff "that the count has protected him." The view therefore is manifest: and the defendant does not seem to be intitled to the character that he has assumed.

It will be of a very bad consequence, if protections should be set up to sale, or made use of merely for the sake of screening people from paying their just debts.

[1679] The two other Judges, Mr. Justice Yates and Mr. Justice Aston, concurred, for the same reasons; being thoroughly satisfied, upon the circumstances of this case laid all together, and upon the whole complexion of it, "that this was not a bonâ fide service, but a scheme to screen him from the payment of his debts." And Mr. Justice Aston mentioned the case of *Wigmore v. Alvarez*: (which see cited, together with others on this subject, ante, p. 1479, in *Bath's case*).

Per Cur. unanimously and clearly,

Rule discharged.

Mr. Walker prayed that it might be discharged with costs. But costs were not added; because Mr. Kelly, the attorney who appeared to support the rule, declared in Court (on Lord Mansfield's asking him "who was his employer"), "that he was concerned for Count Haslang and employed and paid by him."

REX *versus* ELLEN TAYLOR late BENT. 1765. A married woman may be committed for not maintaining her previous bastard, pursuant to an order of two justices. [See 5 Durn. 157.]

She was brought up by habeas corpus from Lancashire; having been committed to the house of correction at Manchester, for disobeying an order of two justices "adjudging her child to be a bastard, and ordering her to maintain it, by paying 8d. a week for so long time as the child should be chargeable to the parish;" there to remain without bail or mainprize, except she shall put in sufficient surety "to perform the said order, or else, &c." or be otherwise discharged by due course of law.

She was unmarried when the child was born; but was now married to Taylor.

Sir Fletcher Norton, (Attorney General) Mr. Stowe, and Mr. Dunning, for the defendant, objected first, to the warrant of commitment; alledging, that the justices of the peace had no power, under 18 Eliz. c. 3, to make this order upon her, for her maintaining the child; she being then a married woman, and incapable of having any property: so that she could neither pay money nor give security. And the husband was, in fact, incapable to pay it. Her being a married woman is apparent upon the return: and we have also proof of it, by affidavit.

[1680] To prove "that a feme-covert, can not be charged," they cited Foley's Cases of Laws Relating to the Poor, p. 56, in point: and they insisted that the husband ought to have been summoned to shew cause against this order.

Second objection. By 18 Eliz. c. 3, they are obliged to commit to the common gaol; and in that case, she would have been intitled to charities: whereas this commitment is, "to the house of correction;" where there is no such benefit. And



as this was a new Act of Parliament, they were obliged to pursue it literally. They mentioned a case of *Rex v. Boys*:<sup>\*1</sup> where it was determined "that upon a new Act of Parliament, they are confined to the method prescribed in it."

They said that the 6 G. 1, c. 19, § 2, does not extend to the present case. This is not a criminal, but a civil case. She has been already punished as a lewd woman. Therefore this case stands only on the 18 Eliz.

Contra, pro Rege, Mr. Morton, Mr. Wedderburne, and Mr. Wallace, answered the objections.

First, non constat that she was a married woman: but admitting "that she was;" yet matrimony can not discharge a woman from either a crime or its penalty: the husband takes her under this incumbrance.

This is not like cases under 43 Eliz. For under this Act, it is a punishment: Luat in corpore, si non habet in loculo. But under the 43 Eliz. the having ability is essentially requisite to making any order grounded upon it.

In 11 Rep. 61.—*Dr. Forster's case*—it was determined, that a feme covert was within 1 Eliz. c. 2, § 14, and shall forfeit for not going to church. And in 2 Strange, 1120, *Rex v. Crofts*, a feme covert may be convicted on 9 G. 2, c. 23, for selling gin.

Secondly, the house of correction is preferable to the common gaol. Besides, this case is within the 6 G. 1, c. 19, § 2, which impowers the justices to commit vagrants and other criminal persons charged with small offences, either to the common gaol, or house of correction, as they shall think proper. For the Act says<sup>\*2</sup> "and whereas vagrants and other criminals, offenders, and persons charged with small offences, are for such offences, or for want of sureties, to be committed to the county gaol," it enacts that they may commit such vagrants [1681] and other criminals, offenders, person and persons, either to the common gaol, or house of correction, as they in their judgment shall think proper. And this woman is within the words, "other offenders," and "other persons." This is a commitment for an offence; and is (in the words of the Act of 18 Eliz. c. 3) "till she shall find such surety as aforesaid, or be otherwise discharged by due course of law." They cited *Rex v. Davis*, M. 28 G. 2, B. R. where an indictment was holden to lie against a parish-officer, for refusing to receive a pauper regularly removed to his parish: though it was objected, "that it was a new offence, so made by the Act of 3, 4 W. & M. c. 11, § 10, which Act gives a particular penalty; and that therefore it was not indictable." However this is one of the small offences mentioned in 6 G. 1, c. 19, § 2.

Lord Mansfield—1st. A feme-covert is liable to be prosecuted for crimes committed by her. This woman has disobeyed the order of the justices: and the 18 Eliz. c. 3, prescribes the punishment here inflicted upon her. There is no need to summon the husband, in a criminal prosecution against the wife.

2dly. It is within 6 G. 1, c. 19, § 2. She is committed for an offence; and for want of sureties. It is therefore within the provision of that Act, and a legal commitment: and it is better for her, than a commitment to the common gaol.

Mr. Justice Wilmot had no doubt about it.

1st. The 18th of Eliz. expressly considers the producing bastards, as an offence: not only the getting or bearing the child, but the leaving it to be a burthen on the parish, and defrauding the relief of the true poor of it. Therefore the justices may order a proper punishment; and also take order for the maintaining the child, in relief of the parish: they may do either, or both.

Matrimony does not purge the crime; she is still the object of the law, as to criminal jurisdiction. So was the case of the woman selling<sup>\*3</sup> gin. There was no need to summon the husband. The husband is not liable for the criminal conduct of his wife.

2dly. And if it be a crime, she is a criminal offender within 6 G. 1, and may be committed to either prison, as the justices think proper. And it is for the ease,

<sup>\*1</sup> P. 26 G. 2, 1753, B. R.

<sup>\*2</sup> V. 6 G. 1, c. 19, s. 2.

<sup>\*3</sup> 2 Sir J. S. 1120.(a)

(a) And it appears from a full manuscript note of that case, (16 MS. 202) that there she did the act voluntarily; and the Court held that if it had been by compulsion of the husband, that would have been a proper defence, and he then would have been the person who ought to have been convicted.

benefit and advantage of the party committed, to send her to the house of correction, rather than to the common gaol.

[1682] The order mentioned by Mr. Foley was made upon a feme covert "to keep her grandchild." But such orders made upon parents and children "reciprocally to maintain each other," are not upon the foot of criminalty; but to give a moral obligation a legal efficacy.

As to the conclusion of the commitment—the words of the Act are pursued. The addition of—"and until discharged by due course of law;"—is only nimia cautela, and non nocet; it can not vitiate the former part of the order.

Mr. Justice Yates concurred.

1st. All offences are personal; and no change of the offender's circumstances can discharge her. The husband was no object of this law; therefore there was no need to summon him.

2dly. It is good, within the 6 G. 1, though it had been bad under 18 Eliz.

Mr. Justice Aston concurred likewise; and said it was a clear case.

Per Cur. unanimously,

Remanded.

COMBE ESQ; *versus* PITT. 1765. [S. C. 1 Bl. 523.] V. ante, p. 1586 to 1591. Too late to object to plea roll after defendant has paid for issue.

The defendant's counsel having moved for a new trial, pursuant to the liberty reserved for them, as is mentioned in pages 1586 and 1591; cause was now shewn, and allowed: and, consequently, the rule discharged.

The objection was to the plea-roll, which contained nothing but the declaration and the plea of nil debet; whereas there was a plea in abatement, which had been demurred to, but had never been deserted, nor any judgment upon it entered on the roll, before nil debet was pleaded, (as the counsel for the defendant alledged;) and which the plaintiff ought not to have dropped, but ought to have entered it on the roll. This, they said, was an irregularity which would vitiate the whole: and the acceptance of the issue (in which this plea in abatement was omitted) could not cure it.

[1683] But the Court held this irregularity to be cured by the defendant's accepting the issue, and paying for it. His objection ought to have been made at that time: it is too late to make it now.

Rule discharged.

REX *versus* WROUGHTON, ESQ; AND OTHERS. Friday, 3d May, 1765. Information will lie for disturbing a dissenting congregation.

On shewing cause against an information for a misdemeanour, in obstructing divine service in the church, and grossly insulting the rector—Pewsey was the name of the church: and the rector's name was Townshend. The particular circumstances were long and minute: enough of them will appear from what the Court said. It is sufficient to hint, that Mr. Townshend was a well-wisher to the Methodists; that he had admitted one of them into his pulpit; and that Mr. Wroughton, a justice of peace residing in his parish, disapproved of it, and strenuously opposed it.

After hearing the affidavits and arguments of the counsel on both sides—

Lord Mansfield declared that he always understood "that a preacher must have a licence from the bishop of the diocese wherein he so preached:" and "that a licence from the bishop of a particular diocese would not give the person authority to preach in every diocese, nor in any other diocese." Indeed this is very seldom disputed: but if it be disputed, he took it to be in strictness so, by the canons.

In the present case, he thought the Court should not interpose, upon the application of Mr. Townshend (the rector:) because he had suppressed truth, and thereby misrepresented the case; and also for another reason, viz. that Mr. Townshend was going out of the way of the general and usual course of celebrating divine service in the Established Church. Again, there was an inhibition, which had been obtained against Mr. Townshend from the bishop of the diocese; who had commissioned Mr. Wroughton to see it complied with. Further Mr. Townshend himself behaved improperly, by particularly marking Mr. Wroughton, and preaching personally at him in his sermon. And it seemed to him, that the blow complained of was not a blow struck Mr.



Townshend by Mr. Wroughton, (as is charged upon him :) but an accidental brushing him with his finger.

[1684] Therefore, there is no reason for the Court to interpose in an extraordinary way, in this case as it is circumstanced.

Otherwise, I would have it understood, in general, that Methodists have a right to the protection of this Court, if interrupted in their decent and quiet devotion : and so have dissenters from the Established Church likewise, if so disturbed.

Mr. Justice Wilmot was of the same opinion, for the same reasons. Here is a total suppression of truth and facts on Mr. Townshend's side, who makes this application : and upon the whole of the affidavits, I see no misbehaviour in Mr. Wroughton ; and very great misbehaviour in Mr. Townshend. Mr. Wroughton applied to the bishop, attended him, and was directed by him to take care "that no unlicensed preacher should preach in the church of Pewsey ;" and the bishop actually issued an inhibition, which Mr. Townshend defied and disobeyed. And the blow is sufficiently accounted for, as quite an accident, and not intended at all as a blow.

He added that he took the law about licences to be as Lord Mansfield had stated it : it must be a licence from the bishop of the diocese : (though in practice, it is not so used). Strictly, the bishop of the diocese is to licence all who preach in it.

Mr. Justice Yates concurred, for the same reasons : and added—"with costs ;" because he had suppressed the truth.

Mr. Justice Aston concurred with Mr. J. Yates ; as the Court would not have put Mr. Wroughton to the expence of defending himself against this rule, if the whole circumstances of the case had been disclosed.

Per Cur.—Let the rule be discharged, with costs.

OATES, EX DIMISS. MARKHAM, *versus* COOKE. Tuesday, 7th May, 1765. [S. C. 1 Bl. 543.] Estate in fee held to pass to a trustee by inference of testator's intention, without the word "heirs," or other technical words. [See also 8 Vin. 69. 2 Vez. 521. 8 Vin. 72, pl. 26.]

[Followed, *In re Davies to Jones*, 1883, 24 Ch. D. 193.]

This was an action of trespass and ejectment ; to which the defendant pleaded the general issue.

It appeared in evidence, that George Beaumont being seised in fee of the tenements in question, five acres whereof were copyhold holden of the manor of Wakefield, and the rest were freehold, duly made his last will and tes-[1685]tament in writing, bearing date the 29th day of September 1760 : (which will was set out verbatim, in the case). The substance of it was as follows. He gives several sums of 3l. a year, to divers persons ; some, for life ; some, in fee : one of which annuities for life he expressly directs to be paid by his trustee or executor ; and afterwards adds—"These legacies to be faithfully paid by my trustee John Cooke, every year and yearly, a month after Martinmas." He then gives several small legacies. He wills and desires, "that William Frith shall not be removed from his farm, upon any account whatsoever, during his natural life ; he paying the same rent as usual : he leaving the farm, whoever come into it, to pay after the yearly rent of 9l. And his decease, the same." Then immediately follows—"I do also leave unto my trustee and executor, out of the yearly rents of the farm, 1l. 10s. a year, and yearly, for repairs and other uses of the farm." He afterwards leaves to his trustee and executor, 3l. for sawing out the roughing : and 5l. to build a tomb for him, in Tankersley church-yard : "he and his heirs always to see that it be kept in order." Then he gives several directions, and several more legacies. "And I do hereby constitute John Cooke before-mentioned, sole executor and trustee of this my last will and testament ; he paying all my just debts, legacies, and funeral charges." "Delivered by the aforesaid testator, to be his last will and testament in the presence of witnesses surrendered according to law. James Brooks. Edward Lloyd. Thomas Butler." "And further I desire that the bed with all the furniture thereunto belonging, standing in the closet, be left there, particularly for my trustee that when he pleaseth to come over, he may lodge there without let, molestation, or hindrance."

After the making of the said will, to wit, on the 8th day of April 1761, the said George Beaumont surrendered the said copyhold tenements to the use of his will ;



and afterwards died seised of the said premises, respectively, in manner aforesaid; leaving John Smith, John Parkin, Thomas Beaumont, and the lessor of the plaintiff, his nephews and co-heirs at law.

The question was, "whether any estate, and what passed to John Cooke the trustee."

Mr. Walker argued for the plaintiff: Mr. Fenton, for the defendant.

On behalf of the plaintiff, the heir at law, it was urged, that there was nothing to disinherit him: and the intention of the testator is uncertain.

[1686] On the contrary, for the trustee, it was insisted, that he took a legal estate; and therefore the heir was barred. And to prove "that he took a fee, by necessary implication," the cases of *Shaw v. Weigh*, 2 Strange; 798. *Willis v. Lucas*, 1 Peere Williams, 472. *Collier's case*, 6 Co. 16, and *Ackland v. Ackland*, 2 Vern. 687, were cited and relied on.

The Court were all clear, "that both the freehold and copyhold passed to John Cooke, the trustee, in fee."

Lord Mansfield declared, he had not a particle of a doubt. The intention is to be collected from all the parts of the will: and it must be clear; or else the heir at law shall not be disinherited. But here, the testator's intention is most clear, "that he meant to devise his real estate, in trust."

Mr. Justice Wilmot concurred. Cooke, the trustee, took the legal estate, by this devise. The intention of the testator is to be collected from all the parts of the will taken together: and if it be thereupon necessary to imply it, it is the same thing as if it was particularly expressed. Now here are trusts to be executed, which the trustee could not execute and effectuate, without having an estate in fee devised to him. No particular technical terms are requisite: it is sufficient, if the implication be strong, violent, and necessary. And here it is so: (which he shewed, at large).

Mr. Justice Yates was likewise of the same opinion; and held that the implication here was clear, plain, and necessary. The estate must be co-extensive with the charges: and here are annuities charged upon the real estate, and devised in fee. Therefore a legal estate was certainly intended to be devised to the trustee.

Mr. Justice Aston concurred; declaring it to be a clear case in his opinion.

Per Cur.—unanimously,  
Judgment of nonsuit.

[1687] BRIGHT *versus* PURRIER. Tuesday, 14th May, 1765. [S. C. and P. Bull. 269.]  
Affidavit of debt, as appears, insufficient. [See H. Bl. 634.]

This was an action brought upon a foreign bill of exchange, payable at the distance of 120 days. The bail was refused to be accepted. The assignee thereupon brought this action against the drawer, within the 120 days: who put in bail to the action.

Sir Fletcher Norton and Mr. Walker moved, on Thursday last, on behalf of the defendant, to set aside the plaintiff's proceedings, for irregularity, insisting, that this action was brought prematurely; for, it must be presumed, they said, that there was, at the time the bill was drawn, a consideration given for the forbearance of payment for the 120 days.

But the Court had great doubt about this: they were not satisfied that the plaintiff's right remained suspended for 120 days.

Whereupon the counsel for the defendant turned their motion, "that the defendant should be discharged on common bail," upon the insufficiency of the affidavit made by the plaintiff in order to hold him to bail: (which affidavit was only by way of reference, "as appears by a bill of exchange, &c.")

A rule was then made to shew cause: which rule was now made absolute.

REX *versus* SAMUEL DIXON. Wednes. 15th May, 1765. Attorney not bound to obey a subpoena duces tecum to prove a forgery against his own client.

A subpoena out of the Crown-Office had been served upon Mr. Samuel Dixon, an attorney, with a duces tecum of certain papers hereafter mentioned; to give evidence before the grand jury of the county of Northampton, at the last assizes there; and to produce three vouchers which had been produced and insisted upon by one Mr. Peach,

Mr. Dixon's client, before a Master in Chancery : and this subpoena with the duces tecum was in order to found a prosecution by way of indictment against Peach (who had produced these vouchers before the Master,) for forgery. Mr. Dixon did not appear before the grand jury, in obedience to this subpoena. Whereupon,

[1688] On Monday the 6th instant, Mr. Wallace moved on behalf of the prosecutor, for an attachment against him, for refusing to appear ; and had a rule to shew cause.

Mr. Caldecott now shewed cause. He insisted that Mr. Dixon could give no other evidence, but of what had been communicated to him by his client, in confidence : and therefore he was not compellable to produce these papers against his client, in order to prove him guilty of a forgery.

Lord Mansfield was clearly of this opinion : and that Mr. Dixon, instead of producing them against his client, ought to have, immediately upon receiving the subpoena, delivered them up to his client.

Mr. Justice Wilmot concurred that he ought not to have produced them against his client.

Mr. Justice Yates was of the same opinion ; and thought the rule ought to be discharged with costs.

Rule discharged, with costs.

N.B. These were not papers that had been detained or impounded by the Court of Chancery ; but remained in Mr. Dixon's hands, as papers belonging to his client Peach, who had produced them as vouchers to his account, and which were afterwards returned to Mr. Dixon as his solicitor.

*SURMAN versus SHELLETO.* 1765. In slander by words actionable if less damages are given than 40s. full costs are not payable, unless there is a colloquium and special damages laid.

Mr. Harvey made a motion for full costs ; though the jury had found only 1s. damages. They had given 40s. costs.

It was an action for \* words : and there was a colloquium laid about the plaintiff's trade ; and also a special damage laid, of his having lost his business by reason of the speaking of the words. The words in question were contained in the 3d count ; on which 3d count, the verdict was taken : and they were these—"Thou art a rogue ; and thou hast cheated me of several pounds."

[1689] The rule, he said, was "that where the words are not actionable in themselves, there shall be full costs, if special damages are laid ; though the damages found be under 40s." And to shew, that these words are not in themselves actionable, he cited *Hardr. 8, Wake v. Chapman et Ux.* and 5 Mod. 398, *Savage v. Robury.*

Indeed, if the words spoken are in themselves actionable, and less damages found than 40s. there shall not be full costs ; except there be a colloquium, and special damages laid, as a substantive and independent injury.\*

But the Court held the latter words, "thou hast cheated me of several pounds" to be actionable ; and told Mr. Harvey, he must be content with his 40s. costs.

Motion denied.

*BUTTERWORTH AND BARKER versus WALKER AND WATERHOUSE.* 1765.

Prohibition not to be granted in a matter not essential.

Sir Fletcher Norton and Mr. Lee shewed cause against a prohibition to stop the Prerogative Court of York from proceeding to grant a faculty for an organ in the church of Halifax.

The cause below was for obtaining a faculty for it : and there was a citation of the parishioners and inhabitants, to appear, and to "shew cause why an organ should not be erected in their parish-church." They did so : and their objection was, "that the plaintiffs below had not the consent of the parish." The answer was—"But we have the consent of the churchwardens ; and there is also so large a subscription for erecting and maintaining it, that it will never be chargeable to the parish." And they also alledge the consent of a select meeting or vestry. The other side deny that the parish in general is bound by the consent of this select meeting or vestry. Where-

\* V. 21 J. 1, c. 16, (as to 22, 23 C. 2, c. 9, s. 149. V. ante, p. 1282, 1283, 1284.

upon the applicants for the faculty alledge, "that for twenty, thirty, or forty years, it has been usual to collect the sense and consent of the parishioners about all parochial matters, at such select meetings or vestries; and that the whole parish are, and for all the time allegate have been bound by the acts and consent of such select meetings or vestries."

Upon which, these parishioners who opposed the organ moved for a prohibition.

[1690] The counsel who now shewed cause against it, not only contended, that the consent of the parish is not necessary; but also insisted that there is no ground shewn for a prohibition. For the applicants for the faculty only alledge, "that for twenty, thirty, or forty years, it has been usual to collect the sense and consent of the parishioners to all parochial matters, &c." and that "at one of these meetings, &c. &c." and "that for all the time allegate, it has been usual, &c." So that here is no custom in issue; nor any thing that the Ecclesiastical Court can not try: it is only alledged, that "for twenty, thirty, or forty years, it has been usual, thus to collect the sense of the parish." But there is no allegation of any immemorial common-law custom: and therefore the Ecclesiastical Court may proceed. 2 Ro. Abr. 286, pl. 42, 43. *Latch*, 210, *Clarke v. Prowse*. A custom alledged in a libel, and denied by the defendant in the Ecclesiastical Court, may be there decreed against. The case between *The Churchwardens and the Rector of Market-Bosworth*, in 1 *Ld. Raym.* 435, was so: and a prohibition was refused, after the sentence. That case gives the true reason of this Court's issuing prohibitions to the Spiritual Court to inhibit them from trying customs: namely, "because they have different notions of customs, as to the time which creates them, from those that the common law hath. For, in some cases, the usage of ten years; in some, twenty; in some thirty years; make a custom in the Spiritual Court: whereas by the common law, it must be time whereof, &c." Which reason failed in that case; because they had there adjudged "that there was no such custom allowed by their law, which allows a less time than the common law does, to make a custom."

The Court observed, that the very ground of applying for the faculty, is, "that the parish are not to be burthened with the expence of this organ:" the very condition of praying it is, "that it is to be maintained by a subscription."

Mr. Wedderburne, who was for the prohibition, said that no matter of splendour or ornament in the church can be done without the consent of the parish.

Mr. Justice Wilmot asked him what authority he had for his position. He said, he knew no such doctrine.

Mr. Wedderburne did not specify any particular authority for it; but went on to say that this Court will not suffer the Ecclesiastical Court to proceed upon temporal rights; and here is a temporal right in the parish. [1691] Therefore, "whether it be laid as a custom, or not," is immaterial: the question is, whether a temporal right does not intervene. The parish can not be bound by the majority of a meeting of their representatives, or by their churchwardens.

Mr. Wallace, on the same side, observed that if the Ecclesiastical Courts allow the evidence of ten, twenty, thirty, or forty years to be a proof of a custom, the alledging a usage for such a time only, without alledging it to be immemorially, would be only an artifice to elude prohibitions to hinder them from trying immemorial customs. And if ornaments can be imposed upon the parish by the Ordinary, without the consent of the parish, the parish will be bound to maintain them. He insisted that the Ecclesiastical Court have no such power as that of imposing them without the consent of the parish: and we deny any such consent; or any usage for the parish to be bound by such a meeting as this was.

Lord Mansfield—(directing his discourse to Mr. Wedderburne and Mr. Wallace) repeated the case. The Ecclesiastical Court issue a citation for the parishioners and inhabitants to appear and shew cause why this organ should not be erected in their church. They do appear. It appears to be applied for, upon a subscription; and a consent by a select meeting is alledged: but it is denied "that the parish are bound by such select meeting." Then it is alledged, that for twenty, thirty or forty years, it has been the usage "that the parish in general are bound by such a select meeting." Upon this you apply for a prohibition.

But his Lordship did not, at present, declare any opinion.

Mr. Justice Wilmot thought they were proceeding below, upon a mistake. The citation must be intended to have been issued, for the parishioners to shew "whether



they have any temporal rights that will be injured by setting up an organ." But the consent of the whole parish can not be essentially necessary to the Ordinary's setting up an organ: nor would the parish be bound to repair it, when set up.

Now if the consent of the parish is not necessary, then all these proceedings below are nugatory. It seems as if they did think such consent to be necessary: and I own, that if the consent of the parish were necessary, I should think the prohibition ought to go, because the consent of the vestry can not bind the whole parish, without immemorial usage.

[1692] Mr. Justice Yates also thought a prohibition ought to go, if there were any temporal right to be determined. For a usage of thirty or forty years is not sufficient: it can be no valid custom, unless it has been used time out of mind.

This suit, he said, below, seems to me to be totally nugatory.

Parishioners can not be charged with new ornaments, without their consent, as well as that of the Ordinary. The citation might be intended only to prevent injury being done to the property of their private seats in the church.

Both sides here seem to have thought the consent of the parish necessary; which it is not.

Mr. Justice Aston—If proper trial of the custom is eluded by alledging a usage of forty, thirty, or twenty years, I should think Mr. Wallace's observation to be right.

The parish may be used to meet and consider of necessary repairs: but they can not preclude the Ecclesiastical Court from ordering an organ, or any thing else within their cognizance.

This organ is stated to be provided by voluntary contribution. The citation was issued in order to receive reasons against injuries that might happen to the private property of the parishioners.

But the Ecclesiastical Court does not encroach upon or interrupt the meetings of the churchwardens about such things as belong to them; nor draw the cognizance of them to a different forum.

Lord Mansfield—The ground we go upon is "that a prohibition will not be material."

Rule discharged.

MONEY, WATSON, AND BLACKMORE *versus* DRYDEN LEACH. Friday, 17th May, 1765. [S. C. 1 Bl. 555.] Acknowledgment of a bill of exceptions by the Chief Justice of C. B. [Vide post, 1742.]

(In Error.)

Soon after the Court sat, the Lord Chief Justice Pratt came personally into Court, to confess (ore tenus) his seal put to a bill of exceptions in this case; pursuant to the requisition of the following writ, viz.

"George the Third, &c.—To our trusty and well-beloved Charles Pratt Knight, our Chief Justice of the Bench, greeting.—Whereas we have lately been informed [1693]ed that in the record and process and also in giving of judgment in a plaint which was in our Court before you and your associates, our justices of the said Bench, by our writ, between Dryden Leach, and John Money, James Watson, and Robert Blackmore, in a plea of trespass, assault, and imprisonment, manifest error hath intervened, to the great damage of the said John, James, and Robert; which said record and process, for the error aforesaid, we have caused to be brought into our Court before us; and now, on the behalf of the said John, James, and Robert we are informed, in our said Court before us, that at the trial of the issue first joined between the said parties in the plea aforesaid, the council learned in the law of the said John, James, and Robert alledged on their behalf certain exceptions to the opinion then declared and given by you; and that the said exceptions were then and there written in a certain bill, to which you put your seal, at the request of the said John, James, and Robert, according to the form of the statute in such case made and provided; and the said John, James, and Robert have brought into our Court before us the said bill with your seal put to the same as it is said; whereupon the said John, James, and Robert have besought us to do what further should seem meet to be done in this behalf, according to the form of the said statute;

and forasmuch as by the said statute it is ordained, that in such case the justice whose seal shall be put to such exception be commanded to appear before us at a certain day, to confess or deny his seal: therefore we command you that you personally appear before us, on the morrow of the Ascension of our Lord, wheresoever we shall then be in England, to confess or deny the seal so put to the said bill of exceptions as aforesaid to be your seal, according to the form and effect of the said statute; and that you bring with you, at the same time, this writ. Witness William Lord Mansfield, at Westminster, the 24th of April in the fifth year of our reign."

N.B. The bill of exceptions, sealed by Lord Chief Justice Pratt, had been previously brought into this Court, and was now in the hands of Mr. Owen, as Secondary of the Office of Pleas: and all the proceedings, down to and including the abovementioned writ, were entered upon the rolls of this Court.

The Lord Chief Justice Pratt being now come into this Court, pursuant to the command contained in the said [1694] writ, delivered it to the Lord Chief Justice of this Court; Mr. Owen, at the same time, delivering the original bill of exceptions into Lord Mansfield's hand. Whereupon Lord Mansfield, shewing to Lord Chief Justice Pratt the seal thereto affixed, asked him "whether that was his Lordship's seal, or not." To which question, his Lordship answering in the affirmative, Lord Mansfield redelivered the bill of exceptions to Mr. Owen; at the same time delivering to him the abovementioned writ, with orders "that it should be filed."

Note—There was no written return to this writ: but Mr. Owen proposes to indorse upon it—"Sir Charles Pratt Knight, the Chief Justice within named, personally appeared in the Court of the lord the King before the King himself, &c. on the day of the return within written; and confesseth that the seal put to the bill of exceptions within mentioned is his seal."

The Lord Chief Justice of the Common Pleas immediately retired, without sitting down: and the Lord Chief Justice of this Court attended him till he was got past the Puisne Judge, but not quite to the door of the Court.

REX *versus* THE INHABITANTS OF BURTON BRADSTOCK. Saturday, 18th May, 1765.

This case is already printed and published, in the quarto-edition of my Settlement-Cases, No. 171, p. 531.

REX *versus* RIGHTON, ESQ. Monday, 20th May, 1765. Not to pay costs for not going to trial pursuant to notice if not occasioned by the party's own default.

Mr. Coxe shewed cause, on the part of the defendant, why his client should not pay the prosecutor his costs by him expended in this cause, for the defendant's not going to trial, in pursuance of his notice given for that purpose.

It was an indictment for refusing to take upon himself the office of borsholder: which indictment the defendant had removed by certiorari; and thereupon had (of course) entered into recognizance "to appear, plead, and try it at the next assizes." The defendant had ob-[1695]-tained a rule for a special jury; and every thing was ready for trial: but only five of the special jury appeared; and neither side prayed a tales; (though the defendant had a warrant for a tales in his pocket).

The question was, "whether, upon these circumstances, the defendant was obliged to pay costs for not going on to trial."

Mr. Filmer, for the prosecutor, urged very strongly, "that he was obliged to pay them."

Mr. Coxe argued, on the contrary, that the defendant had been guilty of no default; and that the prosecutor might have prayed a tales, if he had thought fit.

Mr. Filmer replied, that they were not provided with a warrant for a tales; because it was incumbent on the defendant, to go on to trial: and he had actually a warrant in his pocket, but would not use it.

The Court were unanimously of opinion, that the defendant had not been guilty of such a default as could render him liable to pay costs for not going on to trial: the prosecutor might have come prepared with a warrant for a tales, if he had thought proper.

Rule discharged.

The end of Easter term, 1765, 5 G. 3.

## [1696] TRINITY TERM, 5 GEO. 3, B. R. 1765.

REX *versus* EDMUND THIRKELL. Friday, 7th June, 1765. Jurors cannot express their disapprobation of a verdict after given. [Vide 2 Bur. 1040. Bull. 8.]

He had been convicted of an assault upon Mary Amelia Halfpenny, an infant under ten and upwards of five years of age, with intent to ravish her.

Eight of the jury signed a paper in his favour; intimating their disapprobation of the verdict, which they themselves had given.

On Tuesday the 7th of May last, he was brought up and committed.

Lord Mansfield then expressed great dislike of such representations made by jurymen, after the time of delivering their verdict. It might be of very bad consequence, to listen to such subsequent representations contrary to what they had before found upon their oaths; and which might be obtained by improper applications subsequently made to them.

Mr. Justice Wilmot also expressed the same dislike of such subsequent representations made by jurymen after their departure from the Bar; and thought they ought to be totally disregarded.

Upon Lord Mansfield's report, it appeared that the child had also received the foul distemper from him.

He was, at that time, only committed to the custody of the marshal.

Mr. Justice Wilmot now pronounced the judgment of the Court upon him; viz.

[1697] To be set in and upon the pillory at Charing-Cross, for an hour, between the hours of twelve and two; to be imprisoned one year; to find security (himself in 100l. and his sureties each in 50l.) for his good behaviour for three years; and to pay a fine of 6s. 8d.

REX *versus* OSBORN. Monday, 10th June, 1765. Indictment for selling as two chaldron of coals a less quantity, is not maintainable: it must be for selling by false measure.

Mr. Morton shewed cause against quashing an indictment for selling, as two chaldron of coals, a quantity defective by so many bushels (in the indictment specified) of that quantity which a bushel ought by law to contain.

He argued, that this is tantamount to an indictment for selling by false measure; and distinguished the present case from those of 1 Sir J. S. 497, *Rex v. Gibbs*. 1 Lord Raym. 442, *Rex v. Flint*, and 2 Salk. 687, S. C.

It is no objection to an indictment, to say "that a civil action might have been brought:" for, the person injured may take either method.

The case of *Rex v. Marks*, in 1 Ld. Raym. 702, was an indictment for the unlawful taking, vi et armis, so much money (ten pounds) in pecuniis numeratis, of J. S. Mr. Eyre moved to quash it, because an action lies: sed non allocatur.

Therefore the Court will not quash it on motion.

Lord Mansfield—A man may be indicted for selling by false measure: but this is not so charged.\* If it had been charged, "that he sold by false measure; by a bushel which contained but so much, whereas the legal bushel ought to contain so much;" it had been another thing.

Mr. Justice Wilmot and Mr. Justice Yates both concurred. The latter said, it was only a declaration turned into an indictment. The former mentioned *Rex v. Lewis*, P. 1755, 28 G. 2, in this Court; which was an indictment for selling as gum-senega, what was not gum-senega; and that judgment was arrested: which was a very strong case, he said.

[1698] (Many cases in point were there cited by Mr. Serjeant Hewitt: and on Friday 9th May 1755, his rule "to arrest the judgment," was made absolute without opposition.)

Lord Mansfield—If there be no doubt of this indictment being bad, it is better for the prosecutor, to quash it on motion. And I take it, that it ought to be expressly

\* See the cases in point of *Rex v. Wheatley*, ante, vol. 2, p. 1125 to 1131, and *Rex v. Dunage*, 1130. And *Rex v. Driffield*, and *Rex v. Combrune*, and other cases there cited.



charged "that the defendant sold them by false measure:" whereas here, it is not expressly charged, but only left to be collected by implication.

Mr. Justice Aston thought that this selling short measure instead of full measure was worthy the attention of the Legislature; although it might not be indictable at common law, unless charged to be by false measure. He agreed, that this indictment has not the proper averments.

Mr. Justice Wilmot—The reason why this is not indictable, is, because it is in every body's power, to prevent this sort of imposition: whereas a false measure is a general imposition upon the public, which can not be well discovered. Yet he concurred with Mr. Justice Aston, that this is an inconvenience which very much requires a remedy.

Per Cur. unanimously,  
Indictment quashed.

REX versus EUNDEM. 1765.

This was the same point as the last: and therefore the same rule was made.  
Indictment quashed.

REX versus JOHN STORR. 1765. Indictment will not lie for a mere matter of trespass.

On the last day of last Hilary term, Mr. Serjeant Hewitt moved to quash four indictments, being (as he said) for private injuries only; though laid "vi et armis:" and he had a rule to shew cause.

Mr. Attorney General now shewed cause why these four indictments (which he said were for forcible entries and detainers) should not be quashed.

[1699] The first was for unlawfully entering his yard, and digging the ground, and erecting a shed; and unlawfully and with force and arms putting out and expelling one Mr. Sweet the owner, from the possession, and keeping him out of the possession of it.

It was objected, "that this is only an action of trespass converted into an indictment."

But this is charged as an unlawful entry, with force and arms, upon the possession of Mr. Sweet.

There is no other difference between this case and \*1 *Rex v. Bathurst and Others*, Trinity term 1755, but that that was an entry with force and arms into a dwelling-house or a school-house with the appurtenances: this, into a yard and shed.

An entry with force and arms, unlawfully, upon the possession of another, and putting him out of possession, is an indictable offence; even though the person so entering has a right. And the Court can not, before trial, say "that it was not with force and arms:" that must depend upon the evidence.

Therefore the Court will not quash these indictments, on motion.

N.B. There was no other charge of violence, in the present case, besides the common technical term of vi et armis.

Mr. Justice Wilmot—In four of the counts in *Rex v. Bathurst et Al.* "manu forti" (which was in the first) was omitted: and it was holden, "that any sort of force sufficient to support it might have been given in evidence, by virtue of the words vi et armis; though if no such evidence should be given upon the trial, the defendant ought to be acquitted."

Mr. Justice Aston mentioned, that he took Mr. Justice Denison to have said, that "vi et armis was *primâ facie*, as good as *manu forti*."\*2

Mr. Serjeant Hewitt, and Mr. Caldecott, contra, argued in support of the motion.

[1700] They took notice, that three of these indictments differ from the fourth: the first is for erecting a shed, &c. the second for erecting, &c. the third for cutting a bellfry, (which in Lincolnshire means a stable:) the fourth (which they did not object to,) for entering, &c. a dwelling-house; and vi et armis and with strong hand, &c.

\*1 In Easter term, 1755, 28 G. 2, the Court refused to quash that indictment, upon motion: and in Trinity following, they gave judgment for the King upon demurrer. [And see 8 Durn. 358.]

\*2 According to my own note, his words were—"This is laid to be with force and arms: and the degree of the force must depend upon evidence."

They insisted that the offence charged in each of the former three, respectively, was a private injury; and does not at all concern the King or the public; and therefore was not indictable. To prove this, they cited 2 Hawk. P. C. c. 25, p. 210. And *Rex v. Thomlinson*, Tr. 9 G. 1, for entering a close, was quashed.

The case of *Rex v. Bathurst*, they said, was, upon the face of it, an indictment for a forcible entry, and not for a common trespass. It was a stronger case than this: that was against three persons, who were enough to make a riot: this is only against a single person: that was for entering a dwelling-house, and putting him out of possession: this is only entering a yard, digging the soil, and erecting a shed.

There are many cases prior to that of *Rex v. Bathurst*: Hil. 11 G. 2, *Rex v. Archer*; Pas. 22 G. 2, *Rex v. Gask*; *Rex v. Hide*, and *Rex v. Hide and Another*, Tr. 22 and 23 G. 2.\*

The converting an action of trespass into an indictment is attended with great inconvenience: it makes the plaintiff a witness for himself, and saves costs.

Mr. Attorney General, in reply.—Let them demur that the point may be settled.

The case of *Rex v. Bathurst* must govern the present case. And in that case it is settled, “that any degree of force and violence sufficient to support an indictment may be given in evidence under the *vi et armis*:” which contradicts the principle laid down by the other side.

Every battery, every breach of the peace is indictable. The party injured has his election to bring an action, or to indict. Every trespass too is indictable, if it comes out upon the trial, to be an offence against the King and the public.

*Rex v. Bathurst*, was only *vi et armis*: and *vi et armis* is, and was there holden to be, equipollent to “with a strong hand.”

[1701] It is said, that in that case, there were three defendants; here, only one. But one man may commit a breach of the peace; though not a riot: he might be armed with pistols, for aught that appears to the contrary; and this might be, possibly, proved.

There is no distinction between a school-house, or even a dwelling-house, and a yard or a stable.

After that solemn resolution in the case of *Rex v. Bathurst*, an indictment of this sort ought not to be quashed in a summary manner, on motion.

Lord Mansfield—The objection to the fourth indictment is given up. The other three stand, all of them, upon the same ground. Nothing but the *vi et armis* implies force. Every force and violence is a breach of the peace.

The case of *Rex v. Bathurst* does not seem to me to lay down any such rule as “that *vi et armis* alone implies such a force as will, of itself, support an indictment.” There, the fact itself naturally implied force; it was turning and keeping the man out of his dwelling-house; and done by three people. Three of the Judges lay a stress upon that circumstance, of its being an entry into a dwelling-house: and the parties who framed the indictment plainly had a view to indict for a forcible entry.

As at present advised, I should think the present case within those that justify the quashing.

Coming with a pistol, though possible, is not to be supposed.

If there be no doubt upon it, there is no reason to put the defendant to more expence.

Mr. Justice Wilmot thought that it ought to appear to be an indictable offence: for otherwise, in cases where there was no malice, the defendant might be put to a great expence without remedy or satisfaction.

The cases cited shew, “that such indictments have been quashed:” and that of *Rex v. Bathurst*, being an entry into a dwelling-house makes that case no authority in this.

[1702] But this case stands indifferent, “whether the offence is indictable or not:” whereas it ought to appear upon the face of the indictment “that it is indictable.”

Therefore he was for quashing these three indictments.

Mr. Justice Yates concurred. *Rex v. Bathurst* was determined upon a right principle: but there, the nature of the offence appeared; and evidence might be given

\* N.B. The three last rules were made absolute without defence. *Rex v. Rawson*, Tr. 1749, 22 and 23 G. 2, S. P. but the rule was enlarged.

to shew the offence to be indictable. It was a forcible entry into a man's private dwelling-house, by three people.

But in ordinary common cases laid *vi et armis*, we are not to suppose and presume swords and pistols, or any thing criminal and indictable, unless it be charged. Here is no outrage or violence charged or probable.

Therefore he was for quashing.

Mr. Justice Aston likewise concurred. A man can not be indicted for a bare trespass. In a case of *Rex v. Jopson and Five Others*, P. 25 G. 2, B. R. All the cases of this sort were cited: and the Court refused to quash it on motion. The distinction there taken was, "that there were numbers of persons unlawfully assembled, and actual force charged;" and therefore that indictment was not quashed.\*

In *Rex v. Bathurst*, the ruling reason was "that it was a dwelling-house:" and there would have been no occasion to have recourse to that reasoning, if *vi et armis* alone had been sufficient. The degree of force ought to appear upon the indictment.

[1703] If it was a matter of property, it ought to be civilly tried: as was done in a case of *Rex v. Wightwick*, temp. Lord Hardwicke. So in another, of *Rex v. Fry*—(tried by the name of *Fry and Wood*—) for pulling down a house at Tunbridge-Wells.

Therefore I think the three indictments which have been objected to, ought to be quashed.

Lord Mansfield—Let the three indictments be quashed;  
And the rule be discharged, as to the other.

See S. P. determined accordingly, post, p. 1706, *Rex v. Atkins*, the very next day after this: and *Rex v. Gillet*, on the same day; and *pa.* 1731, *Rex v. Blake and Fifteen Others*, on the last day of this term, 26th June 1765.

GOODRIGHT, EX DIMISS. TYRRELL, Wid. *versus* MEAD AND SHILSON. Tuesday, 11th June, 1765. A tenant in tail may pass a base fee by lease and release, or bargain and sale, voidable by the issue in tail.

This was a special case in ejectment, from the last Lent Assizes for the county of Devon. It was tried before Mr. Serjeant Burland: and a verdict was found for the plaintiff, subject to the opinion of this Court, on the following case.

Case—John Shilson, the father of the defendant Nicholas Shilson, being seised to him and the heirs male of his body, of the premises in question, the remainder to his own right heirs, by lease and release dated 24th and 25th October 1742, previous to his marriage with Susannah Smerdon, conveyed the same to trustees, to the use of himself for life; remainder, to the trustees to preserve contingent remainders; remainder, to the use of the said Susannah, for her life: remainder to his first and other sons by the said Susannah, in tail male.

The marriage took effect; and they had issue Nicholas Shilson, the defendant their only son.

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\* It was an indictment against John Jopson and five others therein named, charging that they and several other persons to the jurors unknown, unlawfully assembled, to disturb the peace of the King; and, being so assembled, the six defendants particularly named, with force and arms, at, &c. the mine of Blead Lead of J. B. and J. S. Esquires, did unlawfully break and enter, and sixty pounds weight of black lead, &c. of the goods and chattels of the said J. B. and J. S. did unlawfully take and carry away; against the peace, &c.

Mr. Clayton moved to quash it; for that no indictment would lie; it being only a trespass for which an action of trespass or trover might and ought to have been brought: and he cited several instances where indictments had been very lately quashed, because the matter was merely actionable. Many of these have been already mentioned: others were *Rex v. Birkhead*, M. 11 G. 2. *Rex v. Newhall* (qu. when). *Rex v. Archer*; *Rex v. Mason*; both in Hil. & Pas. 11 G. 2, (but both were without defence). *Rex v. Jackson*, M. 12 G. 2. *Rex v. Heaton et Al.*, Tr. 13 G. 2, (quashed without defence). *Rex v. Camage*, H. 14 G. 2. *Rex v. Coates*, H. 14 G. 2, and *Rex v. Bateman*, the same term.

The Court thought it to be such a sort of offence, that they ought not to quash the indictment upon motion: the defendants might demur, if they thought proper. And they were unanimous in discharging the rule.



In Trinity term 1761, the said John Shilson suffered a common recovery : and by deed dated 24th June 1761, he declared the uses of the said recovery to be to ——— Lucas his heirs and assigns ; in trust to sell the said premises, and out of the money arising therefrom to pay and discharge certain debts mentioned in the said deed : and to pay the residue of the purchase money, [1704] or reconvey such parts of the premises as should remain unsold, to the said John Shilson his heirs or assigns.

The said ——— Lucas, by lease and release dated 27th and 28th October 1703, in pursuance of the trusts of the said deed last mentioned, conveyed the said premises to Elizabeth Tyrrell, the lessor of the plaintiff, and her heirs.

The said John and Susannah Shilson are both dead.

The question is “whether, upon the facts stated, the plaintiff is intitled to recover the said premises.”

Mr. Gould, for the lessor of the plaintiff, insisted that the purchaser took a good title under this recovery.

1st. The law does not suffer an estate limited by a tenant in tail, to commence after his death, to take effect.

2dly. The limitations under the settlement in 1742, are ineffectual, wrongful and void.

3dly. If the uses are void in their creation, they cannot be made good by the common recovery.

First—In proof of the first position, he cited Cro. Jac. and Lane ; and Cro. Eliz. 279, *Blitheman v. Blitheman* : and Moore, 683, *Freshwater v. Rois* ; and Yelverton, 51, S. C.

Second point—It is not yet well settled, “what estate the releasee or bargainee of a tenant in tail takes.” See 10 Co. 95 b. *Edward Seymor's case*.

But these limitations are wrongful and void, in point of form as well as in substance. The tenant in tail having taken back the estate to himself, he can do no more. All further uses are utterly void.

As to the manner of operation by uses—He cited Yelv. 51, *Freshwater v. Rois*, and Cro. Eliz. 279, *Blitheman v. Blitheman* : Bro. Feoffments al. Uses, p. 29, and Sheppard's Touchstone of Common Assurances, 509, which, he said, was in point to the present proposition.

Indeed there is a dictum in *Machil v. Clark*, which is contrary to this.\* But it is not law : nor is it at all mentioned in several other reporters of the same case.

[1705] He admitted that by the release, a defeasible estate passes to the releasee : but denied that the tenant in tail can limit to himself a use for life, to commence after this limitation.

The doctrine cited from Sheppard's Touchstone is in point : for the present case is a remainder ; which lies in grant, as much as an advowson does.

Third point—If the uses are void in their creation, a common recovery cannot make them good : as appears by the case in Cro. Eliz. 895, *Bedingfield's case*, and that of *Machil v. Clark*, before mentioned.

He concluded that the common recovery conveyed a good title to the purchaser.

Mr. Justice Wilmot—It is now fully settled, “that a release or bargain and sale by a tenant in tail, will convey a base fee, a defeasible estate, to the releasee or bargainee : though it must be allowed, that the old notion was, and even in Lord Coke's time, that a tenant in tail could not convey an estate longer than for his own life.” But that notion is now over-ruled ; and the contrary, settled.

Lord Mansfield—It is now settled, “that a release or bargain and sale by a tenant in tail gives a base fee, voidable by the issue in tail.” This is the principle of ‡ *Machil v. Clark* : and many subsequent cases have been grounded upon it : particularly, that of *Stapilton v. Stapilton*.†

Besides, the common recovery has made good this defeasible estate.

Either ground makes an end of this question. The recovery takes off the fetters of the Statute de Donis.

Mr. Justice Wilmot concurred. The tenant in tail had a fee originally : and a common recovery leaves him a fee again, by removing the bar and fetters imposed

\* V. 2 Salk. 619, pl. 1.

‡ V. Salk. 619. Comyns, 120, S. C. 7 Mod. 18, S. C. 11 Mod. 19, S. C.

† In Chancery—see 1 Atkyns, 2.

by the statute. When the bar and fetters are removed, it then becomes just the same case as if he had been tenant in [fee] ab initio. And though formerly it was doubted "whether a tenant in tail could, any otherwise than by a feoffment, grant any thing more than for his own life;" yet it is now settled, by the case of *Machil v. Clark*, "that he may, by bargain and sale, or by lease [1706] and release, pass a base fee." And if so, it is in his power to limit the remainder, as he pleases. And it makes no difference, whether it is limited to the use of the bargainee or the releasee, or to a stranger, or to himself for life with remainders over: for the base fee feeds all the uses that are limited upon it: till avoided by the entry of the issue in tail.

Mr. Justice Yates—A lease and release, or a bargain and sale by the tenant in tail is not absolutely void; but conveys a base fee, defeasible by the entry of the issue in tail. This is now settled by the case of *Machil v. Clark*: and many determinations and conveyances are founded upon it.

Mr. Justice Aston concurred.

The Court, were, therefore, unanimously of opinion, "that the recovery enured to the uses of the settlement, and that the plaintiff had no title."

Judgment for the defendant.

Note—The Court determined this case without hearing Mr. Dunning, the counsel for the defendant.

REX *versus* ATKINS. 1765. No indictment will lie for a mere trespass.  
V. ante, p. 1698, S. P.

An indictment was quashed: being the same point with the three which were quashed yesterday: (v. ante, p. 1703).

N.B. This was for pulling off the thatch of a man's dwelling-house; he being in peaceable possession of it.

Per Lord Mansfield and Mr. Justice Aston—This is within the distinction taken yesterday: it is only for pulling off the thatch.

[1707] REX *versus* GILLET. 1765. V. ante, ut supra; and also the very last preceding case, S. P.

This being an indictment like the 4th of yesterday, the same rule was made in this case, as in that: viz.

That the rule for shewing cause why it should not be quashed, be discharged.

V. post, pa. 1731, *Rex v. Bake and Fifteen Others*, on the last day of this term, S. P.

SALVADOR *versus* HOPKINS. HEATON *versus* RUCKER. Wednes. 12th June, 1765.

East India insurances includes the chance of detention in India, and the risque of the country voyage there.

The question at present debated was, "whether there should be new trials in these two particular actions upon a policy of insurance;" which had been tried before Lord Mansfield, at Guildhall; where a verdict was found for the plaintiff, in *Mr. Salvador's case*: and for the defendant, in *Mr. Rucker's case*.

But there were nine clauses, in all, upon the several insurances of this same East-India ship the "Winchelsea," (Captain Howe, commander;) which were tried by special juries, at different times.

The charter-party, bearing date the 20th of August 1761, was according to a printed form, which has long been in use: in which, amongst many other provisions, there are the following.

"And to the end the said ship's detention and stay in India and her demorage for the same, if any shall happen, during her present-intended voyage, may be ascertained, it is covenanted and agreed by and between the parties to these presents, that in case the said ship shall, within eight months after the delivery of the said ship's last dispatches from England, arrive at her first consigned port in the East Indies, China, Mocha, or elsewhere within the limits granted or allowed to the said Company; and notice be given thereof, in writing, of her arrival, to the said Company's pre-[1708]-sident, agent, or chief factor there: the said Company will in such case, in four calendar months afterwards, or on or before the eleventh day of February which



shall be in the year of our Lord 1763, or at farthest so soon after as the said ship, making all reasonable attempts, may get about the Cape of Good Hope so as to gain her passage home the same season, lade or cause to be laden on board the said ship, at some ports or places in the said East Indies, China, or elsewhere within the said limits, for England, so much goods and merchandizes (including therein the said tons of iron kintlage) as the said ship can conveniently stow and carry in her, in manner as aforesaid, as shall amount in the whole and together to the quantity of 484 tons; but in default of loading the said ship within the space of four calendar months after such arrival and notice given as aforesaid, the said ship shall from henceforth enter into demorage of 20l. 3s. 4d. a day for so long a time as she shall be detained in India, China, or elsewhere within the said limits, in the service and employment of the said Company. And furthermore, if the said ship shall, within the said eight months after she shall be dispatched from England as aforesaid, arrive at such port or place to which she shall be consigned, and give such notice as aforesaid; and yet is not dispatched for England within the said four calendar months, or the said eleventh day of February, or so soon after that the said ship (making all reasonable attempts) may get about the Cape of Good Hope so as to gain her passage home the same season; nor detained by virtue of the next ensuing or following proviso or covenant; then the said united Company or their assigns shall allow or pay unto the said part-owners and master four months demorage, commencing from the said eleventh day of February, after the rate of 20l. 3s. 4d. a day, for and in consideration of the passage so lost, and her stay in India after the said eleventh day of February: but in such case, no other demorage shall be paid in respect of the said ship's stay after the said eleventh day of February. And contrariwise, if the said ship shall not arrive at her first consigned port within the space of eight months after such dispatches delivered as aforesaid, that then the said Company shall load the said ship as aforesaid, within four months after such her arrival, and such notice given thereof as aforesaid; or, in default thereof, the said ship shall enter into the demorage of 20l. 3s. 4d. a day, immediately after the expiration of the said last mentioned four calendar months, for and during such time as she shall be detained by the said Company's presidents or factors, in the service and employment of the said Company, within the limits aforesaid; but then the said ship shall not have any further or greater allowance, though she be not dis-[1709]-patched so soon as to save her passage that season, than four months demorage only in consideration of the passage so lost, and her stay in India or elsewhere abroad on that account; nor shall such four months demorage, for the loss of such passage, be allowed, if the said ship be by virtue of the said next ensuing proviso or covenant detained in the said Company's service, or if she be dispatched within the said last mentioned four months, unless it evidently be made appear, to the satisfaction of the court of directors for the time being of the said united Company, that the said ship was hindered from her arrival in time at her first consigned port, by unavoidable accidents only. Provided always, and it is hereby covenanted and agreed, that the said Company's presidents, factors and agents shall have liberty to detain the said ship, after the said eleventh day of February, in their employment, in trade, and also in warfare; and shall have liberty to let out the said ship to freight, for the said Company's sole benefit, for so long time as they please: so as such detention be signified in writing, and does not exceed twelve months from the said eleventh day of February, and so as the said ship be dispatched in the proper season to save her next year's passage: in which case, the said Company shall pay demorage, for and during the term of her detention, after the aforementioned rate of 20l. 3s. 4d. a day, till she shall afterwards be dispatched from her last lading port, or the expiration of the said twelve months, which shall first happen. But after the said twelve months are expired, the said ship may return for England; and the said Company shall not be liable for any further demorage, or any damage that may accrue by her detention after that time: and in case all or any part of the said ship's lading shall, after the expiration of the said twelve months, be wanting, yet the said Company do agree, that the said ship may then return for England: the master having first made legal demand, thirty days before his coming away, and due protest for want of the said lading. And furthermore it is agreed, that if the said ship shall arrive at her consigned port within eight months after delivery of the said ship's dispatches as aforesaid, and shall not on or before the said eleventh day of February 1763 be dispatched for England as aforesaid, then the said united Company, their presidents, agents,



factors, or assigns, shall, over and above the value of the said 490l. sterling before-mentioned to be allowed to be carried out, supply unto the master of the said ship for the time being, so many pagothas, rupees, or pieces of eight, dollars, or other coins, as need shall require, for buying victuals or other necessary provisions for the said ship, not exceeding the value of three hundred [1710] dollars for every one hundred tons the said ship is let for: valuing the money so supplied, at six shillings and sixpence a piece of eight or dollar in time of peace, and seven shillings and sixpence in time of war: and in the same proportion, for pagothas, rupees, and other coins. And in case the said ship shall not be dispatched by the said Company's presidents, agents, or chiefs in Council aforesaid, on or before the eleventh day of February 1764, then the said persons who shall so keep the said ship, shall, over and above the said sums of money beforementioned, furnish and lend the master, or the master for the time being, if he desires it, so many pagothas or rupees more, not exceeding the value of 300l. sterling for every hundred tons the said ship is let for, as, upon a survey to be taken as before directed, shall appear necessary to enable the said ship to proceed for England; so as the whole of the money so furnished be actually laid out in necessaries for the said ship; valuing each of the said pagothas at nine shillings, and each of the said rupees at two shillings and sixpence: both which monies so supplied, with the advance of 40l. for every 100l. on the last mentioned supply of pagothas and rupees, for and in consideration of the risque of the said ship's return for England, shall be paid or (at the Company's choice) allowed them out of the freight and demorage payable by virtue of these presents. And if the said ship shall, by written orders from the said Company, be detained at Saint Helena or any other port, to stay for convoy, in such case the said Company shall allow the said part-owners and masters two-third parts of the demorage a day before agreed on, for every day she shall be so detained: but no allowance shall be made to the said part-owners or master on account of the said ship's keeping company with any other of the Company's returning ships. But the said Company shall not allow or pay any demorage for the time that the said ship shall take up in amending any defects: and further, if by the time taken up in repairing any defects in the said ship, she should exceed the times respectively limited for her stay in the East Indies, China, or other the limits aforesaid, or should thereby happen to lose her passage for England, the said Company shall in such case pay no demorage for such time so lost by repairing or amending any such defects, or for the passage lost thereby; except and provided nevertheless, and it is hereby agreed, that if the said ship be detained in the Company's service longer than the said eleventh day of February which shall be in the year 1764, and by reason thereof shall have need of being repaired, that then the said Company shall pay or allow demorage after the rate aforesaid, for every day the said ship shall be so repairing, so as the same do not exceed thirty days."

[1711] The dates of the facts were as follows—

1762. March 25th. The ship sailed.

" Sept. 19th. She arrived at Bombay.<sup>3</sup>

" Novr. 4th. She left Bombay the first time.

1763. March 5th. She arrived at Calcutta, in Bengal.

" " 28th. The Presidency and Council of Bengal entered into a new agreement with the captain: reciting "that the charter-party would expire on the 11th February 1764, but that the President and Council, finding it expedient to detain the ship in India, and desirous of having the time limited in the charter-party prolonged, &c."—The indenture therefore witnesseth, that the captain lets the ship to freight, for one whole year from the said 11th of February 1764, &c.

" July The ship arrived at Bombay, a second time.

Dec. 11th. She left Bombay, to go to Bengal.

1764. She arrived at Bengal.

" March 19th. The ship left Bengal to go to Bombay.

" " 21st. The ship was lost.

" April 3d. Mr. Hume received a letter from the captain, dated 14th April 1763, inclosing a copy of the new agreement: which letter was publicly read in a coffee-house.

1764. April 4th. Some insurances were made by Mr. Hume.

„ July 17th. Other insurances were made by Mr. Hume, all the other insurances were made, after the captain's letter of 14th [1712] April 1763 was received, and publicly read in a coffee-house.

„ October 9th. An account was received in London, of the ship's loss. All the policies had this description—"At and from Bengal, to any ports or places where and whatsoever in the East-Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, forwards and backwards and during her stay at each place, until her arrival at London; on money advanced or to be advanced for bills drawn by the captain for the use of the ship 'Winchelsea,' and for account of the owner: and upon money advanced or to be advanced as absence-money, to pay the ship's company; all or either, as interest shall appear: at 4 per cent."

The underwriters insisted, that the policies were void, because at the time of underwriting, they were not expressly told of the new agreement "to detain the ship in India for a year longer than the enlarged time provided for by the charter-party, which expired on the 11th of February 1764."

The causes were at first tried with different success: but all the nine verdicts were at last uniform, for the plaintiffs, the insured against the underwriters.

The reasons which governed the Court on granting or refusing new trials were—That the underwriters are bound and presumed to know the course of the East-India trade, the terms of the charter-party, and the destination of the India ships (which are under the direction of the Company, and not of their owners:)—that the charter-party is a printed form, of a very long standing—that, besides the liberty thereby given, "to prolong the ship's stay for one year," it is very common, by a new agreement, to detain her a year longer; (for, no ship comes home in ballast;) and the longer a ship is kept, the more beneficial it is to the owners.—That the words of the policy are adapted to this usage; being without limitation of time or place; and without any reference to the first voyage particularly mentioned in the charter-party.—The terms of the policy precisely describe the risque, in it's utmost latitude; and necessarily extend to every prolongation of [1713] stay, and every country-voyage.—That any of the defendants might have learned at the India House all that was to be known.

No mention was made, or question asked, at the time of underwriting, "when the ship was chartered;" "when she sailed from England;" "when she arrived in India;" "whether she was continued a year, according to the proviso in the printed charter-party;" and yet her continuance in the East Indies depended on all these facts.

If they ought necessarily to be disclosed, the policy was void, to the knowledge of the underwriters, at the time they took the premium.

The chance of her stay is one of the risques insured.

The evidence in all the causes was very strong, "that her staying a year longer, if known, would not have varied the premium."

This ship was insured at the same premium, after the prolongation of her stay in India was known.

None of the defendants desired to be off, after they knew that an account of the new agreement "to prolong her stay for a year longer" had been received in England upon the 3d of April 1764: which was notorious to them all, before the intelligence of her loss, which came in the October following.

So that if there had been any force to the objection, it would have been waved by the acquiescence of the underwriters, after they were fully apprized of the whole.

The nine causes were these: 1st. *Heaton v. Rucker*; 2d. *Salvador v. Hopkins*; 3d. *Hume v. Jebb*; 4th. *Hume v. Tidswell*; 5th. *Black v. Boehm*; 6th. *Black v. Innys*; 7th. *Hume v. Da Costa*; 8th. *Black v. Bond*; 9th. *Hume v. Boehm*. No. 1 was tried, the first time, on 26th February 1765; and a verdict found for the defendant; it was tried, a second time, on 10th July 1765; and a verdict found for the plaintiff. No. 2 was tried on 26th February 1765: and a verdict was found for the plaintiff. No. 3 was on 28th February 1765: and a verdict found for the plaintiff; the defen-

dants not making any defence. No. 4, 5 and 6 were verdicts for the plaintiff, without defence, given at the same time with No. 3. No. 7. was tried on 1st March 1766: and a verdict for the plaintiff. No. 8 was [1714] on 4th July 1766: and a verdict for the plaintiff. No. 9 (*Hume v. Boehm*) was tried on 4th July 1766: a verdict was found for the defendant; and a new trial moved for on Friday the 7th, and granted on Monday the 24th of November 1766. It was accordingly tried a second time, upon the 5th of May 1767: and the jury have found a verdict for the plaintiff, without going from the Bar.

As these causes are very much blended together in their nature and circumstances, I take the matter up here (though anticipated in point of time;) and include the whole of the motions for new trials in all these causes, in one single report. Perhaps the best method of rendering the whole matter clear and intelligible, would have been, to have begun with Lord Mansfield's report in this last cause of *Hume v. Boehm*; which gave the exact history of all the rest, and particularized the evidence: but the great length of such a report might have been objected to.

These two causes of *Salvador v. Hopkins*, and *Heaton v. Rucker*, being so very nearly connected with each other, were taken up together, and argued jointly, as if they had been but one single cause.

On Friday 17th of May last, they were argued by Mr. Morton, Mr. Coxe, Mr. Walker, Mr. Dunning, and Mr. Heaton, on behalf of the plaintiffs; and by Sir Fletcher Norton (Attorney General,) for the respective defendants, in both causes.

The Court took time to advise.

Lord Mansfield now delivered the unanimous opinion of the Court, "that there ought to be a new trial in the case of *Heaton v. Rucker*; but not in that of *Salvador against Hopkins*."

They thought the usage of the East India Company's trade and the course of their voyages, to be in fact so notorious, and so well known both to the insurers and the insured, that they must be supposed fully apprized and sufficiently conversant of it; and that the obligation of this policy is to be taken, from the words of the charter-party, (which refer to the usage,) and the usage of these voyages, in the same manner as if it was expressly inserted in the policy.

His Lordship entered into the reasons of their determination in these two causes with more particularity than may be necessary here to specify; as I have already mentioned those which seemed to govern their general determination in all the nine causes.

[1715] The Court esteemed this to be the most convenient way of determining this question; because whoever shall hereafter insure on an East India ship, will know that he insures the contingencies; and may take proper precaution against them, if he will: whereas if every person insured should be obliged to open to the insurer all the grounds of his expectations about the ship's continuance in the East Indies, or coming to England, it might produce great litigation and confusion in cases arising upon these East India policies.

The rules then made were,—that in *Salvador v. Hopkins*, there should be

No new trial:

But in *Heaton v. Rucker*,—there should be

A new trial.

The cause of *Hume v. Boehm* was not tried till long after this determination in these two causes\*: and the verdict being for the defendant, Mr. Morton moved, upon the 7th of November 1766, on behalf of the plaintiff, for a new trial; the verdict being, as he alledged, contrary both to law and evidence.

Rule to shew cause.

On Monday the 24th of November 1766, Sir Fletcher Norton shewed cause.

The great question was, "whether the circumstances of the case and the facts were sufficiently communicated to the underwriter, at the time of his underwriting the policy."

The Court thought they were.

They held that the understanding of the policy must depend upon the course and usage of the East India trade; and conceived it to be contradictory to the policy, to

\* V. ante, p. 1713.



say "that the underwriter did not underwrite for a country-voyage;" and were unanimous in making the rule absolute for a new trial.

This cause of *Hume v. Boehm* was tried the second time, upon the 5th of May 1767: and the jury found a verdict for the plaintiff, without going from the Bar.

[1716] REX *versus* ROBERT HANN AND JOHN PRICE, Justices of Peace for the Borough of Corse-Castle. Thurs. 13th June, 1765. Information against justices of the peace for acting from motives of resentment.

Cause was now shewn against an information which had been prayed against them, for a misdemeanor in the execution of their office, as justices of the peace for the said borough, in refusing to grant a licence to sell ale, to one Ingram an inn-keeper in that borough; merely from a motive of resentment against him, for having joined in an affidavit made in support of the interest which was adverse and opposite to that which was espoused by these two justices and their friends.

Their defence was, that they did not act from any resentment, or other corrupt motive; but solely because Ingram was an improper person, and had kept a disorderly house, and continued to keep it after full notice to the contrary; and in particular, that he encouraged gaming and cock-fighting, at his house.

Lord Mansfield—The Court should never interpose against magistrates,\* unless they have acted from bad motives and *malâ fide*; especially in such a case as this, where they are entrusted with an absolute discretion. But, for that very reason, this is the strongest case for the interposition of the Court, if it appears that they have acted upon corrupt motives.

If it appeared clearly, that this man did keep a disorderly house, it would be a reason against the Court's interposing against the justices. But this does not clearly appear.

Upon the whole, he thought, and by a full discussion of the affidavits shewed why he thought the charge upon the justices was not satisfactorily answered by them: and he declared it to be of very dangerous consequence, to permit the due discretion of the justices to be influenced by considerations of this kind.

The Court thought it a proper case for an information: and made the Rule absolute.

V. post, (pa. 1786,) 20th Nov. 1765.

[1717] EVELYN, BART. Executor of Sir John Evelyn, Bart. *versus* CHICHESTER, ESQ. Friday, 14th June, 1765. [S. C. Bull. 154.] Lord of a manor may maintain an action for the fine due upon the admittance of an infant copyholder when he comes of age.

This was a special case from Surry Assizes.

It was an *indebitatus assumpsit*, wherein the plaintiff declared as executor to his father, for 150*l.* assessed for a fine for the admission of the defendant to a customary tenement called Daniels, within the manor of Abinger, of which Sir J. E. the father was lord: which customary tenement consisted of a large capital mansion-house and a small parcel of land, which land was let for 7*l.* a year, subject to land tax, quit-rents and other outgoings; but the mansion-house had been unlet from the time of the admission of the defendant to the time of the action brought: Mr. Chichester's agents not being able to let it, though it was advertised for that purpose.

On the trial,(a) it was proved, that Sir J. E. the father was lord of the manor. That on the presentment of the death of the defendant's father John Chichester, who died seised, three proclamations were made for the defendant to come in and be admitted. That on the 4th of March 1747, the defendant was admitted to the said customary tenement, in person; and the guardianship committed to Sir Roger Newdigate and John Ludford, Esq. they rendering an account: and upon such admission, a fine was duly assessed, of 150*l.* payable on the 12th day of April then next following, at the mansion-house called Abinger Court; being the like sum as

\* V. ante, 556 to 565, *Rex v. Young and Pitts, Esqrs.* [See also Doug. 568.]

(a) See 1 Sider. 58. 3 Mod. 239. 1 Show. 35. 1 Lev. 273. 3 Lev. 261. 1 Durn. 618. 3 P. Wms. 151.

was assessed for a fine on the last admission of the defendant's father. That the defendant was, at the time of his admission, of the age of six years or thereabouts. That the said Sir J. E. the father lived about sixteen years after the said admission; and then died: and about two years after the defendant came of age, this action was brought against him by the plaintiff, as executor of his father, for the said fine; the defendant, his guardians, or their under-tenants having been in possession of the premises from the time of his admission to the time of commencing the action. The under-tenant had paid the quit-rent as it became due, (though he said he had no direction to do so,) up to the present time.

The jury being of opinion "that the fine was a reasonable one," found a verdict for the plaintiff, for 150l. but subject to the opinion of the Court on the following question—

[1718] Question—"Whether this action will lie against the defendant; he being a minor, at the time of the fine being assessed."

Mr. Coxe, for the defendant, admitted "that this action of indebitatus assumpsit does lie by an executor, for a copyhold fine set by his testator," since the determination of the case of *Shuttleworth v. Garnett* reported in 3 Lev. 261, and 1 Shower, 35, and 3 Mod. 239, and Carthew, 90, S. C. where three Judges held, against Holt, "that an assumpsit would lie by an administratrix for a fine of a copyholder." But Mr. Coxe insisted, that it does not lie against a minor: it is not such an action as will lie against an infant. There is a case in point, "that an action of debt would not lie." 1 Ld. Raym. 36, *Borough's case*; "debt will not lie against an infant, for a copyhold fine upon his admission. And therefore an infant arrested upon such an action, being five years of age, was discharged."

And the infant has done nothing since he came of age, to ratify what was done before. Here is a large capital mansion-house, unlet at the time the action is brought; of which the defendant's guardians or under-tenants have been in possession; and the tenant has continued to pay the quit-rent, but without his direction. Now this could not be for the benefit of the infant.

The rent of the land is only 7l. Therefore a fine of 150l. is unreasonable.(b)

It is stated, that the infant was six years old, when he was admitted: and guardians were then appointed. It shall be intended that these guardians were appointed under the Act of 9 G. 1, c. 29.

I do not say, that the lord is not intitled to a remedy: I only say that he is not intitled to this action of indebitatus assumpsit.

Mr. Bishop, contra—This is an action brought after the infant came of age. The case cited from Lord Raymond was an action brought pending the infancy.

The plaintiff has no other remedy. The Statute of 9 G. 1 is not found by the jury.

[1719] This admission was for the benefit of the infant; for, if he had not been admitted, he could not have enjoyed the rents and profits. He took nothing, till his admission.(c). I agree, that neither debt nor assumpsit could have been brought against the infant, during his infancy.

The Act of Parliament of 9 G. 1, c. 29, was made for the mutual benefit of lords and infant-tenants; it is intitled "An Act to Enable Lords of Manors More Easily to Recover their Fines; and to Exempt Infants and Femes Covert from Forfeitures of their Copyhold Estates, in Particular Cases." But there was no proceeding under this Act, in the present case.

If Sir John Evelyn had entered, under this Act, he must have been a sufferer; as it was a large old house, in a bad country, and untenanted.

The defendant has actually received the rents and profits of this estate for near twenty years. It has been, all this time, in the possession of "him, his guardians, or under-tenants;" which is his possession.

And the fine is stated to be a reasonable one.

Lord Mansfield—There is no giving an opinion upon this case, seriously.

(b) But there was a capital mansion-house, as well as land, as appears by the state of the case.

(c) This is a mistake, because his father died seised, as stated page 1717, and he took as heir by descent: had this been the case of a surrender, what is here said would have been true.

Here is a reasonable fine assessed, the same as his father paid ; an enjoyment for sixteen years, and part of it, since he came of age ; and no renunciation of the estate—; on the contrary, a confirmation of the transaction.

Mr. Justice Wilmot—An entire confirmation. I have not the least scintilla of doubt.

Mr. Justice Yates—If the defendant was still an infant, I should think this action maintainable. Debt, perhaps, would not lie, because an infant cannot wage his law.<sup>(d)</sup> But assumpsit, I think, would lie ; as the infant continued to occupy and enjoy the estate.

In 2 Bulstr. 69, *Kirton v. Elliott*—The plaintiff recovered against an infant the rent upon a lease made to him ; and it is there said—“If a lease be made to an infant, and he occupies and enjoys, he shall be charged with the rent.”

[1720] An infant may contract for necessities. He could not have received the rents and profits of this copyhold, without admittance ; and he must previously pay the fine for such admittance. But here, he has affirmed the whole transaction ; he has enjoyed two years, since he came of age.

Mr. Justice Aston was of the same opinion.

Per Cur.—Unanimously,

The postea must be delivered to the plaintiff.

REX versus MIDLAM. IDEM versus EUNDEM. 1765. Where a certiorari to remove a conviction is issued out of necessity, on the prosecutor's refusal to give a copy, such prosecutor is not entitled to costs.

Sir Fletcher Norton, on behalf of the prosecutor, shewed cause against a rule which had been made upon him, to shew cause “why I should not be directed by the Court, to forbear, and not to proceed to tax the prosecutor his costs in these causes, relative to the affirmance of the convictions against the defendant in these causes ;” and also “why the bond entered into by or on the behalf of the defendant, on allowing the certiorari, should not be delivered up to the said defendant or his clerk in Court to be cancelled.”

This certiorari was brought for removing a conviction upon the game-laws ; and the present rule was grounded on an affidavit of hardship and oppression upon the defendant ; namely, that although the defendant had paid the forfeiture upon the conviction, yet an action had been brought against him for the same offence ; and when he wanted to plead this conviction in bar of the action, the justice had refused to give him a copy of it : and he was obliged to remove it by certiorari : and the prosecutor set it down in the paper, and got it affirmed ; and then the prosecutor became nonsuited in the action.

Sir Fletcher, on behalf of the prosecutor, insisted on having his costs.

He urged, that the Act of 5 Ann. c. 14, § 2, directs full costs to be paid upon removing these convictions, in case the conviction be affirmed. And this is general ; and they must be paid in all cases where the conviction is [1721] affirmed ; be the certiorari brought “upon any pretence whatsoever ;” (for, so the Act of Parliament is expressly worded). And this conviction was affirmed. Therefore the Court cannot, upon this man's own affidavit, enter into the cause or occasion of the removal of the conviction by this certiorari.

Mr. Wheeler and Mr. Walker, contra. The removal of the conviction was absolutely necessary here ; in order to its being pleaded to an action brought for the same offence, under the 8 G. 2, c. 19, § 2. So that this was not an adverse proceeding : nor was the certiorari brought for vexation, but from necessity.

The case of *Rex v. The Inhabitants of Madley*, in 2 Sir J. S. 1198, is not unlike the present. The order was affirmed as to the father and mother, but quashed as to the

(d) In debt for rent upon a lease for years the defendant shall not wage his law, Co. Lit. 295 a. S. P. though the rent be reserved on a parol lease : because it is in the realty, and arises from the taking of the profits from the land, and occupation of it in the country ; and so the notoriety of the thing excludes the defendant from waging his law. Per Holt, Ch.J. 12 Mod. 681. Qu. therefore, if the infant could in this case have waged his law ; but yet, in debt for a fine or amercement at a court baron, the defendant may wage his law. Co. Lit. 295.



daughter. It was resolved, that the parish who removed the order should not pay any costs; otherwise, where a certiorari is brought unnecessarily, and consequently vexatiously; which, the Court there said, was the true test to go by.

Now the present case falls within that true test: the removal was not unnecessary; and consequently, not vexatious.

This defendant had paid the penalty: and then the prosecutor brought an action for the same offence. The conviction was, therefore, necessarily to be removed: it was not removed upon a frivolous or vexatious cause. The whole effect of it was over: the penalty had been actually paid. The action brought for the same offence was mere oppression: the vexation was exercised upon the defendant, not by him.

Sir Fletcher Norton said, the defendant might have quashed the conviction if it was bad: and the penalty must have been refunded.

Lord Mansfield—This is not a case within the intention of the Act of Parliament of 5 Ann. c. 14, § 2. For, this certiorari was not brought for vexation, or out of obstinacy or perverseness; nor to over-hale or object to the conviction: but an action being brought for the same offence, the defendant in that action could not obtain (though he ought to have had it) a copy of the conviction from the justice of peace who made the conviction: and therefore he was obliged to bring a certiorari, to remove it; and he removed it for that purpose only. The prosecutor had no occasion, therefore, to be at any expence about it; for, the defendant [1722] did not object to it. But the prosecutor set it down in the paper, only to increase expence, and merely for vexation; supposing “that the defendant would have been obliged to pay for it.” The plaintiff in the action was nonsuited: and I think the defendant (instead of paying costs) ought to have had an allowance of the costs he was put to in removing the conviction; as it was a necessary part of his defence.

Therefore the present rule ought undoubtedly to be made absolute.

Mr. Justice Wilmot—This is one of the many cases where poachers are pursued with unintermitting vengeance. Here was not only that; but gross oppression also. He was extremely clear, that this was not a case within the intention of the second section of the 5 Ann. c. 14. And he thought (as Lord Mansfield also did) that the justice ought to have given the defendant a copy of the conviction, without putting him to the trouble and expence of bringing a certiorari to remove it. The bringing the action for the same offence was a gross oppression: and the plaintiff in it was nonsuited. And though he knew that the certiorari was brought only from necessity, (as the justice had refused to give the defendant a copy of it;) and that the defendant had actually pleaded it, and used it as a good one;—what, but oppression, could induce the prosecutor to set it down, and get it affirmed? He had had the effect of it: the penalty had been paid.

Therefore he concurred with Lord Mansfield, that the rule ought to be made absolute.

Mr. Justice Yates also concurred, for the same reasons.

The justice ought to have given the defendant a copy of the conviction: for it was a record: and the defendant was intitled to it. And he ought to have been allowed the expence of his necessarily bringing a certiorari, in costs upon the nonsuit; for it was necessary to his defence in the action. He did not remove the conviction, in order to object to it: on the contrary, he had submitted to it, and had paid the penalty. He removed it out of necessity: it was necessary to his defence in the action.

He thought this proceeding of the prosecutor to have been a very oppressive one, in every stage of it; and that the bringing the certiorari, under the circumstances of the [1723] present case, did not intitle the prosecutor to his costs upon affirmation of the conviction: and therefore this rule ought to be made absolute,

Mr. Justice Aston was clearly of the same opinion.

Per Cur.—Rule made absolute:

And the prosecutor to pay the costs out of pocket, of this application.

MILLAR *versus* YERRAWAY. Saturday, 15th June 1765. Sci. fa. in error needs not lie four days in the office before return.

Mr. Bearcroft, on behalf of the defendant in error, shewed cause against a rule which had been obtained by the plaintiff in error, for the defendant in error to shew

cause "why the writ of scire facias, on which the defendant in the original action (the present plaintiff in error) had been summoned, should not be set aside for irregularity."

Mr. Walker (who obtained the rule) had objected on behalf of the plaintiff in error, "that this writ of scire facias had not lain four days in the office, before its return."

But the Court took a distinction between writs of scire facias in error, and writs of scire facias against bail: \*<sup>1</sup> it is not necessary, in the former case, "that the scire facias should lie in the office before the return;" though it is necessary, in the latter. And the rules that have been made for the scire facias lying four days in the office, relate (as Mr. Justice Yates observed) only to writs of scire facias against bail.

Therefore they discharged the rule.

GREETHAM, Widow, *versus* THE INHABITANTS OF THE HUNDRED OF THEALE.

Monday, 17th June, 1765. Wherever a plaintiff is entitled to costs, so on the other hand is the defendant also.

This was an action brought by the party grieved, against the inhabitants, on 9 G. 1, c. 22, § 7, for satisfaction and amends for the damages sustained by the maliciously setting on fire a barn and outhouse belonging to the plaintiff: in which action, the plaintiff was nonsuited; and on an application by the defendants to the Master, "to tax the costs of the nonsuit," he doubted "whether the defendants were intitled to them."

[1724] Whereupon Mr. Ashhurst, on behalf of the defendants, now moved for the direction of the Court, to the Master, "to tax them."

He mentioned the statute of 18 Eliz. c. 5, made for the restraint of informers upon penal statutes; by the 3d section of which, an informer upon a penal statute shall pay costs, if nonsuited. And he urged and relied upon that of 4 Jac. 1, c. 3, § 2, "that if any person sues, in any Court, any action wherein the plaintiff or demandant might have costs, if judgment should be given for him; the defendant shall have judgment to recover costs against such plaintiff or demandant, if he be nonsuited, or a verdict pass against him." And he cited the case of *Bellasis v. Burbriche*, in 1 Ld. Raymond, 172, to prove "that where an action upon a penal law is brought by the party grieved, he shall have his costs." And as this action is brought by the party grieved, who would have received costs, if he had prevailed; it is clear, that he must pay costs, upon being nonsuited.

Mr. Stowe, on behalf of the plaintiff, opposed this motion. He admitted, that where the party grieved sued as being so, he should have his costs; but a common informer, he said, shall not have his costs, though he be the party grieved. But the defendant shall have no costs, even where the action is brought by the party grieved.

And he cited the following note, out of 1 Salk. 30, "Note, where a statute gives a penalty to a stranger, and he sues, he is a common informer, and shall pay costs upon the 18 Eliz. But where the statute gives it to the party grieved, he is not a common informer, nor liable to pay costs within the 18 Eliz. 1 Anderson, 116. 3 Cro. 177."

Mr. Ashhurst, in reply. Perhaps, we may not be intitled to costs under the 23 H. 8, c. 15.\*<sup>2</sup> But we certainly are, under 4 J. 1, c. 3.

The Court held, that wherever the plaintiff would be intitled to costs, the defendant is so, reciprocally.(a) Here, the plaintiff, the party grieved, would have been † intitled; therefore as it is mutual and reciprocal, he is liable. And accordingly they gave directions to the Master

To tax the costs.

[1725] REX *versus* INHABITANTS OF UTTOXETER. 1765.

See this case at large, in my Settlement-Cases, No. 172, p. 538.

\*<sup>1</sup> V. post, 2439, 5th June 1769, *Gross v. Nash*, acc.

\*<sup>2</sup> V. § 1.

(a) This is by the express words of 4 Jac. 1, c. 3.

† Qu. of this assertion "that he would have been intitled to costs." See what was said by Mr. Justice Aston, in the case of *Wilkinson, qui tam, &c. v. Alliot, Clerk*, 27th Nov. 1775, B. R.

WESTON *versus* MASON. WESTON *versus* CHAPMAN. Thurs. 20th June, 1765.  
Matter of demurrer will not be listened to after verdict.

On Monday the 10th instant Mr. Dunning, on behalf of the defendants, moved in arrest of judgment; a verdict having been found for the plaintiff.

It was an action of debt on bond, brought against the sureties of a sheriff's bailiff. Oyer was prayed of its condition. The condition recites, "that the sheriff has appointed this person a bailiff for the hundred of East Gotson:" if therefore he shall duly execute his office, &c. within that hundred; and shall duly execute all warrants directed to him, and make due and sufficient return thereof, &c. then the bond to be void. Performance of the condition was pleaded. To which plea the plaintiff replied, and assigned a particular breach. The breach assigned by the plaintiff was, "that this bailiff had not made a due return to a particular warrant directed to him." The defendant rejoins "that he had."

Mr. Dunning's objection was, "that this man is only appointed bailiff of a particular hundred; and the warrants to which he was obliged to make returns are confined to the particular hundred of which he was bailiff: and it does not appear, that the warrant which he is charged not to have returned, was directed to him as bailiff of the hundred. And if not, he was not obliged to return it."

The case of *Stoughton v. Day*, Hil. 22 C. 2, in Aleyn, 10, is in point: it is exactly the same case with the present, in all its circumstances; except that that was a warrant, on an execution; this, on mesne process. And that case is cited and approved by Mr. Justice Twisden, in 2 Saund. 414, (in the case of *Lord Arlington* against *Merrick*).

[1726] Sir Fletcher Norton and Mr. Ashurst now shewed cause why the judgment should not be arrested.

As to the objection, "that he was appointed bailiff for the hundred of East Gotson only"—this does not appear, otherwise than by the recital in the condition of the bond. Besides, the warrant was directed to him, and delivered to him: therefore he ought to have returned it.

These bailiffs are appointed bailiffs of a particular hundred, merely to prevent confusion in summoning juries, and such like purposes: but as to executing mesne process, they are not confined to the particular hundred; in that respect, they are bailiffs for the whole county. Otherwise, there must be as many warrants as there are hundreds in a county; which would be very inconvenient.

The Court cannot make such an intendment, upon these pleadings. The defendant pleads this condition of the bond, and a performance of it. The plaintiff shews a breach, in not executing a particular warrant. The defendant rejoins "that the bailiff did execute it." Issue is joined thereon: and a verdict for the plaintiff.

The case cited from Aleyn proves only, "that as the defendant was not obliged to execute the writ there in question, he could not be charged for not executing it." But here, the defendant does not pretend "that he was not obliged to execute it." If he had pleaded that, it had been another thing. Here he is estopped from saying "that he was not bound to execute it:" for, he has received it. That case was on demurrer: this, after verdict. Therefore it shall be supposed, "that every thing necessary to maintain the action was proved."

The practice is, for sheriffs to direct these warrants, generally; and not "to the bailiff of a particular hundred."

If this was a good objection, there would be an end of all sheriff's bonds.

They therefore prayed judgment upon their verdict.

Mr. Dunning and Mr. Davenport, contra, for the defendants, insisted upon the case cited from Aleyn, as being a case in point: the condition was in the very words of the present condition. There too, the bailiff had executed the writ, as well as here. And they alledged, that [1727] upon looking into the record of that case of *Stoughton v. Day*, it agreed with the present record. Moreover, that case has been recognized, in a case subsequent to it, viz. 2 Saund. 414, *Lord Arlington v. Merrick*.

They admitted, that the bailiff might execute a writ out of the hundred; but insisted that he was not bound to do it under this obligation and condition: and if he was not bound to execute, he was not bound to return it. But admitting even "that he himself having undertaken to do it, was answerable for doing it regularly;" yet the present defendants are not answerable for his doing so. For these defendants



are the sureties of the bailiff; not the bailiff himself. Therefore under this general direction of these warrants, they are not bound: for they have undertaken for no more than his behaviour within this particular hundred. The bailiff himself may perhaps be answerable for the regular executing this writ, having undertaken it: but the sureties are not; it is not within their undertaking.

As to the general principles of arresting judgments, they cited 1 Salk. 77, title "Arrest of Judgment." 1 Bulstr. 173. Hob. 301, and Carthew, 148.

As to the verdict curing the defect—the plaintiff not having alledged, it was not necessary for the plaintiff to prove, either "that the writ was directed to him as bailiff of the hundred of East Gotson;" or, "that it was to be executed within that hundred."

Lord Mansfield—The condition of this bond appearing upon oyer, the plea alleges a performance of it, by the bailiff's having duly executed, and made due and sufficient returns to all warrants directed to him. The plaintiff replies, and specifies a particular warrant which he did not duly return. The defendant does not demur; but takes issue upon the fact. It does not appear that this warrant was directed to him as bailiff of the hundred. Therefore it is said "that he was not obliged to execute it:" and a case is cited out of Aleyn, as in point.

But the case out of Aleyn \*<sup>1</sup> was upon a demurrer.

If it stood upon the construction of the bond, I should have desired to consider of it: but this being in arrest of judgment after a verdict, and not on demurrer; it does [1728] not appear, that it was not directed to him as bailiff of the hundred.

Mr. Justice Wilmot—If it had stood upon a demurrer, I should have thought the case in Aleyn to have been in point.

If it had stood upon the whole, and upon the construction of the bond, I should rather think (with Mr. Attorney) "that, in general, he had an authority, as to executing process, all over the county:" but I give no opinion, as to this.

But, upon this record, we can not take the warrant to be directed to him otherwise than as bailiff of the hundred. And by joining issue on the fact of returning it, he admits "that it was not directed to him generally." And since he has admitted the execution of it, we can not intend that it was not directed to him as bailiff of the hundred, in order to arrest a judgment.

Mr. Justice Yates—The case in Aleyn was determined on a demurrer; (a general demurrer indeed: but it was before the Statute of Queen Anne \*<sup>2</sup>). Therefore that case does not affect this.

A verdict will aid a title defectively set forth; though not a total defect of title.

But here, it was sufficient for the plaintiff to pursue the words of the condition of the bond: and it lay upon the defendant to shew "that this was not such a warrant as was within the condition." Whereas he admits, that the bailiff returned this warrant: which is an admission of its being a proper one. And the Court will not intend it to be otherwise, in order to overturn a verdict.

I am therefore clear, that the plaintiff is intitled to his verdict. The defendant has not chosen to take the opportunity of shewing what he might have done, if true.

Therefore there is no ground for arresting the judgment.

Mr. Justice Aston concurred; and joined likewise in observing that the defendant might have taken the proper method of stating the particular fact to his advantage, [1729] by a rejoinder, if his case would have borne it; whereas he has declined that, and taken issue upon the fact generally assigned.

Per Cur.—Postea to be delivered to the plaintiff, in both causes.

#### REX versus INHABITANTS OF WHITE CHURCH CANONICORUM. 1765.

See this case at large in the quarto-edition of my Settlement-Cases, No. 173, pa. 540.

\*<sup>1</sup> N.B. This case of *Stoughton v. Day*, is also reported in Style, 18. And (though very erroneously there reported) it appears both from Style, and from Aleyn, that it was upon a demurrer.

\*<sup>2</sup> V. 4, 5 Ann. c. 16, s. 1: concerning special demurrers.

**BISSEX versus BISSEX.** Friday, 21st June, 1765. Award alleged to be made after making arbitration bond, and before the exhibiting plaintiff's bill is sufficiently positive.

This was an action of debt on a bond dated 28th March 1764, conditioned to perform an award to be made and delivered on or before the 21st May then next following. The defendant pleaded, "that the arbitrators did not make any award on or before 21st May." To this, the plaintiff replied, "that the arbitrators in the said condition mentioned, after the making of the said writing obligatory, and before the exhibiting of the bill of the plaintiff, to wit, on the 21st day of May in the said condition mentioned, did make their award; and thereby ordered Edward Bissex, the defendant, to pay 56l. due to the plaintiff, on divers accounts, from John Bissex deceased, the defendant's father." The defendant demurred specially to this replication; and for cause shewed, 1st. That it does not shew that the said award was made and ready to be delivered to the parties on or before the 21st day of May; but the pretended time of making the said award is included under a videlicet, and not made or attempted to be made part of the issue in this cause. 2dly. That it was made concerning transactions supposed to have passed between the plaintiff, and John Bissex deceased; without shewing that such transactions were never submitted to arbitration by the bond. 3dly. That the replication was a mere negative pregnant, neither confessing or avoiding, traversing or denying the matter alledged by the plea.

The plaintiff joined in demurrer.

[1730] Mr. Gould for the defendant, argued that it does not appear that this award was made within the limited time. For the time of making it is not positively, directly and precisely alledged; but only comes under a videlicet: it is not alledged with sufficient certainty, for the defendant to have taken issue upon.

He cited the case of *Skinner v. Andrews* in 1 Siderf. 370; (a) and 2 Keb. 361, 368; and *The Bishop of Lincoln v. Wolforston*, Trin. 4 Geo. 3, B. R.† to prove, that it was bad upon the special demurrer.

Mr. Wallace, for the plaintiff, likewise cited the same case of *Skinner v. Andrews*, from 1 Saund. 169: and said it was precisely the same case as the present.

The ‡ other reporters of *Skinner v. Andrews* all agree, "that it was positively enough alledged."

And the record shews that the award was dated on that day.

Mr. Justice Wilmot\*—The award was in fact made on the 21st day of May. The defendant says "no award was made." To this, the plaintiff replies, "that an award was made, after the making of the bond, and before the exhibiting of his bill, to wit, on the 21st day of May."

It seems to me to be a positive averment. I would have adhered to a case directly in point, even against my own common sense. But this case of *Skinner v. Andrews* is not so. It was upon a general demurrer. Saunders was the most accurate reporter of his time: and he says, "it was holden to be positively enough alledged." If any thing was thrown out by any of the Judges, not founded on any argument, it was extrajudicial, and not to the point before them.

Mr. Justice Yates concurred—Saunders was much the most accurate of the reporters of his time: and he reports, "that all the Court were of opinion that the scilicet was

(a) The report of the case in 1 Sid. 370 is expressly so; and there is nothing to the contrary in any of the other reporters, i.e. not in 2 Keb. 361, 388, or 1 Lev. 245. And it is so far from being true, as here reported to have been said by Wilmot J. "that they all agree that it was positively enough alledged," for Saunders is the only one who reports it so. In 2 Kebl. 361 the cause was adjudged without any thing having been said by any of the Judges, except Keeling, who said it was not sufficient pleading; and in 2 Kebl. 388, *Twisden v. Windham*, seem to found their opinion on the case being on a general demurrer, as it was in effect; because though special, yet the objection insisted on was not shewed for cause, as appears by the pleadings, 1 Saund. 157; and the reasons of Mr. Justice Wilmot as here stated, are agreeable to the report of *Skinner v. Andrews*.

† V. ante, p. 1508 and 1509.

‡ V. 2 Keble, 361, 388, and 1 Levinz, 245.

\* Lord Mansfield was gone.

sufficient." The time of making the award is material: and therefore this allegation of it shall be taken affirmatively. And the date of the award appears to be so. The defendant might have taken issue upon it.

Mr. Justice Aston was of the same opinion.

Per Cur. unanimously,  
Judgment for the plaintiff.

[1731] FONTAINIER *versus* HEYL. Saturday, 22d June, 1765. Privilege from a foreign minister not allowed, unless the defendant swear to the nature of his employment, and to the actual performance of it.

Mr. Jones shewed cause against the rule which had been obtained by Mr. Attorney General, for the plaintiff to shew cause why an execution should not be set aside, and restoration, &c. made to the defendant, upon the foot of his being under a regular protection as the domestic servant of a foreign minister; viz. valet de chambre to Count Haslang.

Mr. Jones's cause was (and it was well supported by affidavits, as well as by writing under the defendant's own hand,) that he was a trader, and called himself merchant; and that the being valet de chambre to Count Haslang was mere sham and pretence. (And so it most plainly appeared to be.)

The Court saw it in the same light: and they held it necessary that the defendant himself ought, in these cases, to shew the nature of the service, and swear to the actual performance of it.

Rule discharged, as to the plaintiff; but made absolute as to the bailiffs, (who had not exculpated themselves from the charge of misbehaviour in executing this *feri facias*).

REX *versus* INHABITANTS OF ST. LUKE'S, IN MIDDLESEX. Wednes. 26th June, 1765.  
[S. C. 1 Bl. 553.]

See this case at large, in my Settlement-Cases in quarto, No. 174, pa. 542.

REX *versus* BLAKE AND FIFTEEN OTHERS. 1765. Indictment for a forcible entry, not shewing any actual force, quashed upon motion. V. ante, S. P. in p. 1698. *Rex v. Storr*; and p. 1706, *Rex v. Atkins*; and also *Rex v. Gillet*, p. 1707. [See also 8 Durn. 538.]

Mr. Dunning shewed cause why an indictment should not be quashed.

He called it an indictment for a forcible entry; and argued "that an indictment for a forcible entry may be maintained at common law." He cited a case in Trin. 1753, 26, 27 G. 2, B. R. *Rex v. Brown and Others*; and *Rex v. Bathurst*, Tr. 1755, 28 G. 2, S. P.\*

[1732] But, N.B. This indictment at present in question was only for (*vi et armis*) breaking and entering a close (not a dwelling-house;) and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession.

Mr. Popham, on behalf of the defendants, objected "that this was an indictment for a mere trespass, for a civil injury; not a public, but a private one; a mere entry into his close, and keeping him out of it. The force and arms" is applied only to the entry; not to the expelling or keeping out of possession: they are only charged to be unlawfully and unjustly. This is no other force than the law implies. No actual breach of the peace is stated; or any riot; or unlawful assembly. And he cited the cases of *Rex v. Gask*; and *Rex v. Hide*; and *Rex v. Hide and Another*: (which, together with a note upon them, may be seen in the text and margin of page 1768).

*Rex v. Bathurst* is the only case where the objection has not been holden fatal: and that was, because it was a forcible entry into a dwelling-house.

*Rex v. Jopson et Al.* Tr. 24, 25 G. 2, B. R. was an unlawful assembly of a great number of people. (V. ante, pa. 1702, vol. 3, in the margin.)

Mr. Justice Wilmot—No doubt, an indictment will lie at common law, for a

\* V. ante, p. 1699, in margin.



forcible entry ; though they are generally brought on the Acts of Parliament. On the Acts of Parliament, it is necessary to state the nature of the estate ; because there must be restitution : but they may be brought at common law.

Here the words "force and arms" are not applied to the whole : but if they were applied to the whole, yet it ought to be such an actual force as implies a breach of the peace, and makes an indictable offence. And this I take to be the rule, "that it ought to appear upon the face of the indictment to be an indictable offence."

Here indeed are sixteen defendants. But the number of the defendants makes no difference, in itself : no riot, or unlawful assembly, or any thing of that kind is charged. It ought to amount to an actual breach of the peace [1733] indictable, in order to support an indictment. For, otherwise, it is only a matter of civil complaint. And this ought to appear upon the face of the indictment.

Mr. Justice Yates concurred. Here is no force or violence shewn upon the face of the indictment, to make it appear to be an actual force indictable : nor is any riot charged ; or any unlawful assembly. Therefore the mere number makes no difference.

Mr. Justice Aston concurred, the true rule is, "that it ought to appear upon the face of the indictment to be an indictable offence.

Per Cur. unanimously,

Rule made absolute, to quash this indictment,

So that this point seems now to be fully settled.

The end of Trinity term 1765, 5 G. 3.

Between the end of this term and the beginning of the next, viz. on Sunday, the 8th of September 1765, died Sir Thomas Denison, late second Judge of this Court.

#### [1734] MICHAELMAS TERM, 6 GEO. III. B. R. 1765.

RICORD *versus* BETTENHAM. Friday, 8th Nov. 1765. [S. C. 1 Bl. 563.] Action maintainable by an alien enemy on a ransom bill. [See *contra*, 1 Doug. 30, and another like judgment given in B. R. was reversed in Cam. Scacc. and the law is now so settled by stat. 22 G. 3, c. 25.]

This was an action brought by the captain of a French privateer against the captain of an English ship called the "Syren," for the ransom of the "Syren," which had been taken by the French privateer.

It was tried before Lord Mansfield, at Guildhall, at the sittings after Easter term 1765.

There was a special case stated, for the opinion of this Court, viz.

That it was an action brought by the plaintiff against the defendant on a ransom-bill : wherein the plaintiff declares, that whereas at the time of the capture after-mentioned, to wit, on the 24th day of August 1762, and before, there was an open war between the Lord George the Third, then and still King of Great Britain, and the French King ; and that during the time of such open war, to wit, on the same day and year aforesaid, the said John Ricord, then being a subject of the French King and commander of a certain privateer called the "Badine" then cruizing upon the high seas to take the ships and effects of the subjects of the lord the present King of Great Britain, did, upon the high seas, in an hostile manner, attack, conquer and take a certain ship or vessel called the "Syren," of great value, to wit, of the value of one thousand pounds, then the property of one William Templer, a subject of the lord the present King of Great Britain, whereof the said John Bettenham was then master and commander, and then proceeding upon a certain voyage ; and whereas afterwards, to wit, on the same day and year aforesaid, at London aforesaid, to wit, in the parish of St. Mary le Bow, in the ward of Cheap, in [1735] consideration that the said John Ricord would, at the special instance and request of the said John Bettenham, ransom and set at liberty him the said John Bettenham and his said ship or vessel, and grant him one month's time from that day to repair to his destined port, he the said John Bettenham undertook, and to the said John Ricord then and there faithfully promised, that he and his owners would pay to the said John Ricord, for the said ransom, the sum of 300 pistoles of foreign money, within two months then next ensuing ; and that he the said John Bettenham would give for hostage

Joseph Bell who was mate of the said ship or vessel, and would maintain the said Joseph Bell till the day of payment of the said ransom. And the said John Ricord in fact saith, that confiding in the promise and undertaking of the said John Bettenham, he the said John Ricord afterwards, to wit, on the same day and year aforesaid, at the request of the said John Bettenham did ransom and set at liberty him the said John Bettenham and his said ship or vessel; and did grant one month's time from that day, to repair to his destined port. And although he did give for hostage the said Joseph Bell (with his own consent) to the said John Ricord; who afterwards and after the expiration of the said time for the payment of the ransom-money, to wit, on the 9th day of November, in the year aforesaid, died, whereof the said John Bettenham afterwards, to wit, on the same day and year last aforesaid, had notice, that is to say, at London aforesaid, in the parish and ward aforesaid; yet the said John Bettenham, not regarding his promise and undertaking so made as aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said John Ricord in this behalf, hath not performed his said promise and undertaking, in this, that the said John Bettenham and his owners did not nor did either of them, within the said two months or at any other time, pay the said 300 pistoles or any part thereof, or the value thereof in lawful money of Great Britain or otherwise, to the said John Ricord; although the said John Bettenham afterwards, to wit, on the same day and year last aforesaid, at London aforesaid in the parish and ward aforesaid, was by the said John Ricord requested so to do: but to perform his said promise and undertaking in this behalf, he the said John Bettenham hath altogether refused, and still doth refuse; and the said ransom-money still remains wholly due and unpaid, contrary to the form and effect of the said promise and undertaking of the said John Bettenham. And whereas during such open war as aforesaid, to wit, on the 24th day of August in the said year of our Lord 1762, the said John Ricord, then being a subject of the French King and commander of a certain other ship or vessel cruising on the high seas to take the ships and effects of subjects of the lord the present King of Great Britain, did, upon the [1736] high seas, in an hostile manner, attack, conquer and take a certain other ship or vessel whereof the said John Bettenham, a subject of our lord the present King of Great Britain was then commander, of great value, to wit, of the value of 1000l. proceeding upon a certain voyage; and whereas afterwards, to wit, on the same day and year aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, in consideration that he the said John Ricord had, at the special instance and request of the said John Bettenham, set at liberty the said John Bettenham and his said last mentioned ship, for a certain ransom, to wit, 300 pistoles, being foreign money, and had granted him one month from that day to repair to his destined port, he the said John Bettenham undertook, and then and there faithfully promised the said John Ricord to pay him the said last mentioned 300 pistoles within a certain time long since past, to wit, within two months then next ensuing; yet the said John Bettenham, not regarding his said last mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said John Ricord in this behalf, hath not paid the said last mentioned 300 pistoles or any part thereof, or the value thereof, to the said John Ricord; although so to do, the said John Bettenham was frequently requested, to wit, at London aforesaid, in the parish and ward aforesaid, by the said John Ricord: but to pay the same or any part thereof to the said John Ricord, the said John Bettenham hath hitherto altogether refused, and still doth refuse. To which declaration the defendant pleaded the general issue, "that he did not undertake and promise, &c.:" and thereupon, issue was joined. The cause came on to be heard before Lord Mansfield, at Guildhall, London, the sitting after Easter term 1765: when it was agreed, that a verdict should be given for the plaintiff; damages 236l. and costs 40s. subject to the opinion of this Court upon the following facts admitted by the counsel on both sides; viz.

That the capture of the "Syren," by the "Badine" privateer commanded by the plaintiff, was four leagues off Cape Negrillo, at sea, the 24th of August 1762.

That the plaintiff then was a natural-born subject of the French King; from whom the "Badine" had a commission; and the defendant a natural-born subject of Great Britain: and that the "Syren" was the property of the defendant's owners, being British subjects.

That at the capture, a ransom-bill was given, at sea, the said 24th of August 1762,



signed by the plaintiff, the defendant, and Joseph Bell the defendant's mate (who [1737] was given as a hostage to the plaintiff:) which ransom-bill was in the words following, viz. "I the under-written John Ricord, captain of the privateer called the 'Badine' of Port au Prince, belonging to Mr. Antony Burgaret, have agreed with Mr. John Bettenham, captain of the English vessel, and taken under the said colours, of the port of Piscatua on the coast of New England, belonging to Mr. William Temple, at present bound from Jamaica to take in her loading at Lucca Martha Brae in the said island, and was taken four leagues to the northward of Point Negrillo; viz. that I the said John Ricord acknowledge to have ransomed the aforesaid captain and his said vessel called the 'Syren,' for the price and sum of 300 pistoles; and have granted to the said captain to repair to his destined port, and to begin from the day of the date of these presents. And I the said John Bettenham oblige myself and owners to pay, within two months from the date hereof, the said aforementioned sum, and give for hostage my mate called Joseph Bell, whom I also oblige myself to maintain till the day of payment of the said ransom. In testimony whereof we have signed together; that this may be authentic, as if executed before a notary public: on board the 'Badine,' this 24th of August 1762. John Ricord. John Bettenham. Joseph Bell."

That the value of the ransom-bill, being 300 pistoles, amounted to 236l. sterling: and that the ship "Syren" was of a greater value.

That the said Joseph Bell died in prison, at Port au Prince, on 12th October 1762.

That the "Syren," after her having been so ransomed, arrived at her destined port of Lucca Martha Brae.

That at the time of the capture, and till the 3d day of November 1762, there was an actual war between Great Britain and France.

Question—Whether, upon these facts, the plaintiff is intitled to recover in this action.

The material substance of this case is the taking of this ship by the French, in a time of open war; that the English captain was a natural-born subject of Great Britain; and the French captain, a natural born subject of France: that the ship was taken in August 1762, and ransomed, and a ransom-bill given for 300 pistoles (which are equivalent to 236l.) and that his mate, Joseph Bell who died in prison, was given as an hostage.

[1738] Mr. Chambers argued on behalf of the plaintiff, upon Friday the 21st of June last; and Mr. Dunning for the defendant.

Mr. Chambers begun with clearing the case of objections. It may be objected, he said (1st.) That this action is brought coram non judice; (2dly.) That the plaintiff is an alien; and (3dly.) That the death of the hostage puts an end to the contract.

As to the first point, he said that the want of jurisdiction ought to have been pleaded in abatement, and before imparlance: and he cited 22 H. 6, 7, pl. 9. Bro. Abr. title Jurisdiction, pl. 88, and title Privilege, 15, and Continuance, 70. Hardr. 365, *Clapham v. Sir John Lenthall*; 1 Lutw. 46, *Wentworth v. Squib*; Carthew, 11, *Jennings v. Hankyn*; Carthew, 354, *Davis v. Stringer*; and 4 Inst. 213, 214, between *Sir John Egerton and William Earl of Derby*.

But after issue is joined, no exception to the jurisdiction can be allowed.

However, the jurisdiction of the Court of Admiralty is not exclusive of the jurisdiction of this Court. They have concurrent jurisdiction, 4 Inst. 134.

Second point. This objection comes likewise too late now. They should have pleaded it in abatement. But an alien friend, or even an alien enemy, under some circumstances, may maintain a personal action. 1 Salk. 46, *Wells v. Williams*. Moore, 431, *Watford v. Masham*.

This is not an illegal contract with an enemy; but a transaction arising from an act of hostility. A captive may redeem his life by a ransom: and money actually paid down, or a promise of money to be paid in future, are equally allowable. It mollifies the vigour of conquest. It is a case of necessity. The victor might, otherwise, even kill his captive.

Third point. The contract did not become extinct by the death of the hostage. The giving of a hostage is a collateral contract. A hostage is not an equivalent, but a collateral security. It is only strengthening the obligation, by giving a pledge. But giving a pledge does not discharge the debt. *Yelv.* 178, *Sir Jo. Ratcliffe v. Davis*.



2 Strange, 919, *The South-Sea Company v. Duncombe*. 2 Salk. 522. Digest, lib. 20, title 5, lex 9.

These objections being removed, no difficulty remains.

[1739] Mr. Dunning, contra, for the defendant, said, that this is an action of the first impression: no such action has ever been brought, though the case must be frequent; nor does a reciprocal action lie in other nations.

He proposed to consider the case under four heads; viz.

1st. As on a written instrument, without hostage;

2dly. As on a written instrument, with hostage; (which he looked upon to be a material part of the engagement).

3dly. Though the action might be maintainable in the Admiralty-Court; yet it is not maintainable here.

4thly. The ransom-bill was obtained under duress.

(But he almost gave up to the two last objections.)

First point. No such contract as this is, can, of itself, support an action. It is void, from the condition of the contracting parties.

The plaintiff is under an incapacity of either contracting, or suing: not indeed as an alien generally, but as an alien enemy. If he sued merely as an alien, it should have been taken in time and pleaded in abatement. But this plaintiff was an alien enemy. Therefore no suit could have been maintained between the parties, at the time of making the contract; nor could any suit have been maintained between the parties, at the time of the breach of the contract; and a personal action once suspended is gone for ever. Here is a fundamental radical defect. No action could accrue upon a contract made with an alien enemy, in time of actual open war.

Being an alien enemy is pleadable in bar, and concludes to the action. Co. Lit. 129 b. is express in point. Comberb. 212, 394.

19 E. 4, 6, pl. 4, and pl. 6, prove that "an alien enemy cannot maintain an action." Bro. Abr. title Denizen and Alien, pl. 20. In Carter, 49, 50, and 191, *Richfield et Uxor v. Udall*—"an alien, executor, may maintain an action; because, he sues in tauer droit." But in Cro. Eliz. 142, pl. 7, it was holden a good plea to an action [1740] of debt brought by an executor, "that the plaintiff was an alien nee at gaunt under the obedience of Philip King of Spain, enemy to the Queen."

But it is said "that this, being for a ransom, turns upon the necessity of the case: for, otherwise, the vanquished might be killed by the victor."

Answer—Allowing the contract to be prudent, and even lawful, yet it ought to be secured by an hostage. This is the obvious method of securing it: and this contract is so secured.

Second point—This contract being so secured by a hostage, the ransom-bill is not an independent substantial agreement; but relative to the hostage. The hostage himself is not bound to pay the ransom; although he has signed the paper. It is the captain only, who obliges himself and his owners. This obligation, if not obtained by what is strictly called duress, was at least not voluntarily entered into. If the captain could thus bind himself, his ship and owners, what need could there be of an hostage? The hostage therefore is a security, and the principal, if not the only security.

He said, it astonished him, that all foreign writers (except Grotius and Puffendorf) are silent upon this subject: and they do not say much about it.

But Molloy, lib. 1, cap. 8, § \*7, says, that "if hostages are taken, he that gives them is freed from his faith: for that in receiving hostages, he that receives them hath relinquished from the assurance which he had in the faith of him that gave them."

An action upon a ransom-bill was never attempted, even in the Court of Admiralty: nor will it lie in France.

But he admitted, that actions had been brought in the Admiralty, by the hostage against the owners who refused to ransom him; and he thought that such an action would lie even in this Court. But that will not be material in the present case.

Mr. Chambers, in reply, cited some other authorities: particularly, *Les Usages et Coutumes de la Mer*: Guidon, *Rachats et Compositions*; Grotius, lib. 3, c. 20, § 58, and c. 23, § 16. Zouch de Jure et Judicio Feciali, part 2, c. 54. *Ordonnances de Louis 14, Touchant la Marine*: which proved, he said, that this was a contract allow-

\* He cited it as section 7, but it is the sixth section.

able by the law of nations. And if the contract is allowed by the law of nations, the action must lie in them all.

[1741] He made some observations in answer to Mr. Dunning.

In this declaration, it only appears that the capture was during the war; it does not appear that the contract was so.

A right may commence, before the right of suing accrues. But supposing he could not have brought his action during the war; yet he may in time of peace. A right may revive.

An alien enemy may sue as executor; or for an account.

In a case in Chancery, Lord Hardwicke over-ruled a plea of "alien enemy," pleaded by Serjeant Kettleby, to a bill brought for an account.

A contract made during a war may be effectuated during a peace.

It is for general convenience, that an alien enemy may be an executor. And 19 E. 4, 6, and Brooke title Denizen and Alien, pl. 20, are not law.

The hostage is not the principal security; but collateral, and not the subject matter of the contract: for which he cited Zouch, Grotius, and other authorities. But if the hostage were the principal security, yet his death does not discharge the debt.

Molloy, lib. 1, c. 8, relates to public hostages, upon leagues and treaties. Besides, other opinions are against him.

Uterius concilium.

Mr. Blackstone who was to have argued for the defendant, upon a second argument now said, he had made inquiries abroad, and had answers from very eminent lawyers of France and Holland, "that such an action had been allowed, and upon principles that could not be disputed." Therefore he did not choose to argue it. For, the only objection which seemed to weigh upon the former argument, was, "that such an action would not lie in the other countries of Europe."

Lord Mansfield said, the Court were all of the same opinion.

[1742] N.B. There were a few other actions of the same kind depending: but upon this judgment, (which gave universal satisfaction) the ransoms were paid.

Per Cur.—unanimously,

Let there be judgment for the plaintiff.

See Puffendorf, lib. 8, c. 7, § 14, and Grotius, lib. 3, c. 23, de fide privatâ in bello.

MONEY ET AL'. *versus* LEACH. 1765. [S. C. 1 Bl. 555.] General warrants illegal.

Roll 60.

[See *Hoye v. Bush*, 1840, 2 Scott, N. R. 94; 1 Man. & G. 788; *Dillon v. O'Brien*, 1887, 20 L. R. Ir. 320.]

Errors having been assigned upon the \* bill of exceptions mentioned in page 1622, they now came on to be argued.

This was an action of † trespass brought in the Court of Common Pleas by Dryden Leach, against three King's messengers, John Money, James Watson, and Robert Blackmore, for breaking and entering the plaintiff's house, and imprisoning him, without any lawful or probable cause; to the plaintiff's damage of 2000l.

The defendants below, pleaded two pleas. The first was the general issue, "not guilty:" on which issue was joined.

The other plea (pleaded by leave of the Court) was a special justification, as to the breaking and entering of the plaintiff's dwelling-house, and staying and continuing therein for six hours, and making the assault upon him, and seizing, taking, and imprisoning him, and keeping and detaining him in prison for four days; as to all which, they say, that before the committing of the supposed trespass, viz. on 19th April 1763, the King made a speech from the throne, &c. in which speech was contained the following declaration, &c. &c. That on the 23d April 1763, a certain seditious and scandalous libel or composition, intitled *The North Briton*, No. 45, was unlawfully and seditiously composed, printed, and published concerning the King

\* V. ante, p. 1692.

† See the 549th and 559th rolls of C. B. of Mich. term, 4 G. 3, and below, p. 1746, at large.



and his said speech : in which libel were contained, &c. &c. &c. That the Earl of Halifax was then one of the Privy Council, and one of His Majesty's principal Secretaries of State ; and that information was given to him of the said publication of the aforesaid libel ; and the said libel was then shewn and produced to the said earl ; and he thereupon in due manner [1743] issued his warrant in writing under his hand and seal, directed to Nathan Carrington, and these three defendants who were then four of His Majesty's messengers in ordinary ; by which warrant, the said earl did in His Majesty's name authorise and require them, taking a constable to their assistance, to make strict and diligent search for the said authors, printers, and publishers of the aforesaid seditious libel intituled *The North Briton*, No. 45, April 23d, 1763 ; and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before the said earl, to be examined concerning the premises, and to be further dealt with according to law : in the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all others His said Majesty's messengers, officers civil and military, and loving subjects whom it might concern, were to be aiding and assisting to them the said Nathan Carrington, John Money, James Watson, and Robert Blackmore, as there should be occasion. They further say, that for 44 weeks and upwards before the issuing of the said warrant, certain weekly compositions intituled *The North Briton*, and respectively numbered, in a progressive order, had been printed and published on Saturday in every week : and that the said seditious libel intituled *The North Briton*, No. 45, Saturday April 23d, 1763, was one of the said weekly compositions. They say that the plaintiff followed and exercised the art and business of a printer ; and did in fact print and cause to be printed one of the said weekly compositions intituled *The North Briton* ; to wit, *The North Briton*, No. 26, and that after the issuing of the aforesaid warrant and before the committing of the said supposed trespass, to wit, on 27th April 1763, information was given to them the defendants, "that the said Dryden Leach and his servants were the printers of the aforesaid seditious libel intituled *The North Briton*, No. 45, Saturday, April 23d, 1763." Whereupon the defendants, being His Majesty's messengers in ordinary as aforesaid, took to their assistance a certain constable, to wit, one Thomas Freeman, who was then a constable of the parish of St. Margaret, Westminster, in the county of Middlesex, to aid them in the execution of the aforesaid warrant ; and, together with the said constable entered into the aforesaid dwelling-house of the said Dryden Leach, in which the said Dryden Leach carried on his aforesaid business of a printer, the door thereof being then open, to search for the printers of the said seditious libel, in order to carry them before the said Earl of Halifax, to be examined concerning the same ; and thereupon, the said defendants, together with the constable aforesaid, did then and there find, within the [1744] same house, a newly printed copy of one of the said weekly compositions intituled *The North Briton*, and also an unfinished copy of part of another of the said compositions then also newly printed, and which said newly printed copies were part of a new edition, which the said Dryden Leach and his servants were then and there reprinting, of the aforesaid weekly compositions. Whereupon, the defendants, together with the constable above-named, did gently lay their hands on the said Dryden Leach, and seized and took him into their custody, in order to bring him before the said Earl of Halifax, to be examined concerning the said seditious libel, and in so searching for the printers of the seditious libel, and seizing and taking the said Dryden as aforesaid, did then and there necessarily stay and continue in the said house of the said Dryden for the space of six hours, part of the time in the declaration mentioned. And because the said Earl of Halifax was, during all the said space of four days, part of the aforesaid five days in the said declaration mentioned, employed in other business belonging to his said office of Secretary of State, so that the said Dryden Leach could not then or during the said four days be brought before the said earl for the purpose aforesaid, they the said defendants, together with the constable aforesaid, did keep and detain the said Dryden Leach in their custody for the said space of four days, part of the said time in the declaration mentioned, in order to carry him before the said Earl of Halifax, for the purpose aforesaid. They further say, that at the end of the aforesaid four days, and not before, upon the examination of the said Dryden Leach and certain other persons who were then and there examined concerning the premises, it appeared to the said Earl of Halifax, "that the said Dryden Leach did not print the said seditious libel intituled *The North Briton*, No. 45, Saturday, April the 23d, 1763 : " and



thereupon, the said defendants, by the command of the said Earl of Halifax, did then and there release the said Dryden Leach out of their custody, and discharged and set him free from that imprisonment. Which are the same breaking and entering of the aforesaid dwelling-house of the said Dryden Leach, in the declaration mentioned, in which, &c. and staying and continuing therein for the space of six hours, part of the time in the same declaration mentioned; and also as to the making of the aforesaid assault upon the said Dryden Leach and seizing, taking and imprisoning of the said Dryden Leach, and detaining him in prison for the space of four days, part of the said time in the said declaration mentioned, above supposed to have been done by the defendants, whereof the said Dryden hath above complained against them. And this they are ready to verify. Wherefore they pray judgment, if the said Dryden ought to have or maintain his aforesaid action thereof against them, &c.

[1745] The plaintiff replied, as to the said plea in bar as to the breaking and entering the dwelling-house, and staying and continuing there six hours (part of the time in the declaration mentioned,) and also as to the making of the assault upon him, and seizing, taking and imprisoning of him, and keeping and detaining him in prison for four days (part of the time in the declaration mentioned;) that the defendants, of their own wrong and without the cause by them in their plea alledged, broke and entered his dwelling-house, and staid and continued therein for six hours and made an assault upon him, and seized, took and imprisoned him, and kept and detained him in prison for the four days in plea mentioned (part of the time in the declaration mentioned,) in manner and form as he has above complained against them. And upon this issue was joined.

The cause came on to be tried before Ld. Ch. Just. Pratt, on the 10th of December 1763, at Guildhall: and the jury found a verdict for the plaintiff upon both issues; and gave him damages 400l. besides his costs and charges, &c. On 16th June 1764, judgment was signed for the plaintiff, for 400l. damages, and 51l. 16s. 8d. costs.

At the trial, a bill of exceptions was tendered and received; which stated the issues, the coming on to trial, &c. and the evidence, and described a printed paper intituled *The North Briton*, No. 45, and the information given thereof to the Secretary of State, and his warrant to the defendants below, together with another King's messenger, Nathan Carrington; and what Mr. Carrington had been told of Mr. Leach's being the printer of it; and their thereupon entering his house, and finding some of the other numbers of the same paper newly printed by him; and their thereupon taking him into custody, in order to carry him before the Earl of Halifax, one of His Majesty's principal Secretaries of State; and that he, appearing not to be either author, printer or publisher of the said paper called *The North Briton*, No. 45, was discharged by them, by the earl's order, without being ever carried before him. They say, that their evidence intituled them to the benefit of the statute of 24 G. 2, c. 44. Though it was denied by the counsel for the plaintiff Leach, that either they or the Secretary of State himself were within that statute, or those of 7 Jac. 1, c. 5, or 21 Jac. 1, c. 12 (the former of which, being only temporary, was made perpetual by the latter, and by which liberty is given to justices of peace and all others acting under their command "to plead the general issue, and give the special matter in evidence").

[1746] That the Chief Justice of the Common Pleas was of "opinion that their evidence was not sufficient to bar the plaintiff of his action:" whereas, the bill of exceptions insists "that it was."

This bill of exceptions being sealed, and the seal acknowledged as is beforementioned, the defendants below assign errors: and a joinder in error was put in by the plaintiff Leach.

The assignment of errors was to the following effect: (it may be seen at large, in the 60th roll of Easter term 5 G. 3, B. R.

The defendants come, on Wednesday next after fifteen days of Easter 4 G. 3, before our lord the King at Westminster, and say, that at the trial, their counsel proposed exceptions to the opinion of the Lord Chief Justice Pratt; which exceptions were written in a bill, and sealed by the Chief Justice; which bill of exceptions the defendants now bring into this Court, and pray a writ to the Chief Justice, to confess or deny his seal; which writ is granted to them returnable on the morrow of the Ascension. At which day, before our lord the King at Westminster come the defendants in their proper person, and the said Chief Justice of the Common Pleas

likewise in his proper person, and acknowledges his seal put to the said bill of exceptions. (The form and ceremony of his doing this may be seen in page 1692.) Then they set out the bill of exceptions, verbatim, "Be it remembered, &c." It recites all the proceedings particularly and minutely, from the very beginning to the end, concluding with the verdict of the jury: which it would be tedious to repeat, as they have been already sufficiently specified. They are entered upon the rolls 549 and 550 of the Court of Common Pleas, (in Michaelmas term 4 G. 3). The defendants (now become plaintiffs in error) then alledge, (in their said bill of exceptions) that upon the trial, the counsel for the plaintiff Leach, in order to prove the defendants guilty of the trespass, gave in evidence "that on 29th April 1763, the defendants entered the plaintiff's dwelling-house, searched it, and continued in it four hours; seized and took Leach into their custody against his will and consent; and kept and detained him in their custody against his will and consent for four days:" which was all the trespass, assault and imprisonment committed by the defendants or any of them. Whereupon their counsel, in order to bar the said action, and to acquit them thereof under the general issue above pleaded, gave in evidence and proved "that before the committing of the trespass, the King made a speech from the throne, &c. containing the [1747] several expressions stated in the second plea of the defendants: and that afterwards and before the supposed trespass, a paper intitled *The North Briton*, No. 45, &c. was printed and published; and that the same contained the several matters set forth in their said second plea:" and it was proved on their behalf, "that the Earl of Halifax was, all that time, one of His Majesty's principal Secretaries of State, and one of the Privy Council; and that information was given to him of the said publication of the abovementioned paper; and the same was then shewn to him; and that thereupon the said earl issued his warrant in writing under his hand and seal directed to Nathan Carrington and the defendants, who were then four of His Majesty's messengers in ordinary." And their counsel then produced and gave in evidence the warrant aforesaid, which was in the words and figures following, that is to say, "George Montagu Dunk, Earl of Halifax, Viscount Sunbury and Baron Halifax, one of the Lords of His Majesty's Most Honourable Privy Council, Lieutenant-General of His Majesty's Forces, and principal Secretary of State, &c.—These are in His Majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper intitled *The North Briton*, No. 45, Saturday April 23, 1763, printed, for G. Kearsley in Ludgate Street London; and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premises and further dealt with according to law. In the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all other His Majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you, as there shall be occasion. And for your so doing, this shall be your warrant. Given at St. James's the 26th day of April 1763, in the third year of His Majesty's reign. Dunk Halifax. To Nathan Carrington, John Money, James Watson, and Robert Blackmore, four of His Majesty's messengers in ordinary." And it was further proved on behalf of the said defendants, "that several of the like warrants had been granted, at different times, from the time of the Revolution to the present time, by the principal Secretaries of State, and had been executed by the messengers in ordinary, for the time being; and that the paper in the said warrant described was the said paper so printed and published as aforesaid; and that the warrant aforesaid, before the committing of the supposed trespass, to wit, on the 26th day of April aforesaid in the year of our Lord 1763, was delivered to the defendants, to be executed;" and "that they [1748] were then three of His Majesty's messengers in ordinary and still are so." It was also proved, on their behalf, "that for forty weeks and upwards next before the issuing of the aforesaid warrant, certain weekly compositions intitled *The North Briton* had been printed and published on Saturday in every week; and that the aforesaid paper intitled *The North Briton*, No. 45, Saturday, April 23, 1763, described in the said warrant, being one of the said weekly compositions, was printed and published before the issuing of the said warrant, to wit, on the 23d day of April 1763; and that after the issuing of the above-mentioned warrant, and before the committing of the said supposed trespass, to wit, on the 28th day of April in the year aforesaid, the defendants were informed by Nathan Carrington, one other of the



messengers in the said warrant named and one of the persons to whom the said warrant was directed, that from the information he had received he was of opinion that the said Dryden Leach who then and long before was and still is a printer in the City of London aforesaid, was the printer of the said weekly compositions intituled *The North Briton*; for that he the said Carrington had been informed that one Mr. Wilkes, a person supposed to be the author of the said weekly compositions, had been seen frequently to go into the said Mr. Leach's house, and that an old printer, whose name he the said Carrington did not mention to the defendants, had told him that the said Mr. Leach was the printer of the said compositions; and that thereupon the defendants took to their assistance a constable, and with the constable entered Leach's dwelling-house (the door being open) to search for the said Leach and his books and papers, and to bring him together with his books and papers in safe custody before the said Earl of Halifax, to be examined concerning the premises and to be further dealt with according to law; and upon that occasion did search the said house, and necessarily continued therein for the said space of four hours." And it was further given in evidence and proved on the part of the said defendants, "that upon that search, the defendants did find Leach in the said house, and did also then find a newly-printed sheet containing a copy of one of the said weekly compositions, intituled *The North Briton*, No. 1, and part of a copy of another of the said weekly compositions, intituled *The North Briton*, No. 2: which sheet was printed by the said Dryden Leach." And it was further proved, "that the said Dryden Leach did also print one of the said weekly compositions, intituled *The North Briton*, No. 26. And the defendants, with the assistance of the constable did seize and take into their custody the said Dryden Leach, in order to [1749] bring him in safe custody before the said Earl of Halifax, to be examined concerning the premises; and on that occasion did keep and detain him in their custody for the space of four days; at the end of which time, it appearing by the examination of divers persons then taken, touching the author, printer and publisher of the said paper, that the said Dryden Leach was not the author, printer or publisher thereof, the defendants, by the command of the said Earl of Halifax, released and discharged him from that imprisonment: but the said Dryden Leach was never carried before or examined by the said Earl of Halifax. And that the entering the house of the said Dryden Leach, and searching the same, and taking into and detaining in their custody him the said Dryden Leach in the manner and on the occasion herein before stated, were the whole of the trespass, assault and imprisonment committed by the said defendants or any of them." But it was proved on the part of the said Dryden Leach, "that he was not the author, printer or publisher of the said paper intituled *The North Briton* No. 45, in the said warrant mentioned, nor of any other numbers of the said weekly compositions, except as before stated." Whereupon the counsel for the defendants insisted before the said Chief Justice, that the said several matters so produced and given in evidence on their part as aforesaid were sufficient and ought to be admitted and allowed as decisive evidence to intitle them to the benefit of the Statute of 24 G. 2, intituled "An Act for Rendering Justices of the Peace more Safe in the Execution of their Office, and for Indemnifying Constables and Others Acting in Obedience to their Warrants;" and that therefore the said Dryden Leach ought to be barred of his aforesaid action, and the said defendants acquitted thereof. And thereupon the said defendants, by their counsel aforesaid, did then and there pray of the said Chief Justice to admit and allow the said matters and proof so produced and given in evidence for the said defendants as aforesaid, to be conclusive evidence to intitle the said defendants to the benefit of the statute aforesaid, and to bar the said Dryden Leach of his action aforesaid. But to this, the counsel for the plaintiff then and there insisted before the Chief Justice, that the matters and evidence aforesaid so produced and proved on the part of the defendants as aforesaid, were not sufficient, nor ought to be admitted or allowed to intitle the said defendants to the benefit of the statute aforesaid, or to bar the said Dryden Leach of his aforesaid action; and that neither the said defendants or any of them, nor the said Earl of Halifax, were or was within the words or meaning of the statute made in the seventh year of His late Majesty King James the First, intituled "An Act for Ease in Pleading against Troublesome and Contentious Suits Prosecuted against [1750] Justices of the Peace, Mayors, Constables, and Certain Other His Majesty's Officers, for the Lawful Execution of their Office;" nor of the statute made in the twenty-first year of the reign of the same late King, intituled "An Act to Enlarge and



Make Perpetual the Act made for Ease in Pleading against Troublesome and Contentious Suits, Prosecuted against Justices of the Peace, Mayors, Constables, and Certain Other His Majesty's Officers, for the Lawful Execution of their Office, made in the 7th Year of His Majesty's Most Happy Reign ;" nor of the said statute made in the twenty-fourth year of the reign of His late Majesty King George the Second ; nor in any wise intitled to the benefit of any of those statutes. And the counsel for the said Dryden Leach further insisted, that the seizure and imprisonment of the said Dryden Leach were not made and done in obedience to the said warrant, nor had the said defendants or any of them, in that behalf, any authority thereby. And the said Chief Justice did then and there declare and deliver his opinion to the jury aforesaid, " that the said several matters so produced and proved on the part of the defendants were not, upon the whole case, sufficient to bar the said Dryden Leach of his aforesaid action against them ;" and, with that opinion, left the same to the said jury. Whereupon the said counsel for the said defendants did then and there, on behalf of the said defendants, except to the aforesaid opinion of the said Chief Justice : and insisted on the said several matters and proofs as an absolute bar to the aforesaid action, by virtue of the last mentioned statute. And inasmuch as the said several matters so produced and given in evidence on the part of the said defendants, and by their counsel aforesaid objected and insisted on as a bar to the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the aforesaid defendants did then and there propose their aforesaid exception to the opinion of the said Chief Justice, and requested the said Chief Justice to put his seal to this bill of exception containing the said several matters so produced and given in evidence on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided : and thereupon the aforesaid Chief Justice, at the request of the said counsel for the abovenamed defendants, did put his seal to this bill of exception, pursuant to the aforesaid statute in such case made, and provided, on the 10th day of December aforesaid, in the said fourth year of the reign of His said present Majesty.

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And hereupon the said John Money, James Watson, and Robert Blackmore say, that in the record and pro-[1751]-ceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict upon the said issue between the parties aforesaid first above joined, and also in giving the judgment aforesaid, there is manifest error, in this, that the Chief Justice before whom, &c. at and upon the trial of the said issue between the parties aforesaid first above joined, did declare and deliver his opinion to the jury aforesaid, " that the said several matters mentioned in the said bill of exceptions, and so as aforesaid produced and proved on the part of the said John Money, James Watson, and Robert Blackmore, were not, upon the whole of the case, sufficient to bar the said Dryden Leach of his action aforesaid against them : " and, with that opinion, left the same to the jury. There is also error in this, that by the record aforesaid it appears that the verdict aforesaid was given upon the said issue first above joined, for the said Dryden Leach, against them the said John Money, James Watson, and Robert Blackmore : whereas, by the law of the land, the verdict on that issue ought to have been given for the said John Money, James Watson, and Robert Blackmore, against the said Dryden Leach. There is also error in this, that it appears by the record aforesaid, that judgment in form aforesaid was given for the said Dryden Leach, against them the said John Money, James Watson and Robert Blackmore : whereas, by the law of the land, the judgment aforesaid ought to have been given for them the said John Money, James Watson, and Robert Blackmore, against the said Dryden Leach. And the said John Money, James Watson, and Robert Blackmore pray that the judgment aforesaid, for the errors aforesaid, and others in the record and proceedings aforesaid, may be reversed, annulled and altogether had for nothing ; and that they may be restored to all which they have lost by occasion of the judgment aforesaid, &c.

And hereupon, the said Dryden Leach, in his proper person, voluntarily comes here into Court, and prays leave to rejoin to the errors aforesaid, before our lord the King, until on the morrow of the Holy Trinity, wheresoever, &c. : and he bath it, &c. The same day is given to the said J. M. J. W. and R. B. at which day come the parties aforesaid in their proper persons : and the said Dryden Leach says " that there is not, either in the record and proceedings aforesaid, or in the matters recited and contained

in the said bill of exceptions, or in giving the verdict aforesaid or in the judgment aforesaid, any error : ” and prays that the Court here may proceed to the examination as well of the record and proceedings, as of the matters aforesaid above assigned for error ; and that the judgment aforesaid may be affirmed in all things.

[1752] This case was first argued on Tuesday 18th of June last, by Mr. Solicitor General de Grey for the plaintiffs in error ; and by Mr. Dunning, for the defendant in error.

Mr. de Grey divided his argument into three points—

1st. The defendants had a right to plead the general issue, and to give the special matter in evidence, under 7 Jac. 1, c. 5 : or, in other words, Lord Halifax, the Secretary of State, was a justice of peace, within the intention of that Act.

2dly. The evidence was sufficient to intitle the defendants to a verdict. Which will take in both the validity of the warrant itself, and the manner of executing it.

3dly. They were also intitled to a verdict within the meaning of 24 G. 2, c. 44, the plaintiff not having observed the terms required by it.

First point—Before the statute of 7 Jac. c. 5, a matter of special justification could not be given in evidence by a justice of peace, upon the general issue pleaded by him.

The question is—who were meant, in that Act of Parliament, by justices of the peace.

Some persons were, from ancient times, so, by office ; some are so by special commission ; some, by corporation-charters ; some, by tenure : some, by prescription.

In the time of Edward the Third, other persons were authorized to act within particular districts.

But the great officers of the State had the jurisdiction, as incident to their offices. So had, in some degree, coroners and other inferior officers.

The Secretaries of State must have had it as incident to an office so ancient as to be coeval with the Crown itself.

A statute in Edward the First's reign says,\*1 “ Desouth le Petit Seale, ne issera desormes nul briefe que touch le common ley.” And Lord Coke, in his comment upon it, in his 2 Inst. 556, calls it the signettum, the King's signet, [1753] which at the making of that statute the King had : and says—“ This seale is ever in the custody of the principal secretary : and there be four clerks of the signet attending on him.”

This seal is as ancient as the Crown ; and the officer that keeps it, as ancient as the seal itself : and he is an officer well known, and recognized by many Acts of Parliament ; and the King's warrants are countersigned by him.

In cases of treason, and of felony, the Courts of Law recognize his authority : and these is equal reason for it, in cases of misdemeanour ; which equally affect Government, and disturb the public peace.

A seditious libel is an offence against Government and the public peace ; and effectually undermines Government.

A Secretary of State is a centinel for the public peace : it is his duty to prevent the violation of it, and to bring the offenders to justice ; and it is necessary that he should be invested with this power, in order to enable him to execute this his duty.

The case of *Rex v. Kendal and Roe*, 1 Salk. 347,\*2 has settled this point, as to treason : for, it was there holden “ that Secretaries of State might commit for suspicion of treason, as conservators of the peace did at Common Law ; and that it was incident to the office, as it is to the office of justices of peace, who do it *ratione officij*.” And the commitment to a messenger was there holden good.

In the case of *The Queen v. Derby*, B. R. 1709, 10 Ann.† for publishing a scandalous and seditious libel called *The Observer*—the two points above mentioned were admitted by Mr. Lechmere, who was counsel for the defendant. He agreed to the power of a Secretary of State to commit for treason or felony ; and that the messenger was a proper officer. And in that case, the Court held the warrant good and legal.

In the case of *Rex v. Earbury*, M. 7 G. 2, 1733, who was arrested and committed by warrant from a Secretary of State ; and his papers seized, which he applied to have restored : Lord Hardwicke held that they could not be restored, in a summary

\*1 V. Artic. Super Chartas, 28 E. 1, c. 6.

\*2 V. 5 Mod. 78, S. C. and State Trials, vol. 4, p. 854, and Comberb. 343. Holt, 144. Skinner, 596, and 12 Mod. 82.

† Fortescue's Rep. 140.



way, on motion. The warrant there was "to search for the papers and to bring the author before the Secretary of State."

The Statute of 1 E. 3 enacts, "for the better keeping, and maintenance of the peace, good men and lawful shall in every county be assigned to keep the peace." So, 4 E. 3, c. 2.

[1754] The 18 E. 3, stat. 2, c. 2, is the first statute that gives the judicature of hearing and determining. 34 E. 3, c. 5, enlarges their powers. The 2 Ed. 5, c. 4,† calls them by the express name of "justices of peace." Their commission impowers them to keep the peace; and also contains a distinct clause "to hear and determine."

Therefore, the old conservators of the peace still remain: they have also power to hear and determine as justices, they are wardens of the peace too, by their commission, as well as by common law: and they may likewise by the common law, without any special commission or warrant, use force to suppress rebels. For which last assertion, he cited Kelyng, 76.

The statute of 7 Jac. 1, c. 5, (about pleading the general issue,) means to protect all that Act as conservators or wardens or justices of the peace, as well as those that act under special commissions.

The Act of 2 Ph. & M. c. 18, (relating to corporation-justices) calls them "commissioners for the conservation of the peace." Justice of peace is not a strict technical name: they may be called custodes pacis. In 2 Rol. Abr. 95, title, Justices de Peace, it is said, "that an indictment taken before them, naming them custodes pacis, and not justices of the peace (as the statute names them) is a good indictment: for, it is all one." It is not material how the appointment is made. The statutes mean to include all conservators of the peace: they may all now plead the general issue, and give the special matter in evidence. The Act of 7 J. 1, c. 5, does not indeed extend to any justices sitting in sessions: it only extends to them in their single jurisdiction.

The statute of 11 H. 6, c. 6, "that suits and processes before justices of the peace shall not be discontinued by new commissioners," is no exception to this rule: neither is 2 H. 5, stat. 1, c. 4, § 2, "that justices of the peace of the quorum shall be resiant in their shire; (except lords named in the commission, &c., &c.)."

Acts of Parliament shall be taken with latitude, and extended to cases within the same reason and calling for the same remedy. Plowd. 366, *Ld. Zouch's case*. Co. Litt. 24 b. 10 Co. 101 b. *Beaufage's case*. Plowd. 147, *Iston v. Studd*. Plowd. 36, *Platt v. The Sheriffs of London*. Bro. Parliament, 20. Wentworth's Office of Executors, 67. Sir T. Jones, 62, *Plummer v. Whichcot*.

[1755] The rule about "several particulars of an inferior nature being enumerated, excluding those that are of a higher nature and not enumerated," will not hold here. This act is not done as a higher officer; but only as a justice of peace. The Bishop of Norwich being named extended to all bishops: so the warden of the Fleet being named, extends to all gaolers. In Moore, 845, *Phelps v. Winchcombe*, it was resolved "that a deputy constable may by the equity of the statute of 7 J. 1, c. 5, plead the general issue."

Persons acting for preservation of the public peace ought to be protected: and these old conservators of it are more reasonably intitled to protection, than other persons are.

Second point—If the special matter may be given in evidence, then the question will be "whether this matter given in evidence would, if it had been pleaded, amount to a justification."

It is objected, "that the warrant is not legal; and that it was ill executed."

1st. As to the warrant itself—No such action has ever been brought upon these warrants, by persons apprehended by virtue of them: or, at least, there is none upon record.

It is said, "that this warrant is too extensive in the description of the person: and that it has been abused."

Answer—The power is not illegal: and the abuse of it is no objection to the warrant itself. Such warrants are agreeable to long practice and usage.

Whatever the present determination may be, in point of law, it will be in the breast of the Legislature to set it right.

In the *Bewdley case*, reported 1 Peere Williams, 207, (*Regina v. Ballivos, &c.*) of

† V. stat. 1, c. 4, s. 2, and stat. 2, c. 1.



*Bewdley*) a construction of an Act of Parliament contrary to the words of it was allowed, founded upon only seven years practice. In *Comberb. 342, The India Company v. Skinner*—where the warrant was granted before any default; Holt said, “that the practice having been, in case of taxes, to grant a conditional warrant to distrain, communis error facit jus.”

The power of justices of peace “to commit before indictment,” stands supported only by practice and usage. [1756] In 6 Mod. 178, *Regina v. Tracy*, Holt Ch.J. says, formerly, none “could be taken up for a misdemeanor, till indictment found: but now the practice all over England is otherwise.” And per Hale, “that practice is become a law.” So likewise has usage and practice established *ac-ecians*, *quo minus*, new trials, &c.

The greatest Judges have bailed persons taken up upon these warrants; and they have not been objected to, by either Courts, or counsel of the greatest eminence: whereas, if they were not legal, the persons apprehended upon them ought to have been discharged. For which he cited, 1 Hale’s Hist. P. C. 578. The Court will not make orders upon illegal warrants: consequently, they saw no objection to them. Even the greatest friends to the Revolution have not objected to these warrants. From whence, it must be inferred, that no objection lies against them.

On 6 July 1641, in the case of *Sir John Elliot, &c.* the House of Commons resolved, that it was a breach of privilege: but they did not vote it illegal.

Lord Hardwicke, in *Earbury’s case*, only said “he would not then determine it.”

In treason, it will scarce be objected to; nor in felony.

In *Miss Blandy’s case*, her bureau was broken open; and her papers seized; and given in evidence.

Indecent prints or books may be seized by a magistrate: and they often have been so.

Evidence taken from felons or other criminals may be produced against them; though a criminal shall not be compelled to produce such evidence against himself.

It is said “that this warrant is illegal, because it is general to take up the author, printer, or publisher.” But it is legal to issue and execute a warrant against a person unknown, but only described. Indeed the magistrate issues it, and the officer must execute it, at their peril. And though the warrant includes seizing the papers, yet that part of it has not been executed: and the bare insertion of it shall not affect the officer who executed the other part of the warrant.

The facts are these—A warrant was directed to four messengers: Carrington, one of them, is informed “that [1757] Leach was the printer: and that the reputed author was frequently at Leach’s house.” The other three act on this information. And this information was not groundless: for, they found a sheet of another number, wet and just printed. They take him up, and carry him to Lord Halifax’s office; who was not then at leisure to examine him: but when he did examine him (four days after,) he discharged him. Here was probable cause for taking him up.

A justice of peace having jurisdiction, may grant a proper warrant on probable cause: and ministerial officers (constables, &c.) are not to be affected by the illegality of the warrant, in other parts of it. This warrant was executed honestly, and upon a probable cause.

Third point—The plaintiff’s action is sufficiently barred by 24 G. 2, c. 44, for want of observing the terms required by it. They neither proved notice, as the third section requires; nor made the demand required by the sixth section.

The defendants have acted in obedience to the warrant of a magistrate who is a justice of peace within the meaning of this Act; and by his order, and in his aid.

The only doubt is, “whether the action is brought for any thing done in obedience to the warrant; or not.”

The defendants have obeyed it to the best of their power.

However, as they have acted under colour of the warrant, meaning to obey it, they are not answerable, although they may have erred in the execution of it. They are protected by this Act, if they have acted *bonâ fide*; even though the warrants and the execution be illegal. They are not to judge of arduous points of law: the statute means to protect them from it.

2dly. The previous step to bringing this action was not taken; viz. the demanding a perusal and copy of the warrant, and shewing a refusal of it.

If there was a fault, or negligence, or mistake in this proceeding, the fault was in

the magistrate: there was none in the officer who executed it. And the requisite steps have not been taken, in order to maintain the suits.

Therefore the plaintiff is barred of this action.

[1758] Mr. Dunning, contra—For Mr. Leach, the plaintiff below.

The first question is “whether this be a case within 24 G. 2, c. 44:” which question will involve the question “whether it be within the Acts of 7 J. 1, c. 5, or 21 J. 1, c. 12.”

All these statutes, being in *pari materia*, must receive the same construction: and they are all unapplicable to the present case.

He then made three sub-divisions of his first question: viz.

1st. Whether Lord Halifax, being Secretary of State, is a conservator or justice of peace within the true intent and meaning of the Act of 24 G. 2, c. 44.

2dly. Whether the defendants are constables, head-boroughs, or officers, &c. within the intent and meaning of that Act.

3dly. Whether this action be brought and properly pursued within the true intent and meaning of it; and for a matter done in obedience to the warrant.

First point—Lord Halifax is not a justice of peace within 24 G. 2. He is not so by commission: he is not so, as incident to his offices, either of Secretary of State, or of Privy Counsellor.

But it has been said “he is a conservator of the peace; and therefore within the meaning of the Act.”

I deny the principle, and also the conclusion. I admit the case of *Rex v. Kendal and Roe*; though the reasons of it do not appear; but I submit to the authority of it, that “a Secretary of State has a power to commit for high treason.”

Serjeant Hawkins’s reasons do not support his assertion: and I deny that a Secretary of State is a conservator of the peace. He has only a power of committing for high treason, as conservators of the peace had in other cases: and *Kendal and Roe’s case* carries it no further. The Court never meant to resolve any thing further.

All the Crown-writers are silent on this subject of a Secretary of State’s having this jurisdiction. None of them [1759] even hint that a Secretary of State is a conservator of the peace. Staundford, Fitz-Herbert, Lambard, &c. say no such thing.

\* Lambard gives the list of those officers who are conservators of the peace: but there is no mention therein, of Secretaries of State. Serjeant† Hawkins copies the same list, without adding Secretaries of State.

There is no proof or pretence that the conservatorship of the peace is incident to their office: nor is there any usage, to support such a notion. Their claim of a power to grant such warrants as the present one is not pretended to be older than the Revolution.

If they were justices of the peace or conservators of the peace, they would be bound to execute the powers given to justices, or residing in constables; and they would be subject to the control of this Court.

The offices are different in creation, constitution, and execution.

The very language of the warrant shews that the Secretary of State did not consider himself as a justice, conservator, or constable.

This statute is not to be extended beyond the letter of it: it is not within the maxims or reasons of extensions of Acts of Parliament.

It is necessary to consider the former statutes of 7 J. 1, c. 5, and 21 J. 1, c. 12: (both of which he rehearsed and observed upon).

In these, there is no mention of Secretaries of State: nor is there any reason to add others not there enumerated; the rather, as the enumeration begins with persons inferior to Secretaries of State. Neither is there any ground to imagine that the Legislature intended to include Secretaries of State within their provision: the preamble shews rather the contrary. The line drawn between those enumerated and those omitted, shews the same thing. The persons intended to be protected, are persons bound to act, and acting for the public good, without reward; not great officers with great salaries, who are not lawyers and are not bound to act.

[1760] The persons introduced by the second Act (churchwardens, sworn-men, overseers, &c.) are persons within the mischief of the former: yet even they were

\* V. lib. 1, c. 3.

† Lib. 2, c. 8, s. 2.

not virtually included in the former, and are therefore particularly named in the latter.

This latter explanatory Act omits, nevertheless, to name Secretaries of State. But constables are within the letter: and it extends to no others. And he referred to 4 Inst. 174, and the two marginal notes there; one on 7 J. c. 5, and the other, on 21 J. c. 12.

From all which premises he argued that these Acts of Jac. 1 are not to be extended beyond the letter: and if they were, yet there is no reason to extend them to Secretaries of State, as not being within the same inconvenience.

No more reason is there to extend that of 24 G. 2, c. 44. If the Legislature had so intended, they would not have confined it to justices of the peace, a species of magistrates well known and understood in our law.

So much for the noble lord.

As to the messengers—They do not fall within the words or meaning of the Act of 7 J. 1, c. 5, which is confined to officers, who are persons known in our law, and bound to execute the warrant of a justice of peace; an office of burthen, not of profit; and incapable to distinguish the precise limits of a jurisdiction.

This is in no respect the case of the King's messengers in ordinary; who are persons unknown in our law, and mere volunteers in executing warrants of justices.

The words, "other officers, &c." mean borsholders, &c. officers of the same sort as constables and tythingmen: not King's messengers: these persons can not be considered as aiding and assisting the constables. The warrant and the fact are quite the reverse: the constables are directed to assist them. They do not act under the command of a justice of peace, or in his assistance.

This warrant is not under the hand and seal of a justice of peace. Therefore the Act does not protect the defendants.

[1761] Nor is the act done in obedience to this warrant. The warrant was "to apprehend the author, printer, or publisher:" but they have executed it upon a person who was not the author, printer, or publisher. Consequently, as they have not acted under it, they can not be protected by it.

It is said, "that a description is equivalent to naming the persons; and that here is a sufficient description."

But the description of an offence is no description of the person offending: and this is only a description of the offence.

The obedience to the warrant is the condition of the protection which the Act gives to the officer. Therefore, the condition failing, the protection does not take place.

Here is no probable cause, nor any reason for justifying the officer under a probable cause. It is not like the cases of apprehending traitors or felons. Here is only information from one of their own body, "that the author of the paper had been seen going into Leach's house, and that Leach was the printer of the composition in general;" not of this particular paper.

But though neither this hearsay-information was in itself true; nor would the consequence follow, if it had been true; yet they thereupon arrest and imprison an innocent man. Therefore these men themselves are to answer for doing this: not the person who issued the warrant. The warrant did not command nor authorize them to do what they have done. It is necessary for them to shew an acting in obedience to the warrant: otherwise they are not within the protection of the Act. In proof of which, he cited two cases; one, by the name of \* *Lawson v. Clark*; and the other, a Norwich-case, where a bailiff had executed the warrant out of the proper jurisdiction. (V. post, 1816.)

Upon these authorities, upon the reason of the thing, and upon the words of the Act, the officer is not intitled to the protection of the Act; nor needs the justice be made a party, but where the officer acts in obedience to the warrant: acting under colour of it only, is not sufficient.

Besides, the party apprehended was not carried before Lord Halifax, or dealt with according to law. Surely, this was the act of the officer; not of the person who [1762] signed the warrant. And no reason is given, stated, pretended, or even existed,

\* Or *Dawson*, qu. [3 Wils. 317.]



why this matter was so transacted. Therefore there was no probable cause or reason whereupon to ground a justification of this their conduct.

So that even allowing the Secretary of State to be a justice of peace, and the officers to be constables; yet the action lies against the plaintiffs in error, who have acted in this unjustifiable manner.

It appears therefore, that even if they had had a defence upon the merits, they have not properly pleaded it. However, in fact they had no defence upon the merits: the plaintiff Leach was neither author, printer, nor publisher of the paper; nor at all within the description of the warrant.

But the warrant itself is illegal. It is against the author, printer, and publisher of the paper, generally, without naming or describing them; and not founded on any charge upon oath: it is also, "to seize his papers;" that is, all his papers.

No justice of peace has power to issue such a warrant. Therefore Lord Halifax could not do it as a justice of peace. Nor is there any pretence of usage to support such a claim of doing it as Secretary of State, further back than the Revolution.

It lies upon them, to prove their claim, and to shew their authority.

The practice of a particular magistrate cannot controul the law. Communis error is not, in this case, sufficient to make law. It is the duty, and it is therefore, doubtless, the inclination of the Court, to stop the mischief, as soon as it is complained of to them.

If "author, printer, and publisher," without naming any particular person, be sufficient in such a warrant as this is, it would be equally so, to issue a warrant generally, "to take up the robber or murderer of such a one." This is no description of the person; but only of the offence: it is making the officer to be judge of the matter, in the place of the person who issues the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

To ransack private studies in order to search for evidence, and even without a previous charge on oath, is contrary to natural justice, as well as to the liberty of the subject: and it is as useless as it is cruel, in the case of libels; [1763] because it is the publication only that makes the crime of a libel.

To search a man's private papers *ad libitum*, and even without accusation, is an infringement of the natural rights of mankind. And this is a warrant "to seize all a man's papers," without any particular relation even to the crime they would suppose him chargeable with.

No case of this sort has ever undergone judicial discussion and determination. And as the Court does not interpose in cases not objected to, no arguments can be drawn from such as passed sub silentio, or were never objected to.

All the writers upon the Crown-law say, "that there must be an accusation; that the person to be apprehended must be named; and that the officer is not to be left to arrest who he thinks fit." For which, he vouched Hale's Hist. P. C. 1st part, page 580 and 586, and Hawkins's P. C. book 2, c. 13, § 10, pages 81 and 82.

Here, it is left to the officer, to take up any person whom he himself suspects.

Lord Ch. J. Scroggs was impeached for issuing such warrants as this is.

Therefore he prayed judgment for the defendant in error.

Mr. Solicitor General de Grey, in reply, on behalf of the plaintiffs in error.

A Secretary of State is an officer by prescription; and his office must be as ancient as the office of the person to whom he is secretary: for, he is and always has been an officer necessary to the Crown; and the constitution always required the support of this office. And as his power to commit for treason depends upon prescriptive right and the nature of his office; so likewise it does in all cases of preserving the public peace.

In the case of *Kendal and Roe*, the power, in treason, was acknowledged. In *Darby's case*, it was recognized, in felony. In *Earbury's case*, (where the warrant was general, as this is,) he was continued on his recognizance. A Secretary of State has these powers, upon the foundation of prescription; not on our law-books: and he has, [1764] equally, the power in him: whether he does or does not exert it in low and common instances. I suppose he is as compellable to act, as a conservator of the peace formerly was, before the Acts of Parliament which give power to justices of peace.

Charter-justices can scarce be called commission-justices: and yet these statutes extend to them.

A "justice of the peace," means a conservator, a warden of the peace. Therefore there was no need to name Secretaries of State, in the Acts of Parliament: they were included, without naming them particularly.

The marginal note in Lord Coke is no authority. However these officers are named in the text, "and certain others His Majesty's officers."

This action is brought for what was done in obedience to the warrant; which the officer was obliged to execute, in the best manner he could.

If there is any fault, it is in the magistrate: he should have described the offender with greater certainty. If the executing officer acts to the best of his ability; he is justified, and acts in obedience to his warrant.

Here the officers did so: they were reasonably satisfied "that Leach was the printer." And on search, this probable cause was increased to a higher degree: for, they found another fresh sheet of the same work, just printed off, and wet. They detained him on occasion of his being to be carried before Lord Halifax, to be examined. The officers had nothing to do with his examination: that was the affair of Lord Halifax; and if he discharged the persons apprehended and brought before him without examination, it was the better for them.

In Vaughan 111, *Stiles v. Sir Richard Coxe and Others*—It was determined, that the defendants should have the benefit of the Act; because they acted by colour of the warrant.

As to the warrant itself—It is objected, "that there is no charge upon oath." But there was no occasion, he said, for it: and to that purpose, he cited *The Queen v. Darby* (v. *Fortescue*, 141), *Rex v. Earbury*, Mich. 7 G. 2, and 1 Hale H. P. C. 582, where it is laid down, that "it is convenient, though not always necessary to take an information upon oath of the person that desires the warrant."

It is objected "that this warrant is not authorized by any length of usage."

[1765] But the usage, as here stated, is sufficient: and it must be taken to be coeval with the office. The bill of exceptions indeed only takes it up from the Revolution; asserting that it has been so ever since that time: but the facts go up to the Restoration; and none of a different form were produced, prior to the Revolution.

As to seizing papers—It is difficult indeed to draw the exact line. But is certainly necessary, in some degree: and no instance is produced, of such warrants having ever been abused as instruments of oppression.

He concluded, upon the whole, that the plaintiff had no right to bring his action.

Lord Mansfield—I suppose, this is intended to be argued again. However, I will say something, at present, upon it.

A bill of exceptions supposes the evidence true; and questions the competency or propriety of it.

"Whether there was a probable cause or ground of suspicion," was a matter for the jury to determine: that is not now before the Court. So—"whether the defendants detained the plaintiff an unreasonable time."

But if it had been found to have been a reasonable time; yet it would be no justification to the defendants; because it is stated "that this man was neither author, printer, or publisher:" and if he was not, then they have taken up a man who was not the subject of the warrant.

The three material questions are—1st. "Whether a Secretary of State acting as a conservator of the peace by the common law, is to be construed within the Statutes of James the First, and of the late King."

The protection of the officers, if they have acted in obedience to the warrant, is consequential, in case a Secretary of State is within these statutes.

As to the arrest being made in obedience to the warrant, or only under colour of it and without authority from it—[1766] This question depends upon the construction of the warrant; whether it must not be construed to mean "such persons as are under a violent suspicion of being guilty of the charge;" (for they cannot be conclusively considered as guilty, till after trial and conviction). The warrant itself imports only suspicion; for, it says,—"To be brought before me, and examined, and dealt with according to law:" and this suspicion must eventually depend upon future trial. Therefore the warrant does not seem to me, to mean conclusive guilt; but only violent suspicion. If the person apprehended should be tried and acquitted, it would shew "that he was not guilty:" yet there might be a sufficient cause of suspicion.



Mr. Dunning says, very rightly, that "to bring a person within 24 G. 2, the act must be done in obedience to the warrant."

The last point is, "whether this general warrant be good."—

One part of it may be laid out of the case: for, as to what relates to the seizing his papers, that part of it was never executed; and therefore it is out of the case.

It is not material to determine, "whether the warrant be good or bad;" except in the event of the case being within 7 J. 1, but not within 24 G. 2.

At present—As to the validity of the warrant, upon the single objection of the uncertainty of the person, being neither named nor described—The common law, in many cases, gives authority to arrest without warrant; more especially, where taken in the very act: and there are many cases where particular Acts of Parliament have given authority to apprehend, under general warrants; as in the case of writs of assistance, or warrants to take up loose, idle and disorderly people. But here it is not contended, that the common law gave the officer authority to apprehend; nor that there is any Act of Parliament which warrants this case.

Therefore it must stand upon principles of common law.

It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.

[1767] Then as to authorities—Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary.

It is said, "that the usage has been so; and that many such have been issued, since the Revolution, down to this time."

But a usage, to grow into law, ought to be a general usage, communiter usitata et approbata; and which, after a long continuance, it would be mischievous to overturn.

This is only the usage of a particular office, and contrary to the usage of all other justices and conservators of the peace.

There is the less reason for regarding this usage; because the form of the warrant probably took its rise from a positive statute; and the former precedents were inadvertently followed, after that law was expired.

Mr. Justice Wilmot declared, that he had no doubt, nor ever had, upon these warrants: he thought them illegal and void.

Neither had the two other Judges, Mr. Justice Yates, and Mr. Justice Aston, any doubt (upon this first argument) of the illegality of them: for, no degree of antiquity can give sanction to a usage bad in itself. And they esteemed this usage to be so. They were clear and unanimous in opinion "that this warrant was illegal and bad."

Lord Mansfield—Let it stand over, for further argument.

The case standing in the paper, on Friday 8th Nov. 1765, for further argument—

Mr. Yorke, Attorney General, was now to have argued on behalf of the plaintiffs in error; and begun to enter into his argument: but when he came to mention the two cases cited by Mr. Dunning, both of which were determined before Lord Mansfield, upon 24 G. 2, c. 44, one of them at Norwich, Summer Assizes, 1761; (where damages were given;) the other\* of them, on a warrant under the Vagrant Act of 17 G. 2, (where his Lordship held "that the defendant ought to shew that the officer had acted in obedience to the warrant;" and he did so;) he seemed to intimate that this objection "of their not having done so, in the present case," was too great a [1768] difficulty for him to encounter; and therefore rested the matter where it was, without proceeding any further in his argument.

Lord Mansfield remembered both these cases; and said, he still continued of the same opinion.

Where the justice can not be liable, the officer is not within the protection of the Act. The case in Middlesex concludes exactly to the present case. For, here the warrant is to take up the author, printer, or publisher: but they took up a person who was neither author, printer, nor publisher: so, that case was a warrant "to take up a disorderly woman:" and the defendant took up a woman who was not so.

And he held the same opinion now, he said, as he did before, in the case at Norwich.

\* *Dawson or Lawson v. Clarke*. V. ante, p. 1761. [See also 2 Bosan. 160.]



This makes an end of the present case: for, this is a previous question; and the foundation of the defence fails.

The consequence is, that the judgment must be affirmed.

The other Judges assenting,

The rule of the Court was "that the judgment be affirmed."

Judgment affirmed.

BULBROOK *versus* SIR ROBERT GOODERE AND OTHERS. 1765. [S. C. 1 Bl. 569.]

Water bailiff of the river Thames cannot justify seizing nets in a private fishery.

This was a demurrer to an action of trespass for breaking and entering the plaintiff's close called the river Thames; and taking up, breaking and destroying his bucks there erected and placed for the catching of fish; and taking his fish out of the bucks, and carrying them away, and converting them to their own use.

The defendants, in their plea, alledge, that the close in question is part of the river Thames, and lies between Staines Bridge, and the head of the river; and that the conservacy of that part of the river is in the Crown. Then they alledge that the office of water-bailiff is in the gift of the Crown. Then they set forth the statute of 1 Eliz. c. 17, which prohibits the taking of fish but only with the particular nets or tramels therein specified, under forfeiture [1769] of a pecuniary sum, and of the fish so taken, and also of the unlawful engines.<sup>(a)</sup> Then they shew a grant from the Crown to two of them, of the office of water-bailiff between Staines Bridge and the head of the river. They alledge that these bucks were engines for catching of fish, other than the nets and tramels allowed by the said Act of Parliament; and were unlawful engines; and were wrongfully and unjustly erected there: and therefore they justify the taking up the bucks and throwing the fish into the river; two of them, as water-bailiff; and the other two, as their servants and by their command.<sup>(b)</sup>

The plaintiff in his replication admits the conservacy to be in the Crown: and that the office of water-bailiff is in the gift of the Crown; and admits the Act of 1 Eliz. c. 17, as stated in the plea; and admits the grant to Sir Robert Goodere and others: but protesting that the bucks which were taken away by the defendants, were not unlawful engines: for replication, he says, and insists, that all offences done and committed by unlawful fishings in the said river Thames, by the laws and statutes of this realm ought to have been and ought to be in due and legal manner presented, or information concerning such offences ought in due and legal manner to be made at a Court of Conservacy, or other Court having sufficient and competent authority in that behalf; and there ought to have been and ought to be discussed, tried and determined, according to the laws and statutes of this realm. Then he avers, that no information, presentation, conviction, or adjudication whatsoever had ever been made before the committing this trespass, at any Court of Conservacy, or other Court concerning the said offence in the plea mentioned. He concludes therefore, that the defendants committed the trespass in their own wrong; and prays judgment against them.

The defendants demur generally. To which there is a joinder in demurrer.

Mr. Walker argued for the defendants.

There is no one fact suggested, but a matter of law; nothing that we could take issue upon.

The only fact alledged in our justification, and not admitted by the replication, is denied by protestation only.

If we had rejoined, we could only deny facts suggested: we could not meddle with matter of law. Here they only suggest matter of law; viz. "that it ought to have been presented." We could not, by a rejoinder, take issue upon that matter of law.

[1770] Lord Mansfield—The point lies in a nut-shell: the only question is "whether they could seize the nets before conviction."

(a) Qu. If the defendant was not intitled to judgment by the 5th section of the stat. referred to?

(b) The defendants seem to have been justified in what they did, if they had pleaded the stat. 30 G. 2, c. 21, s. 5, (in note (d) *infra*) and had brought the case within that stat.; which, if they acted properly, they might have done. Vid. the above sect. of the Act.

Mr. Walker—We do not claim the forfeitures: we only set up this that we have pleaded, as a defence or excuse for the trespass.

We have a right, as water-bailiff, to stop and prevent an illegal nuisance contrary to the Act of Parliament; and to remove and abate this private nuisance: (though we have a right also to proceed subsequently for the penalty; which we have not yet done).

And he cited several cases, to prove that the party injured may remove a nuisance. F. N. B. 184, 185. 1 Ro. Abr. 661, title Distress. Sir William Jones, 221, *James v. Hayward*. Cro. Car. 228, *Reynell v. Champenoon*. 5 Co. 2, part 101, *Penruddock's case*. 9 Co. 57, *William Aldred's case*. 2 Salk. 458, *Rex & Regina v. Wilcor*. And 3 Bulst. 197, *Morrice v. Baker et Ux*.

Where the injury is increasing, the party injured may stop it; whether the nuisance be public or private: and in private nuisances, he may have an action also for the injury already sustained. And this reasoning is applicable to the present case.

N.B. The replication was admitted to be bad. But see the 6th, 7th, 8th, 9th, 10th and 11th sections of this Act: where power is given "to inquire concerning offences against it, by the oaths of twelve men;" and presentments and convictions are mentioned expressly.

Mr. Ashhurst was to have argued for the plaintiff: but, it was not thought necessary.

Lord Mansfield—An offence is here created by an Act of Parliament. If you take advantage of this Act, you must pursue the method prescribed by it. This is the plaintiff's own fishery: and he might have done what he would in it, before this prohibition in the Act of Parliament.<sup>(c)</sup>

Mr. Justice Wilmot concurred. This is not to be considered as a nuisance, either public or private. The violation of this public law is not within the idea of a nuisance.

Mr. Justice Yates concurred. This was the [1771] plaintiff's own fishery: and the defendants have taken up the bucks, and taken the fish. This laying the bucks was no nuisance: and no power is given by the Act, "to seize." The defendants are not to be their own judges. They ought to have followed the method prescribed by the Act. The water-bailiff had no right to take the nets of the person fishing in his own fishery.<sup>(d)</sup>

Mr. Justice Aston declared his assent, to the same effects.

Whereupon, per Cur.

Judgment for the plaintiff.

FABRILIUS *versus* COCK. Saturday, 9th Nov. 1765. If it be discovered that the witnesses were suborned, a new trial will be granted.

This was an action of trover for 6000 pagodas, of the value of eight shillings each, or 2400l. sterling; in which a verdict had been given for the plaintiff, for 2400l. at Nisi Prius in Middlesex, before Lord Mansfield.

On Friday 25th of January last, Mr. Serjeant Davy, on behalf of the defendant, moved for a new trial.

<sup>(c)</sup> This is a mistake, as appears by the stat. 13 Ric. 2, stat. 1, c. 19. However, it seems that there should have been a conviction; for in the Stat. Westminster 2, c. 47, made on the same subject (though not extending to the Thames) for the first offence inflicts a punishment of burning the nets; and Lord Coke in 2 Inst. 479, observes that it ought to be by indictment.

<sup>(d)</sup> By the stat. 30 G. 2, c. 2, s. 5, the water bailiff hath an authority "to seize unsizeable or unseasonable fish, and unlawful nets, engines, and instruments;" but then he ought by that statute to bring them before a proper magistrate, and proceed as thereby directed.

But that relates only to the water bailiff within the jurisdiction of the Lord Mayor of London, which extends no higher than to Staines: whereas the present action was for a trespass higher up, and the conservancy there was in the Crown, by whom the defendants were appointed; but how far the power of such officers extends does not appear by this case.

The plaintiff was a Dane: and the case he made at the trial, was "that he had escaped from a Danish settlement in the East Indies, with 6000 pagodas quilted about his body." (He was present in Court; walked to and fro, with great agility; and then shewed he had 6000 pieces of lead, of the size of pagodas, concealed and fastened about his body.) That he came aboard one of our East India ships; of which, the defendant was mate: and that he had deposited these pagodas with him.

Some Danish sailors, who were aboard, swore to circumstances which proved his having the pagodas and putting them into the defendant's hands. Great stress was laid upon the confusion the defendant appeared to be in, when the money was demanded of him. A witness, who called himself a Danish consul, swore to circumstances in support of the plaintiff's case.

The defendant always denied the whole story; but was not able to contradict the proof at the trial. So the jury, to the satisfaction of Lord Mansfield, found a verdict for the plaintiff for 2400l. the value of the pagodas.

[1772] The defendant moved for a new trial, upon the ground, "that the whole was a fiction, supported by perjury, which he could not be prepared to answer. That since the trial, many circumstances had been discovered, to detect the iniquity, and to shew the subornation of the witnesses."

The Court, after a very strict scrutiny, on Monday the 11th February last, granted a new trial on payment of costs.

The justice and propriety of this determination, appeared in a very strong light to many persons: who thought the whole story to be manifestly a scheme of villainy, supported by perjury. And the plaintiff never dared to try it again.

And now (this 9th of November 1765) on Mr. Davenport's motion, the plaintiff not having proceeded, a rule was made for

Judgment as in case of a nonsuit.

LEITH *versus* MAC FERLEN. Saturday, 16th Nov. 1765. Rule to assign errors.  
[See 2 Durn. 18.]

It was agreed by Court and counsel, that a writ of error could not be non-pros'd, without a rule "to assign errors."

JOHNSON *versus* JEBB. 1765. Plaintiff may bring error to reverse his own judgment. [See 2 Durn. 17, 18.]

Where a plaintiff brings a writ of error to reverse his own judgment, (which is nothing strange or unreasonable where it is given for a less sum than he has a right to demand,) the common method of bringing a *scire facias quare executionem non*, or a *scire facias ad audiendum errores*, would be improper. Therefore, if the plaintiff in error will not proceed, this Court may and ought to make a rule to oblige him to assign errors within a limited time.

Accordingly—The Court made a rule upon the plaintiff in error, to assign error within four days; or else that his writ of error should be non-pros'd.

N.B. This case arose upon the late practice of the Court of Common Pleas about paying money into Court; which used to differ from the practice of this Court, (who order so much as is paid in by the defendant to be [1773] struck out of the declaration: whereas, in C. B. they did not use to strike it out, but the plaintiff took judgment at all events;) which late practice, Sir Fletcher Norton said, that Court had, very recently altered, from the inconvenience they had perceived in it, particularly in the present cause,) and had made their practice conformable to the practice of this Court.

It was an action in C. B. brought upon a policy of insurance; and the defendant had paid in a sum of money into that Court.



BOND AND HIS WIFE *versus* SEAWELL AND HIS WIFE. Saturday, 16th Nov. 1765. [S. C. 1 Bl. 407, 422, 454. Bull. 264.] It may be presumed when the witnesses only saw the last sheet of the will that the whole was in the room. [See 3 Mod. 263. 2 P. Wms. 510. 3 P. Wms. 254. Comyns, 383.]

[Referred to, *Roberts v. Phillips*, 1855, 4 El. & Bl. 458. Distinguished, *In the Goods of Hammond*, 1863, 3 Sw. & Tr. 93.]

This was a case reserved at Nisi Prius at Guildhall, before Lord Mansfield : and the question was upon the due execution of the will of Sir Thomas Chitty.

This will, or paper purporting to be a will, bore date on 20th March 1762 : and the cause was tried at the sittings after Hilary term, 1765.

It was proved, "that Sir Thomas Chitty made his will, consisting of two sheets of paper, all of his own hand-writing ; and signed his name at the bottom of each page : and he also made a codicil, of his own hand-writing, upon one single sheet. He called in one Francis Harding ; shewed him both the sheets of his will, and his signature to every page thereof ; and told him that was his will. He also shewed him the codicil ; and desired him to attest both the will and codicil : which he did, in the presence of the testator and in the manner appearing upon the face of the instruments ; and then went out of the room. John Vaughan and John Leyland came in immediately afterwards. The testator shewed them the codicil and the last sheet of the will ; and sealed both, before them ; he took each of them up, and delivered them severally as his act and deed, for the purposes therein mentioned. These witnesses attested the same, in the testator's presence : but never saw the first sheet of the will ; nor was that sheet produced to them : nor was the same, or any other paper upon the table ; both the sheets of the will were found with the codicil, [1774] in the testator's bureau, after his death, all wrapped up in one piece of paper ; but the two sheets of the will were not pinned together."

On the trial, it was agreed that a verdict should be given for the plaintiff, subject to the opinion of the Court ; and in case the Court should be of opinion "that the said will was duly executed according to the Statute for the Prevention of Frauds and Perjuries," then the verdict should stand : but in case the Court should be of opinion "that the said will was not duly executed according to the said Statute for the Prevention of Frauds and Perjuries," then a verdict should be entered for the defendants.

There were three arguments upon this case : the first, on Friday 6th May 1763, by Mr. Morton for the plaintiffs, and Mr. Yates for the defendants ; the second, on Friday 10th June 1763, by Serjeant Hewitt for the plaintiffs, and Mr. Thurlow for the defendants ; the third, on Tuesday 31st January 1764, by Mr. Willes for the plaintiffs, and Mr. Norton (Attorney General) for the defendants : and it stood for the opinion of the Court.

But there being some difference upon the case as stated, it was thought proper to have it argued before all the Judges in the Exchequer-Chamber : which argument I did not hear, and therefore cannot report.

Lord Mansfield now (on this 16th November, 1765,) acquainted the Bar that there had been a conference on the preceding evening, amongst all the Judges except Mr. Baron Adams (who was out of town,) upon this case : which was an amicable suit, he said, to try the real merits of the question : and it was agreed by the parties, "that if either side desired it, the case should be turned into the form of a special verdict."

It occurred to the Judges, that the way in which the parties have put the case, does not go to the whole merits : because, if the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good will and a good attestation of the whole will : but if the first sheet was not then in the room, a doubt might arise whether it "was or was not a good attestation, as to the real estate."

However, no opinion was given or formed by the Judges, upon such doubt which might so arise, if it should appear "that in fact the first sheet was not then in the room."

[1775] His Lordship observed, that the first sheet stopped or ended in the middle of a sentence. In the last sheet, the devise of the land was contained : and charges upon his lands were also contained in it.

A will properly attested may, (he said) by reference to another instrument, establish particular clauses so ascertained by a clear reference, as strongly as if the clauses so referred to had been repeated in the will verbatim; (for which he cited the case of *Acherley and Vernon* \*). And here are references, in this will, from one part to another: in the first sheet, the testator gives the trust of lands which were to be after-mentioned. In the last sheet, he appoints persons trustees of his will, who are not his executors, and therefore must be devisees of his land: he also calls them "trustees of his will, upon the several trusts therein mentioned." (a)

But the question made at the trial, and submitted by the case, as it now stands, turns only upon the solemnity of the execution; not at all upon the intent of the testator. And we are of opinion, "that the due execution of this will cannot be come at, in the method wherein the matter is now put."

If this be considered as a special verdict, we think it is defectively found, as to the point of the legal execution of the will.

Every presumption ought to be made by a jury, in favour of such a will, when there is no doubt of the testator's intention.

It is not necessary, that the witnesses should attest in the presence of each other; or, that the testator should declare the instrument he executed "to be his will;" or, that the witnesses should attest every page, folio, or sheet; or, that they should know the contents; or, that each folio, page or sheet should be particularly shewn to them.

This has been settled.

But the fact "whether the first sheet of his will was or was not in the room, at the time of executing and attesting the latter," may be material to be known. If it was, the jury ought to find for the will, generally; and they ought to find all things favourable to the will. If it be doubtful "whether the first sheet was then in the room or not;" we all think the circumstances sufficient to presume "that it was in the room;" and "that the jury ought to be so directed."

But, upon a special verdict, nothing can be presumed.

[1776] Therefore we are all of opinion, that it ought to be tried "over again." And if the jury shall be of opinion, that it "was then in the room," they ought to find for the will, generally: and they ought to presume, from the circumstances proved, "that the will was in the room."

A new trial was ordered.

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\* M. 10 G. 1. Vide Comyns Rep. 381.

(a) N.B. Where a will is revoked it is no will; and therefore the same ceremonies are necessary to revive it as are necessary to make a new will: now to make a new will of real estate, it is necessary, by the Statute of Frauds, not only that it should be signed by the testator in the presence of three witnesses, but also that the three witnesses should subscribe their names as witnesses thereto, in the presence of the testator: consequently, when a will of real estate is revoked, it is necessary that a codicil which revives it, must not only be attested by three witnesses who saw the testator sign the codicil, but also that the testator should see or might see the witnesses to the codicil subscribe their names as witnesses thereto; now when the codicil is, at the time of the execution of the codicil, indorsed on or annexed to the will, if the testator see the witnesses attest the execution of the codicil, they must necessarily see the will, and therefore their attestation of the codicil goes to the attestation of the will, the codicil and the will being but one will; and consequently, the testator's seeing the witnesses to the codicil attest the execution, does in effect see them execute the whole will, as much as if the will and codicil had been all upon one paper; but if the codicil be neither annexed to nor indorsed on the will, the witnesses to the codicil, can be witnesses only to the execution of that, and not of that and the will, unless the will be shewed to them at the time they execute the codicil. N.B. This seems to account for the reason why many cases make the indorsement of the codicil on the will, or the annexation to the will as a material circumstance, as well as the number of witnesses to the codicil, in all questions about republication of wills of real estate by codicil.

LAVIE AND ANOTHER, Assignees of Jane Cox, a Bankrupt, *versus* PHILLIPS AND OTHERS, Assignees of John Cox, a Bankrupt. Tuesday, 19th Nov. 1765. [S. C. 1 Black. 570.] A wife sole trader in London is liable to a commission of bankruptcy.

This was a case reserved upon a trial at Nisi Prius, before Lord Mansfield at Guildhall, at the sittings after Trinity term, 1765, in an action of trover, brought by the assignees of Jane Cox, a sole trader in London, and a bankrupt; against the assignees of John Cox, her husband, who was also a bankrupt.

The action was brought in order to try whether the plaintiffs had a right, as assignees of Jane, to certain goods in the millinery trade carried on by her after her marriage: which goods had been seized by the persons acting under the commission issued against John Cox, her husband.

It was tried by a special jury: and a verdict was given for the plaintiffs; subject to the opinion of this Court, upon the following facts and custom, then and there stated and agreed: viz.

1st. The commission of bankruptcy issued against John Cox the husband, on the 13th of March, 1764: and the commission against Jane his wife, on the 26th April, 1764.

2d. The custom of London, taken and translated from Liber Albus in the town-clerk's office, is as follows—"Where a feme, covert of her husband, useth any craft in the said city on her sole account; whereof the husband meddleth nothing; such a woman shall be [1777] charged as a feme sole, concerning every thing that toucheth the craft: and if the husband and wife shall be impleaded, in such case the wife shall plead as a feme sole; and if she is condemned, she shall be committed to prison till she has made satisfaction; and the husband and his goods shall not, in such case, be charged nor impeached."

3d. This Jane Cox, the wife, was a sole trader; and carried on a separate trade within the said city, according to the custom of the said City of London.

4th. The fans, for which this action was brought, were part of the effects of her sole trade.

5th. The assignees of the husband's commission seized those fans, the day the commission issued against him.

The question was put as a single one; but it was in effect double: namely,

1st. Whether the assignees of John, the husband, had a right to take the separate effects of Jane his wife, who was a sole trader; and apply them towards satisfaction of the debts of the husband, under the commission awarded against him, in prejudice of the separate creditors of his wife.

2d. Whether a commission of bankruptcy may issue against a married woman, being a sole trader.

Mr. Eyre (Recorder of London) for the plaintiffs, insisted, 1st. That the husband's assignees had no such right: and 2dly. That a commission may issue against a feme covert, being a sole trader, in London.

First. The assignees of the husband could not seize the separate effects of the wife: for, they were no part of the husband's property.

The custom is, "that the wife is to carry on the trade upon her sole account: in which trade the husband is not to intermeddle." The words of this custom were read in 3 C. 1, *Langham v. The Wife of John Bewett*, Cro. Car. 68, Littleton's Rep. 31, and Hetley, 9, S. C. And it appeared, that by the custom, she is to have all advantages, and to be sued, as a feme sole. Also it is part of the custom, "that if the husband and wife shall be impleaded, the wife shall plead as a feme sole: and if she pleads false, she shall be committed to prison till she has made satisfaction; and the husband shall not be charged nor impeached."

[1778] The husband is joined in an action brought against her, only for conformity: but execution shall be only against the wife; though the judgment be against him. She must be supposed to have wherewithal to make satisfaction: otherwise, it would be absurd and unreasonable to commit her "till she makes satisfaction." Therefore she has clearly a capacity to have property of her own.

I have looked through all the books; but find very few authorities on this head. In the note at the end of *Langham's case* as reported in Cro. Car. 68, a case betwixt *Geppings and Harding*, in the Year Book of M. 29 H. 6, Rot. 344, is mentioned and



referred to; but the case is not to be found in the Year Books. It is said to have been trespass for goods sold by the delivery of the feme. Issue was taken "whether she was a feme sole:" and it was found "that she was not a feme sole merchant." So it is there stated.

Lord Mansfield—The custom itself is not disputed; only, the consequence or extent of it.

Mr. Recorder—In the Year Book of 21 H. 7 fo. 18, pl. 29, where the tenant had pleaded a feoffment; and the plaintiff had replied "that the feoffor was under age, and when he came of age had entered upon the defendant, and enfeoffed the plaintiff;" to which the defendant had rejoined "that there was a custom in the vill for an infant of the age of fifteen, to make a feoffment—which was objected to, as a departure—Palmes (then a <sup>\*1</sup>Judge) in order to prove it to be a departure, puts a case of a rejoinder of a custom in London—"As in this case—in a writ of trespass, I say that a woman was seised of the same goods, as of her proper goods, and gave them to me: wherefore I took them. And I give colour to the plaintiff. And the plaintiff says, that at the time of the gift, she was his wife, &c. To which, I say there is a custom in London, that women are sole merchants: wherefore, &c. This is a clear departure. So here. Wherefore, &c."

The wife has a complete property in the effects of her sole trade.

As to any objection arising from the commission against the husband, as being tantamount to the husband's intermeddling—It was not with his or her consent; and, at the utmost, can extend only to her future deal-[1779]-ing. But the case of *Cecil and Juxon v. Juxon*, in vol. 1, p. 278, of Mr. Baron Atkyns's Reports, proves that he could not intermeddle.

Lord Mansfield—That was only securing the woman's property. And a woman's separate property has been secured by a Court of Equity, in several cases: but that does not, nor did there depend upon any particular custom.

Mr. Eyre—Wherever she continues liable to her own separate debts, her property in her effects must necessarily remain in her, for the purposes of the trade: otherwise, she would be liable to perpetual imprisonment.

This invasion upon her property could not have been made in the case of the wife herself, if she had not become a bankrupt: but it is much more unreasonable, now it is the case of her separate creditors.

The second point is "whether a feme sole trader in London can become a bankrupt."

Now this is a consequence of her sole trading: it follows of course. He mentioned an instance in <sup>\*2</sup>Lord Hardwicke's time; but said that the books which would have verified it were lost, and therefore could not be searched.<sup>\*2</sup> (See it particularized by Lord Mansfield, post, pa. 1828.)

If she might become a bankrupt, then her assignees had a right to demand these goods in an action of trover, in the manner they have now done.

Mr. Dunning, on behalf of the defendants, did not dispute the custom: but (admitting it) argued to this effect.

<sup>\*1</sup> He was only a serjeant.

<sup>\*2</sup> Mr. Seare (a benchor of the Middle Temple) informs me, "that this was a commission against Mary Dennis (wife of Peter Dennis,) a linen draper and sole trader in London. It was dated the 12th March 1741: and on the 16th the commissioners (Mr. Atkyns, Mr. Seare, and Mr. Osbaldiston) declared her a bankrupt." See Mr. Baron Atkyns's Reports, vol. 1, pa. 206, case 110, *Ex parte Carrington*; on a petition to supersede a commission against Dorothy Jones, because she was a married woman: the Lord Chancellor dismissed the petition; declaring "that as she was admitted to be the daughter of a freeman of London; and appeared plainly to be a separate trader, by the custom of London: she was clearly liable to bankruptcy, notwithstanding her coverture." See also Comyn's Digest, vol. 1, pa. 521, and Blackstone's Commentaries, vol. 2, pa. 477. Both of them in point "that a feme covert merchant may be a bankrupt;" or (as Mr. Justice Blackstone more fully expresses it) that "a feme covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt." (N.B. Mr. J. Blackstone seems to found his assertion upon this very case: at least, he cites only this case in proof of it.)

The present question turns upon the import and extent of it.

[1780] It cannot be taken upon so large a ground as has been insisted on. The custom does not, in terms, express any such thing. I take the custom from *Liber Albus*. There is nothing in it that takes away from the husband any of his marital rights: nor does it give the wife any exclusive rights. It only exempts him and his effects from being liable to her debts.

The husband may put an end to his wife's sole trade, whenever he pleases: and at the end of it, the profits of it will be his property. His power over her effects, and his property in them, always remain in him; though subject to a right of action in her creditors.

It does not follow from this custom, or from any branch of it, that the effects of the wife are protected from being liable to the demands of her own husband or his creditors. He has the same property in them, as a husband has in all other cases: and he may dispose of her effects, in his lifetime, or by his will. If so, they are become legally vested in his assignees under the commission of bankruptcy issued against him: and, consequently, they were lawfully seized by his assignees.

Local customs are *stricti juris*: they are derogatory from the common law; and shall not be extended. 1 Ro. Abr. 567, letter G. 2 Leon. 109, *Sir John Savage's case*.

This custom is totally silent, as to the interest and property of the husband in the wife's goods. Therefore it shall be left to the common law.

The suing and being sued as a feme sole, is a privilege confined to residence in the city, and to the City-Courts. Here, she must sue, and be sued, with her husband. Tr. 25 Eliz. Moore, 135, *Stanton's case*. 1 Leon. 131, *Chamberlain and Thorp's case*. 1 Modern, 26, *Anonymous*. Cro. Car. 69, *Langham v. Bewett*. Comberb. 42, *Soan v. Mace*.

As to the right of the husband over the effects of his wife—If costs be adjudged upon her suing in the Spiritual Court pro reformatione morum—, the husband shall have the costs recovered by her: or he may release them.

As to the case cited in Cro. Car. 69, from the Year-Books—Delivery by an infant is an excuse, in trespass.

[1781] Every scintilla of interest in the bankrupt passes to his assignees: and here the property was vested in the husband's assignees, before the wife's assignees had any right.

As to the second question—Such a woman, married and using a sole trade, is not within the spirit of the bankrupt-laws; though within the letter. This is only the second instance of such a commission issuing. There was such a one in the year 1741: but that was not litigated; it passed sub silentio.

Upon the Statutes of Queen Elizabeth and King James, the words of them do indeed take in this case: but the provisions of them relate only to persons sui juris.

Some of them are penal, and even capital: which must relate to free agents. But a married woman is not so: she is under the coercion of her husband. He may prevent her from surrendering.

Others of these provisions relate to lands, and chattels real, and choses in action: and these were never meant to be taken from a married woman. She may have dower, or jointure: and how is she to convey her right? It was not meant to make her goods liable to such a severe execution as these Acts render the objects of them liable to. She has not such a sole property in them, as to exclude the rights of her husband.

Her creditors may take their remedy under the commission issued against her husband.

Mr. Eyre, in reply.

As to the second point—A feme covert, sole trader, is within the spirit of the Bankrupt-Acts, as well as within the letter.

As to the first point—The positions which I have laid down are consequences without which the custom itself can not exist.

The husband had no right to seize his wife's effects; she being a sole trader, in London: and the husband's assignees are assignees of his property only; not of his marital rights, whatever they may be; and of which, such a power of seizure was certainly no part.

[1782] Lord Mansfield said, he had an opinion at the trial; and having thought

of it since, he now continued in it: and he added—"I am very well satisfied in my opinion."

As to the single instance of a commission having ever before actually issued against a feme covert sole trader—it is perhaps only the first that has been found: it does not follow, that there certainly was none before it. There probably were others; though not now recollected, or particularly ascertained.

His Lordship having particularly stated the case, observed, in repeating that part of it which agrees "Jane to be a sole trader, and to have carried on a separate trade within the city according to the custom of it;" that it must, consequently, be a trade wherein her husband did not intermeddle.

He then shortly rehearsed the arguments of the counsel; and took notice that Mr. Dunning had put the question upon this point—"Whether the husband is totally excluded from all power over the effects of the wife."

Whereas the present question is not between the husband and wife; but between his and her creditors: she is no party to this case. Therefore it is not necessary to go into that question.

But, taking it for granted, "that the husband might put a stop to the wife's separate trade in futuro; and after that might have a right to the residue;" (I say, in futuro; for he certainly could not do it with a retrospect;) yet it does not follow, that he can take to himself what belongs to her creditors. This would destroy the custom, by rendering it nugatory and ineffectual. And if he himself could not prejudice her creditors, his assignees can not do it.

The feme sole trader in London under this custom must indeed, bring her action in London; but such custom would be allowed in any other Court, in a defence by the husband.

Perhaps there might be difficulty in the wife's having a remedy, herself, against her husband: but there is none, as to the creditors of the wife. They are intitled to a remedy for the seizure of her effects, out of which they were to be paid their just debts.

[1783] The separate effects of the wife are, in the first place, liable to her separate creditors: but if they were liable, in the first place, to the husband's debts, this would destroy the end of the custom.

In joint-commissions of bankruptcy, joint debts are first paid; then, the separate debts: so also, where there are different joint-commissions.

As to the second point—"Whether she be liable to a commission"—

The Statutes of Bankruptcy extend to the City of London; and the words of the statutes take in this case. And it is for the benefit of the wife, "that she should be liable to a commission;" because, otherwise, she would be liable to perpetual imprisonment. It is also for the benefit of the creditors; (who can not, by reason of this custom, come at the husband). There is no reason to take this case out of the Acts relating to bankruptcy. The husband himself was not liable to the wife's creditors; nor had he any demand upon them. The consequences of her bankruptcy, as a sole trader, concern only the relation in which she stands to her creditors; and they, to her.

As to the precedents—there is no method of searching for commissions that may have issued against sole traders: but here is one instance produced, of such a commission; which is very express. It issued in Lord Hardwicke's time; and was directed to Mr. Atkyns, Mr. Craster, and Mr. Seare, three experienced gentlemen: and Lord Hardwicke allowed a \* certificate.

As to Mr. Dunning's supposed inconveniences—this custom affects no rights but such as are the subject of the custom; not marital or any other rights.

And as to the danger to the wife, from the coercion of her husband—she could never be liable to the guilt of a capital offence, where she was under an invincible necessity.

I am of opinion, that a commission may be taken out against her as a sole trader, with respect to her separate effects in trade.

Mr. Justice Wilmot—This is a consequence of the custom. The custom establishes her being a sole and separate trader: it follows of course, that these goods, in her separate trade, may be taken and seized under a commission of bankruptcy against her.

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\* It was signed by the commissioners, on the 17th July, 1742.



[1784] The present question is not now between the husband and wife; but between two sets of creditors, those of the one, and those of the other. She has, by this custom, particular privileges; and her creditors have particular rights, as against her. These customs (though local) are to be considered as allowable under the general law of the land, when they come in question in other Courts; though the action must be brought in the local Court.

As to the husband's intermeddling—he certainly cannot do it, so as to injure her creditors: it would be a strange thing indeed, if the husband could intermeddle so as to affect the creditors of the wife, to their prejudice. And if he himself can not do so, no more can his assignees, who stand in his place.

The second point is of consequence. It must be confined to her debts in the way of her trade. And as to that, she is within the words and meaning of the Bankruptcy-Acts: and her assignees stand just in her place.

The husband's assignees can not take her effects; nor her assignees, his. But, the commission against her, ought to be confined to matters in the way of her trade.

Mr. Justice Yates was of the same opinion.

An action upon the custom can only be brought in the Mayor's Court of London; but the custom may be pleaded in bar, in a Superior Court. Bro. Customes 43. It may be used in a Superior Court by way of defence: and in such cases, the Superior Court will take notice of the custom.

The only question here is, "whether the effects of the wife belonged to her assignees under the commission which issued against her."

The property in these goods was transferred to them: and they certainly had a right to recover them.

In 1 Shower, 183, *Fabian v. Plant*—Sir Bartholomew Shower said, that "the husband shall not put in bail." The wife alone is chargeable; and the husband's effects are not: therefore he cannot take hers from her creditors.

A commission being issuable against her is a consequence of the custom for her sole trading.

[1785] As between the husband and wife, he has a right to seize her effects: she has no remedy against him, from the custom. But he can not meddle with them, so as to affect her creditors.

There can be no objection from the bankrupt-laws. She is within them: but she could not be liable to capital punishment, if she was really under her husband's coercion.

I have not the least doubt about this case.

Mr. Justice Aston said, he remembered a case in C. B. in his time, in the manor of Harwell: where this custom of feme covert sole trader was established.

Her person and her effects in trade are answerable to her creditors: and the husband is bound, by an implied consent.

The Statutes of Bankruptcy are but as a statute-execution upon her effects in trade, so far as they are liable by law.

The assignees of the husband only stand in his place: and he himself could not have receded from his consent. He may put an end to her sole trade, in futuro: but he can not do it, with retrospect. He can not take away the prior right of her creditors to her effects as a sole trader. This custom does not interfere with any marital rights: it respects only trade and commerce.

Per Cur. unanimously,

Judgment for the plaintiff.

Mr. Justice Wilmot observed, that this custom subjected the wife to an execution: to which she was not liable at common law.

REX *versus* ROGER AIKIN. Wednes. 20th Nov. 1765. Conviction on the Hawkers Act. [See Cowp. 241. 2 Durn. 23.]

[Referred to, *Egginton v. Pearl*, 1875, 33 L. T. 430.]

The defendant had been convicted on the Hawkers and Pedlars Act: and the conviction was removed hither, by certiorari.

Sir Fletcher Norton objected to the conviction: for

1st. He was not summoned, to answer to the charge : at least, it does not appear, that he was summoned.

2dly. The witness was not examined in the presence of [1786] the defendant : and therefore he did not hear the evidence ; as far as appears upon this conviction. V. 2 Sir J. S. 1240, *Rex v. Baker*.†

3dly. The witness does not swear him to be a hawker and pedlar at the time of the conviction.

Mr. Wallace was for the prosecutor. But

The Court were unanimously of opinion “that these objections were not well founded.” For

1st. He did appear, and denied the guilt ; but did not desire further time to produce his evidence, or to prove his innocence. He seems therefore to have waved any further defence.

2dly. It may be presumed, that the witness was examined in his presence.

3dly. There is an inaccuracy in this conviction : but it appears that the defendant exposed his goods to sale, on the 15th ; and the conviction was on the 17th.

Per Cur. unanimously,

Conviction affirmed.

REX *versus* HANN AND PRICE. 1765. Personal appearance will not be dispensed with on giving judgment, where the sentence may possibly be a corporal punishment.

Mr. Morton and Sir Fletcher Norton moved, upon Tuesday the 12th of this present November, on behalf of the defendants, who were borough-justices of Corfe-castle, and had confessed themselves guilty of an information \* charging them with a very great misbehaviour in the execution of their office, (viz. refusing a licence to a public-housekeeper, out of pique and resentment, and upon bad motives, arising from their attachments in respect to a late Parliamentary election ; and acting therein under the influence of one of the candidates ;) for a rule to dispense with the personal appearance of the defendants, on the undertaking of their clerk in Court “to answer for their fines.”

[1787] It was defended immediately (without any rule to shew cause) by Mr. Serjeant Davy, Mr. Thurlow, and Mr. Dunning, of counsel for the prosecutors. And The Court, upon full debate, were unanimous in refusing the motion.

The general doctrine laid down by the Court, and agreed by the counsel on both sides, was that though such a motion was subject to the discretion of the Court, either to grant or to refuse it, where it was clear and certain that the punishment would not be corporal ; yet, it ought to be denied in every case where it was either probable or possible that the punishment would be corporal. And though the Court did not then declare what punishment they would inflict upon the present defendants, yet they saw the offence in so atrocious a light, as to be far from determining “that it would be only pecuniary.” And Mr. Justice Wilmot and Mr. Justice Aston thought that even where the punishment would most probably be only pecuniary, yet in offences of a very gross and public nature (as they held this to be) the persons convicted should appear in person, for the sake of example and prevention of the like offences being committed by other persons ; as the notoriety of their being called up to answer criminally for such offences would very much conduce to deter others from venturing to commit the like.

The Court therefore, upon the whole, unanimously denied the motion.

The sentence of the Court now (on this 20th of November) pronounced upon them was, that they should be committed for a month ; fined 50l. a piece : and imprisoned till the fine was paid.

RUSSELL *versus* STEWART. Thurs. 21st Nov. 1765. A defendant who surrenders in discharge of his bail, must be charged in custody within two terms.

A motion had been made for the discharge of the defendant out of custody, for want of having been charged in custody, within two terms. The motion was founded

† And v. ante, p. 1164, 1165, 1166, *Rex v. Vipont, et Al*, Pasch. 1761.

\* V. ante, p. 1716.

upon a rule of this Court, made in Trinity term 1716, 2 G. 1, whereby it is ordered "that if any defendant shall be committed to the custody of the marshal, or charged in custody of the marshal, or arrested or committed by virtue of the process of this Court to the custody of any sheriff or other officer what-[1788]-soever, at the suit of any plaintiff; and shall so remain in custody for two terms; and the plaintiff shall not declare against such defendant within that time; such defendant, after the end of the second term after such imprisonment, shall be discharged out of the prison where he shall be so detained, on filing common bail signed by one of the justices of this Court, without giving notice to the plaintiff or his attorney."

Cause was now shewn: and the question was whether the "defendant, who was not in custody upon being taken, but had surrendered himself in discharge of his bail, was or was not supersedeable within the abovementioned general rule and its construction, and the practice of the Court."

Lord Mansfield—No doubt, the time runs from the time of notice of the defendant's being in custody.

Per Cur.—Rule made absolutely, for discharging the defendant out of custody.

Memorandum—The debt was a large one; upwards (it is said) of 3000*l.* And an \*action was brought by the plaintiff, soon after this motion, against his attorney Mr. Palmer, for his neglect in omitting to charge the defendant within time: which action was tried in C. B. about 24th or 25th June 1766; and \*500*l.* damages given against Mr. Palmer.

GRAY *versus* ASHTON. 1765. Sham demurrer is not within an order for pleading issuably.

The defendant having obtained a Judge's order upon the terms (amongst others) of "pleading an issuable plea," put in a sham demurrer.

The plaintiff's attorney, looking upon this as a mere evasion of the Judge's order requiring the "pleading an issuable plea," signed judgment; supposing that a sham demurrer is not an issuable plea.

The defendant obtained a rule to shew cause why this judgment, which the plaintiff's attorney had signed, should not be set aside. And cause being now shewn; it was prayed by the counsel for the plaintiff, that this rule might be discharged with costs.

The Court were of opinion, "that it ought to be so."

[1789] A distinction was taken by the Court, between a real and fair demurrer, and a sham one; the former is an issuable plea, within the intent and meaning of the Judge's order: the latter, is only an evasion of it.

Rule discharged, with costs.

KNOX, ESQ. *versus* COSTELLO. Friday, 22d Nov. 1765. One alone cannot bring error, where there are several. [See 1 Durn. 463.]

This was a writ of error from B. R. in Ireland, to reverse a judgment of their's, affirming a judgment in C. B. there, in an action of debt for 1800*l.* brought against William Knox by Christopher Fallon deceased; and also affirming the adjudication of C. B. in Ireland, of execution of the same judgment upon writs of scire facias issued out of the said Court of C. B. in Ireland, against the said Knox, at the suit of Edmond Costello and Edmond Fallon, surviving executors of the said Christopher Fallon.

It appears upon the return, that the original action was brought in C. B. in Ireland, by Christopher Fallon; and that he had recovered his debt, and also 1*l.* 18*s.* 5*d.* for damages occasione detentionis debiti. That a scire facias quare executionem non issued, at the suit of the said Edmond Fallon and Edmond Costello, suggesting "that Christopher Fallon was dead, and that they were his surviving executors." That upon this scire facias, the defendant pleaded payment: which was found against him, with sixpence damages. Whereupon it was adjudged, "that they (as his executors) should have execution against Knox for the debt and damages aforesaid:" and it was also adjudged, "that they do recover against the said William

\* V. post, p. 2060. *Pitt v. Yalden*, 18th and 19th May, 1767.



Knox their costs and expences aforesaid, to sixpence by the jury aforesaid in form aforesaid assessed; and also 17l. 14s. 8d. for their costs and expences aforesaid adjudged to them at their own request, by the Court here, by way of increase according to the form of the statute in such case made and provided; which said costs and damages, in the whole, amount to 17l. 15s. 2d. and that the said Edmond Fallon and Edmond Costello have execution, &c."

Only one of the executors appeared to the writ of error in B. R. in Ireland, viz. Edmond Costello; who, alone, sued out the scire facias quare executionem non, in B. R. there; and yet the Court affirmed that judgment of C. B. for both; and the adjudication was "that both should recover."

[1790] This cause came on to be argued upon Tuesday last; but was then adjourned; and now stood in the paper again.

Mr. Ashhurst, for the plaintiff in error, made these two objections—

1st. The Court below have given damages for non-payment of the money: whereas damages can not be given in a scire facias. 1 Ro. Abr. 574, letter P. pl. 6. "In a scire facias, no damages shall be recovered." 2 H. 6, 15. Nor could costs, till the Statute of 8, 9 W. 3, c. 11, "for the Better Preventing Frivolous and Vexatious Suits." [V. sect. 3.] He also cited 6 Mod. 157, *Fanshaw v. Morrison*, Hil. 3 Ann. B. R.

2d objection—The scire facias quare executionem non, in the King's Bench in Ireland is prayed by Edmond Costello only; though the writ of error is brought against the two executors: and yet there is no suggestion "that either of them is dead:" though only one of them appears to it, and prays the scire facias.

The case of *Brewer v. Turner* in 1 Sir J. S. 233, is in some degree applicable to the present. The judgment was against two; and was so described in the writ of error: but it was laid to be only ad grave damnum of one of them; though it did not appear, that the other was dead. There it was determined "that both defendants ought to join in the writ of error." Here, they ought both of them to be joined.

Mr. Wallace, contra, for supporting the judgment in C. B. in Ireland, and also the judgment of affirmance in B. R. there.

He allowed the first objection to be good, if well founded: and mentioned the case of *Henriques v. Dutch West India Company*, in 2 Sir J. S. 807, 808, and in 2 Lord Raym. 1532, S. C. where the judgment was reversed for the damages. But he denied that damages are here given for the delay of execution: the words are \*only "that he has been damaged and put to costs." The damages are only 6d. on a debt of 1800l. and the judgment is that the plaintiffs recover their costs and expences aforesaid, to 6d. by the jury assessed; and for increase of costs and charges 17l. and upward.

[1791] But if it should be admitted "that this is damages for the delay of execution;" yet the judgment ought to be reversed only for the 6d. as was done in the case of *Henriques and The Dutch West India Company*.

As to the 2d objection—no case is cited in proof of it. No objection was made. It was the plaintiff in error's fault, not to bring in the other executor. However, one executor alone may call upon the plaintiff in error, to assign errors; and if the judgment shall be affirmed as to one of them, it is and must be affirmed as a good judgment with respect to both of them.

But here, the other executor (Edmond Fallon) shall be intended to be dead. *Hensloe's case*, 9 Co. 36 b.

Mr. Ashhurst, in reply. The judgment must be reversed in toto, if at all.

The 6d. is as inadequate a satisfaction for costs, as it is for damages.

Lord Mansfield was not in the Court.

Mr. Justice Wilmot (after stating the case particularly) said "the Court ought to support a judgment recovered upon the merits."

This original judgment was obtained so long ago as the twenty-third year of King G. 2. And the plaintiffs below have not yet obtained the effects of it.

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\* The jury found "that Knox did not pay the aforesaid debt and damages, so as aforesaid recovered against him by the aforesaid Christopher Fallon, by the said judgment in the said several writs of scire facias mentioned, &c. And that the said Edmond Fallon and Edmond Costello, by the non-payment thereof, as executors of the said Christopher Fallon, were damnified and put to costs, to the amount of sixpence sterling."

The first objection turns upon a fact, which does not support the objection. To be sure, damages for delay of execution can not be given in a *scire facias*; nor could costs, till the statute of 8, 9 W. 3, c. 11.\*<sup>1</sup> And if this case were so, the judgment might be reversed as to the 6d. and affirmed as to the rest.

But here, the being "damified and put to costs to the amount of 6d." is only meant as a foundation for the costs *de incremento*: and the judgment is "that the plaintiffs shall recover 17l. 14s. 8d. for their costs and expences, &c."

The second objection is "that the *scire facias quare executionem non* is brought by only one of these two executors."

[1792] As to the case of *Brewer v. Turner*, in *Strange*, cited by Mr. Ashhurst—it may be right: for both are there plaintiffs, to reverse the judgment.

But a *scire facias quare executionem non* is only to bring the plaintiff in error in, to assign his errors. He comes in, upon it, and assigns his errors. Therefore he waved any objection, and admitted the one executor to be sufficient to call upon him merely to assign errors. He might perhaps have moved to quash it: but as he did not challenge it, he has waved the objection to it; and we are not to presume the other executor to be alive.

No case is cited to bind us to reverse this judgment: and it can be attended with no inconvenience, to affirm it.

Mr. Justice Yates allowed the principle of the first objection; but denied that the fact supported it. "Damages" may mean costs. The fact is not, therefore, as it has been alledged.

As to the second objection—he was very clear, that the judgment ought to be affirmed in toto. *Mr. Ashhurst's case* cited from 1 Sir J. S. 233, is not like this case. *Hacket v. Herne*, in *Carthew*, 7, indeed is a determination "that a writ of error by one alone upon a judgment against two, is not good." But that is upon account of the inconvenience that would arise from a perpetual delay of the execution, if every defendant might bring a writ of error by himself. Now that reason does not hold, in the present case, where these executors are defendants in error, and not plaintiffs.

Mr. Justice Aston declared himself to be of the same opinion.

Whereupon, by the unanimous opinion of all three, the

Judgment was affirmed.

HOLCOMBE AND ANOTHER *versus* WADE. 1765. Necessity of the presence of an attorney on the execution of a warrant of attorney by a prisoner. [See 4 Durn. 433. 1 East, 242.]

It was declared by Mr. Justice Wilmot and Mr. Justice Yates (Lord Mansfield being absent, and Mr. Justice Aston silent) that the general rule of P. 15 C. 2, about the [1793] necessity of an attorney for the defendant being present, \*<sup>2</sup> whenever a person in custody gives a warrant of attorney, "to confess judgment," is confined to judgment in the particular cause whereupon he is in custody; and does not extend to warrants of attorney given "to confess judgments in other actions." And this, they said, has been so settled. (V. 2 Lord Raym. 797, *Finn v. Hutchinson*: where it is settled; and the reason of the rule is given.)

HARVEY *versus* PEAKE. 1765. Judgment to be arrested for a clerical error in joining issue.

Mr. Cox, on behalf of the defendant, had moved on Tuesday the 19th instant, in arrest of judgment: and one of his objections was to the manner of joining issue. For that this issue was joined (or rather not joined) in these words—"et prædictus A. P. similiter;" which was a repetition of the same name (*viz.* that of the defendant;) instead of saying, "et prædict. the plaintiff similiter:" so that, in effect, the party has joined issue with himself.

\*<sup>1</sup> V. sect. 3.

\*<sup>2</sup> This rule forbids bailiffs and sheriff's officers to exact or take from any person being in their custody by arrest any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant.

Lord Mansfield advised Mr. Cox to drop this objection to the want of joining issue; and to rely on his other objections in arrest of judgment.

However, Mr. Serjeant Forster now renewed it; observing that this was the plaintiff's own mistake; and not the defendant's; and he cited *Comyns*, 376, *Walker v. Lester*, and 2 Sir J. S. 1117, *Heath v. Walker*, to prove it fatal.

But the three Judges (Lord Mansfield being now absent) over-ruled it, upon

Mr. Justice Wilmot's rehearsing the case of *Probyn v. Churchman*, M. 5 G. 2, B. R. (which I took the liberty of mentioning to have been since confirmed by a latter one of *Cleaver v. Jordan*, Mich. 7 G. 2, 1733, B. R.).

The rule for shewing cause why the judgment should not be arrested, was discharged.

N.B. That Lord Chief Justice Lee (then only Mr. Just. Lee) did, in both these last-mentioned cases, cite another case: of *Rawbone v. Hickman*, in P. 9 G. 1, in this Court: which was debt upon bond; and the defendant pleaded "solvit ad diem," et hoc petit quod inquiratur per patriam. The plaintiff said, "Et prædict. the defendant similiter." [1794] This was moved in arrest of judgment: but the objection was over-ruled; and judgment affirmed.

ZOUCH, EX DIMISS. ABBOT AND HALLET, *versus* PARSONS. Saturday, 23d Nov. 1765. [S. C. 1 Bl. 575, and cited 1 Brown, 109.] Conveyance of an infant mortgagee is binding, and cannot be avoided by his entry during infancy.

[Followed, ——— v. *Handcock*, 1810, 17 Ves. 384. Approved, *Allen v. Allen*, 1842, 2 Dr. & War. 338. Referred to, *Spachman v. Evans*, 1868, L. R. 3 H. L. 244; *Burnaby v. Equitable Reversionary Interest Society*, 1885, 28 Ch. D. 419; *Carter v. Silber* [1892], 2 Ch. 284; [1893], A. C. 630.]

This was a special case in ejectment: and the question was "whether an infant's conveyance by lease and release was absolutely void, or only voidable."

This cause had been twice tried. Upon the first trial, an incomplete case had been drawn up and agreed upon; which having been argued on Friday 17th June 1763, by Mr. Serjeant Glynn for the plaintiff, and Mr. Dunning for the defendant, Lord Mansfield then observed, that many circumstances were necessary to be known, besides those contained in the case as it then stood; which was not sufficiently stated, to come at the merits: and if the parties could not agree upon the facts, the cause must be tried over again, and those facts ascertained. It was therefore adjourned at that time, in order for the necessary facts and circumstances to be more completely stated: and, the parties not agreeing to them, a second trial became requisite.

It was tried this second time, at the Lent Assizes 1764, for Somersetshire, before Mr. Justice Yates; when a verdict was found for the plaintiff, subject to the opinion of this Court, upon the following case.

Special case. (a) John Bicknell, being seised in fee of the messuages and lands in the declaration mentioned, by indenture of lease and release dated 24th March 1750, and 25th March 1751, conveyed the premises to William Cook and his heirs, by way of mortgage, for securing the repayment of 280l. William Cook afterwards died, leaving John Lamb Cook, an infant, his eldest son and heir at law; and also leaving his widow Elizabeth Cook, and the said John Lamb Cook his joint-executors and residuary legatees.

John Bicknell, the mortgagor, afterwards brought the title-deeds of the premises to one Mr. John Williams an attorney, and desired him to procure the sum of 400l. upon the same security; in order to pay off the said mortgage to the Cooks, and for other purposes. Williams applied to the lessors of the plaintiff, who agreed to advance the same: and by indentures of lease and release [1795] bearing date respectively on the 29th and 30th of June 1761, between the said John Lamb Cook (then being an infant of between sixteen and seventeen years of age) and the said Elizabeth Cook, of the first part; the said John Bicknell, of the second part; and the said Henry Abbott and Catharine Hallett, (lessors of the plaintiff) of the third part; the said John Lamb Cook and Elizabeth Cook, in consideration of the sum of 280l. in

(a) See 4 Brown, 509. 4 Durn. 51, 63. 1 Vez. 304. 3 Atk. 710. 16 Vin. 481, 486, pl. 3.



the said release mentioned to be to them paid by the lessors of the plaintiff, granted and released, and the said John Bicknell, as well for the consideration aforesaid, as for the further sum of 120l. to him mentioned to be paid by the said lessors of the plaintiff, granted, ratified, and confirmed the said premises to the said Abbott and Hallett, and their heirs, to hold to them their heirs and assigns for ever.

The said Mr. Williams when he drew the last mentioned mortgage-deed, apprehended that the whole principal sum of 280l. continued due to the representative of the said William Cook, upon his said mortgage; and therefore expressed that sum to be the consideration paid to them: but, in fact, the sum of 100l. only principal money, and 9l. for interest, then remained due thereon; the said William Cook having been paid the other 180l. in his life-time; and accordingly, at the time of the execution of the said last-mentioned indentures of lease and release, Elizabeth Cook received 109l. being the principal and interest then remaining due to her son and her as representatives of her late husband, upon his mortgage; and the residue of the sum of 400l. was received by the said John Bicknell from the lessors of the plaintiff.

The said John Bicknell continued in possession of the premises from the time of his conveyance thereof to the said William Cook, until the year 1756; when he conveyed the premises, by way of mortgage for 200l. to one Thomas Thorne, for a term of years, who in March 1762 assigned the said term to the defendant Henry Parsons, in consideration of the sum of 228l. in the said deed of assignment mentioned to be the principal, interests and costs then due from Bicknell to the said Thorne: but before the assignment to the defendant, Mr. Williams, then being attorney for the lessors of the plaintiff, gave the defendant notice of the mortgage made to William Cook, and of the assignment of it to the lessors of the plaintiff.

On the 27th day of March 1764, two days before the day of holding the assizes at Taunton, the said John Lamb Cook made an entry on the premises, in order to avoid his said lease and release to the lessors of the plaintiff.

[1796] The question is "whether the lessors of the plaintiff are intitled to recover the premises."

This new case was argued on Friday the 8th of this month, by Mr. Serjeant Glynn, for the plaintiff, in support of the infant's lease and release; and Mr. Dunning, for the defendant, who insisted upon their being absolutely void.

Mr. Serjeant Glynn urged, that infancy is a personal privilege; and that the infant only can avail himself of his infancy: no other person can do so. He cited *Whittingham's case*, 8 Co. 43, as an authority for him: though he owned that this case is not quite conclusive, as it is confined to feoffments. Yet it shews, that privies in estate (as joint-tenants,) and privies in law (as lords by escheat,) shall not take benefit of the infancy of another. And this doctrine, he said, applies to all other conveyances whatsoever.

If the infant does not object, it is good against all the world. He cited Co. Litt. 377. Co. Litt. 51. Bacon on Uses, 355, and he added, that the doctrine is clearly stated in *Humphreston's case* in 2 Leon. 216, 218, and Moore, 105, S. C. (there called *Lane v. Cooper*,) the 7th point of it.\*

It is not a null agreement; because the person of full age is bound: the choice of standing to it, or not agreeing to it, is not reciprocal.

Therefore John Lamb Cook's act was good at the time; and stands good: and the plaintiff has a good title to recover now.

The great point to be attended to, is the benefit of the infant.

In the case of an infant's making a lease without reserving rent, it must therefore be void. But a lease made merely in order to bring an ejectment, is good: for, there the infant is not prejudiced.

Here, the infant is not, can not be prejudiced.

[1797] The mother alone, being joint-executor with him, had a right to receive the money, and give a discharge for it: and after it was received, the infant was only a trustee.

Therefore even with regard to the infant, it is not a void act; but only voidable.

Mr. Dunning, for the defendant, the second mortgagee, agreed that both the first

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\* V. S. C. in Bendl. 195. Owen, 64. Dyer, 337 a. and 1 And. 40.

and second mortgagee were equally intitled to favour; and that therefore strictness of law must prevail.

This is not a case, he said, where the Court of Chancery would have compelled the infant to do what he has done.

The serjeant's proposition is "that the infant's act is good, till dissented to by him, when he comes of age." But I say, that his dissent shall have a retrospect: it rescinds his act, and makes it void ab initio. And he may avoid it at any time; either at the instant he comes of age, or earlier. It was formerly a doubt, whether a dum fuit infra ætatem would lie, after the infant's coming of age.

He argued that this conveyance by lease and release was absolutely void. A feoffment and livery of seisin personally and actually given by the infant, was the only method that could have made it only voidable.

A defeasible estate is not the effect of every sort of conveyance. (And here he went into deep and ancient law concerning the different sorts of conveyances, and the different operations of them.)\* He cited Bro. Abr. title Coverture and Infancy, pl. 1: where it is said "that a feoffment and livery made by an infant himself and not by attorney, is voidable, and not void: nota diversitie." 26 H. 8, 2.

*Whittingham's case*, 8 Co. recognizes the difference between personal delivery of seisin, and a delivery of it by letter of attorney, (see pa. 45 a.). The delivery alone is the foundation of the voidable estate: and the reasoning cannot therefore be applied to any other sort of conveyance than a conveyance by livery.

He cited a case of the daughters and coheirresses of one J. Frevil, in (9 H. 6, fo. 6, pl. 14,) and argued from it, that a feoffment by an infant, without livery of seisin actually and personally given by him, is void; though a voidable estate passes by his personal livery.

[1798] And an infant's personal livery will create a voidable estate, whatever age the infant be of. Therefore though an infant's actual personal livery be good, till avoided; yet it is otherwise, where his livery is not personal.

The distinction I have taken is clear and common; and is laid down in express terms in Finch's Law, lib. 2, p. 102, (qu. where: for it is not in p. 102).

In 26 H. 8, pl. 2, Fitz-Herbert said, than an infant may plead "that he did not grant by the deed," notwithstanding that it be sealed by him; because nothing passed. And if the infant had made livery of seisin at the door of the church, peradventure this might change the case. As if he gives goods, and delivers them himself, he shall not have a writ of trespass; no more than an assize, when he makes livery and seisin himself: but if he makes a letter of attorney, it is otherwise. And this difference was granted by all the Court.

Brooke adds, at the end of his abridgment of this case in Bro. Abr. title Coverture and Infancy, pl. 1, "Et sic vidè que livery dun fait dun enfant nest semble al livery de terre ou biens per luy."

Yet I own, that pl. 12 of the same title seem contradictory: and it is copied into F. N. B. title "Dum Fuit Infra Ætatem." (V. new edition pa. 426, in margine.) Here, indeed, the livery of the deed and the livery of the land are confounded. But the Year-Book (upon looking into it) appears to be misrecited: and such a question could not arise. In Cro. Car. 103, *Sir Thomas Holt v. Sambach*, the infant's grant was agreed to be void as to the remainder. And in *Thompson v. Leach*, 3 Mod. 301, and Carth. 435, S. C. it was holden "that a surrender made by an idiot or by an infant is void ab initio; and that any person may take advantage of it."

A surrender by an infant cannot be by deed, but is absolutely void. *Lloyd v. Gregory*, Cro. Car. 502; 1 Ro. Abr. 728.

The case of *Thompson v. Leach* is the fullest reported in 3 Mod. 301: and there, an infant's surrender was considered as absolutely void. A clear distinction was also taken between the deed itself of an infant, (the form of it,) and the operation of the deed: and it was determined, that all deeds by infants, and all surrenders by infants, are void ab initio.

[1799] It is only feoffments with actual personal livery that are voidable only. Bro. Abr. title Coverture and Infancy pl. 40, referring to 34 Assize, pl. 10, says "tenetur clerement, que release denfant de tout le droit en terre de que il ne fuit

\* V. ante, 92, and 710 to 716.

unques seisie, est void, &c. Mes aliter dicitur dun feoffment. Le reason del diversitie semble per reason del livery del terre. Ceo nest que voidable ; et lauter est void."

Therefore an infant's release is void, not voidable only.

Lord Coke had not considered this subject, or at least not expressed himself upon it, with his usual accuracy. In 1 Inst. 51 b. and in 247 b. he does not distinguish between the different conveyances : and he makes entry equivalent to livery. So, in 2 Inst. 673, on the statute of 27 H. 8, c. 16, concerning inrolments of bargains and contracts—he plainly considered the deed as absolutely void—"If an infant bargain and sell lands which are in the realty by deed indented and inrolled, he may avoid it when he will : for the deed was of no effect to raise an use, &c." So in 1 Inst. 45 b. (for want of considering the different forms of conveyances—) he is not accurate.

In the case of *James, ex dimiss. Aubrey v. Jenkyns*, Tr. 31 G. 2, C. B. a lease by tenant for life was holden voidable only, where the lease for lives was made by livery. Therefore Lord Coke must be understood of such conveyances as operate by livery.

As to infant's leases—the benefit of the infant is considered. His leases are good, if a rent is reserved upon them. But this exception arises from necessity ; like contracts for meat, &c. He cannot occupy his lands himself : therefore it is necessary to validate his leases reserving rent. But this exception extends to no other case.

And it is just the same, whether the infant be six years of age, or sixteen : there is no line drawn between the different ages of an infant.

The Legislature have recognized the law to have been as I say. And the Act of 7 G. 2,† c. 19, rectifies the inconvenience, in one respect, as to infant-mortgagees.

An infant's conveyance by lease and release is absolutely void. The deeds are substantially bad ; though "non est [1800] factum" can not be pleaded to them. This conveyance never conveyed any interest whatsoever : and the plaintiff can neither have judgment for his term, nor even for damages ; by reason of the retrospect.

Mr. Serjeant Glynn, in reply,—premised that the Court did not mean to introduce a new case, upon the second trial : they only meant to take the matter up, as the facts stood and appeared at the time of the first trial, when they were defectively stated to the Court.

This conveyance was good till the infant avoided it.

As to dum fuit infra ætatem—what Mr. Dunning says is not inconsistent with what I have urged.

But there is no case to support his doctrine of a retrospect, as he has laid it down.

As to the citation from Bro. Abr.—it does not follow "that all other acts of an infant are void.

The entry (upon an exchange) is not analogous to livery and seisin : an entry upon an exchange does not make a discontinuance.

Partitions by infants are only voidable, not void.\*

So, leases by infants without reserving rent.

The law only prevents the infant from being injured.

As to the grant of an infant—he may consider it as a voidable act : but it is not a nullity. And the term "void" means only (in several of the cases cited) "that the infant may avoid it."

As to the case of *Thompson v. Leach*—the person who was to avoid the act was the heir of the person who did the act.

A release of a right differs from releases which convey interests.

No stranger has a right to say "that John Lamb Cook's conveyance was a void one."

The Act of Parliament mentioned by Mr. Dunning does not recognize the law to have been as he supposes.

Curia advisare vult.

[1801] Lord Mansfield, after stating the case minutely, now delivered the resolution of the Court to the following effect.

The merits of this cause turn upon two general questions ; 1st. Whether this conveyance is good, and binds the infant ; 2dly. If it does not bind the infant, —whether the defendant can take advantage of the infancy, and on that account object to it.

As to the first—miserable must the condition of minors be ; excluded from the

† He manifestly meant 7 Ann. c. 19. V. post, 1803.



society and commerce of the world ; deprived of necessaries, education, employment, and many advantages ; if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit ; and, without prejudice to themselves, for the benefit of others.

To mention a rule or two ; the reasons of which are applicable to the present case.—

If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him : as if he makes equal partition ; if he pays rent ; if he admits a copyholder, upon a surrender. But there is no occasion to enumerate instances : the authorities are express ; and the reason decisive—"generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." \*

The second resolution in *Conny's case*,† is, "that although the infant in the case at Bar was not compellable to attorn, because the manor was not conveyed by fine ; yet, because by a mean, he was compellable to attorn, scilicet if a fine had been levied, the attornment was good." Fortescue lays it down larger, 18 H. 6, fo. 2 a.—"He did but that which he ought to do : therefore the attornment is good."

"The attornment of an infant to a grant by deed is good because it is a lawful act: albeit he be not, upon that grant by deed, compellable to attorn." Co. Litt. 315 a. The reason is manifest—A right and lawful act is not within the reason of the privilege ; which is given, to protect infants from wrong. His being compellable by any mean, or in any way to do it, proves the act to be substantially what he ought to do.

[1802] In the case of *Holt v. Ward*—the infant's being compellable by the Ecclesiastical Court would have answered the objection made there, as much as her being compellable by the common law : therefore civilians were heard.

To what end should the law permit a minor to avoid an act, which, in any way, through any mean, by any jurisdiction, he might be compelled to do over again, after it was undone ? It would be assisting him to vex and injure others, without the least benefit to himself.

Another rule, which may be collected from the books, is "that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding:" as, where an infant-patron presents ; an infant-executor duly receives and acquits, pays and administers the assets ; an infant-head of a corporation joins in corporate-acts ; an infant-officer does the duty of an office which he may hold.

A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is "that it never shall be turned into an offensive weapon of fraud or injustice." As where tenant for life and infant in remainder levied a fine,—the infant reversed the fine, as to himself, for the inheritance, for nonage ; yet he shall be bound by his assent to the fine and joining in it, not to enter for the forfeiture. And the fine was held good, as to the estate of tenant for life ; and reversed quoad the infant only. *Pigot v. Russel*, 2 Leon. 108. Cro. Eliz. 124, S. C.

To see whether the reasons of these rules are applicable in the present case, it is necessary to ascertain what is in truth the nature of this transaction.

Part of the personal estate of William Cook consisted of 109l. due from John Bicknell, secured by a mortgage in fee. His widow and infant-son were joint executors, and residuary legatees ; and as such, intitled to this money. The fee which descended to the son was merely as a pledge for the money : besides the money, the infant had no beneficial interest in the land whatsoever. Upon payment, he was bound to convey, as the mortgagor should direct.

Conveying is no more than delivering up a security when it is satisfied. The money here was paid to the proper hand.

[1803] An adult, under the same circumstances, would have been guilty of a breach of trust ; if he had refused : he would have been compelled to do it, and would have been condemned in costs for refusing.

\* Co. Litt. 172 a.

† 9 Co. 85 b.

By Act of Parliament 7 Ann.\*<sup>1</sup> the infant was compellable to do it, during his minority.(a)

It is much stronger here, that the money was paid by the plaintiffs; who, upon the faith of this conveyance, and the title deeds produced by Bicknell the mortgagor, advanced more money.

The whole beneficial estate belonged to Bicknell, after paying the 109l. The infant's conveyance was matter of form, and in the nature of an authority, executed by Bicknell's direction, in favour of a third person who ventured his money upon the faith of it.

It would be iniquitous in the infant, to avoid it: it would be unjust, to set up the privilege, to make an innocent man lose his money, circumvented by his confidence in the infant's concurrence.

But it could not even have that effect. It would be nugatory, and without any effect. For, if it was avoided, he must make the same conveyance over again: he would be compelled to do it. A conveyance to the defendant would be a breach of trust.

By the case stated upon the \*<sup>2</sup> first trial, it did not appear that the infant's conveyance was a right act; such as he ought, and was compellable to do. The Court then ordered a new trial, to get a more correct state of the case.

Upon the second trial, it now comes out clear, that the infant was expressly a trustee for the plaintiffs. He was paid by them: upon the faith of the fee being in him, they advanced more money.

If the fee was in a stranger, the plaintiffs have the prior equity. If Thorne had been prior; his letting the mortgagor have the title-deeds, might be sufficient to postpone him. And the defendant had express notice.

There can be no doubt that the infant was compellable to do what he has done.

[1804] Upon the first question, we are all of opinion; "that this conveyance binds the infant."

But supposing it not binding against him, or those who may stand in his place—

\*<sup>1</sup> V. c. 19, s. 2.

(a) In the preamble to the stat. 7 Ann. c. 19, it is recited, that "many inconveniences do and may arise by reason that persons under the age of twenty-one years having estates only in trust for others, or by way of mortgage, cannot, though by the direction of the cestui que trust, or mortgagor, convey any sure estates in such lands to any other;" for remedy whereof, it is enacted, that "it shall be lawful for any such person under the age of twenty-one years, by the direction of the Court of Chancery or Exchequer, signified by order made on the petition of the person for whom the infant shall be seised, or possessed in trust, or of the mortgagor or guardian of such infant, or person intitled to the money; secured on any lands whereof any infant is or shall be seised or possessed by way of mortgage, or of the person intitled to the redemption thereof to convey such lands as the Court of Chancery or Exchequer shall direct; and such conveyance shall be as effectual as if the infant were of the full age of one and twenty years; and it is thereby further enacted that all such infants being only trustees may be compelled as aforesaid to make such conveyances."

Now it is plain that before that Act an infant could not have made such conveyance as in this case, and he is only enabled to make it by that Act, by direction of the Court of Chancery or Exchequer, and therefore cannot make it without such direction; for his conveyance when not warranted by that Act, as it was not in the present case, remains as it was before the Act; that is, as appears by the preamble of the Act, as well as from clear legal principles, that his conveyance does not pass any sure estate, to use the words of the preamble: that is, his conveyance is voidable at best, and in some cases it was void: consequently the infant having entered to avoid the estate, was legally intitled to recover; and whether he might not afterwards have been compelled in a Court of Equity to convey, might depend upon circumstances; but substantiating his conveyance is depriving infants of the protection the Legislature intended for them; by confining their acting to the directions of the Chancery or Exchequer, and it is making good a conveyance which is not so either by common law, or by this or any other Act of Parliament.

\*<sup>2</sup> See the beginning of this case.

The second question is, "whether the defendant can take advantage of the infancy; and, on that account, object to the conveyance."

This depends upon two points; 1st. "Whether this conveyance be void; or voidable only:" 2dly. If voidable only, "whether the infant, by his entry before the assizes, had absolutely avoided it."

It is not settled, what is the true ground upon which an infant's deed is voidable only:—Whether "the solemnity of the instrument is sufficient;" or "it depends upon the semblance of benefit to the infant, from the matter of the deed upon the face of it."

As to the first, the solemnity of the instrument—we think the law is, as laid down by Perkins†—that "all such gifts, grants or deeds made by infants, which do not take effect by delivery of his hand, are void: but all gifts, grants or deeds made by infants, by matter in deed or in writing, which do take effect by delivery of his hand, are voidable, by himself, by his heirs, and by those who have his estate." The words which do take effect are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a mere power and convey no interest.

In Bro. Abr. title "*Dum fuit infra ætatem*" pl. 1, (which cites 46 Edw. 3, 34). It is noted "that a *dum fuit infra ætatem* was admitted to lie of a rent: and yet by some, the grant of an infant was void and not voidable." But (says the book) "it is not so: for then this action would not lie. And besides, the delivery of a deed can not be void; but only voidable."

There is no difference, in this respect, between a feoffment, and deeds which convey an interest. The reason is the same.

The delivery of the deed must be in the presence of witnesses, as much as the livery of seisin. The ceremony is as solemn. The presumption "that the witnesses would not attest, if they saw him an infant," holds equally as to both.

[1805] Littleton, who writes with great accuracy and precision, puts them both upon the same foot. He says\*<sup>1</sup> "If before the age of twenty-one, any deed or feoffment, grant, release, confirmation, obligation or other writing be made by any of them, &c. all serve for nothing, and may be avoided."

In 2 Inst. 673 a bargain and sale inrolled by an infant is denied to be matter of record which the infant must avoid during his minority: but the book says, "he may avoid it, when he will."

An infant, or they who stand in his place, can not plead "*non est factum*," and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed: and that plea avoids it, by relation back to the delivery. The reason of this is, because it has an operation from the delivery; and not because it has the form of a deed.

The deed of a feme-covert has the form: but she may plead "*non est factum*;" because it has no operation.

The distinction between the deeds of femes-covert, and of infants, is important: the first, are void; the second voidable.

Perkins, sect. 154,\*<sup>2</sup> says—"And it is to be known, that a deed can not have and take effect at every delivery, as a deed: for, if the first delivery take any effect, the second is void—as in case an infant makes a deed, and deliver the same as his deed, &c. and afterwards, when he comes of full age, delivers it again as his deed; this second delivery is void. But if a married woman deliver a bond unto me, or other writing, as her deed; this delivery is merely void: and therefore if after the death of her husband, she, being single, deliver the same again unto me, as her deed; the second delivery is good and effectual."

Two objections were made at the Bar, to this proposition; at least, in its extent. 1st. That leases by an infant, by deed, upon which no rent is reserved, are absolutely void; therefore the criterion, "whether the deed is void or voidable," does not depend upon the delivery; but upon the matter and contents—"whether it may possibly be for the infant's benefit." 2dly. A surrender by an infant, by deed, is absolutely void: therefore all deeds are not voidable only.

[1806] As to the first—there are many obiter sayings; but there is no sufficient authority, clearly to outweigh the reasons against this position: I cannot find a case adjudged singly upon this ground. What looks the likeliest to an authority, is the

† Sect. 12.

\*<sup>1</sup> Sect. 259.\*<sup>2</sup> Title, *Faites*; p. 32.



opinion of Wray and Southcote against Gawdy, in *Humphreston's case*, 16 Eliz. Moore, 105, and 2 Leon. 216 : \*<sup>1</sup> but there, the judgment was upon the right and merits of the case, and not upon the point of the lease. The question, as to the lease, arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. The two (Wray and Southcote) held "that no rent being reserved, there was no semblance of benefit to the infant." Whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovering. Besides, the lease was by parol.

But reason soon prevailed ; and it has been long settled, "that an infant may make a lease, without rent, to try his title." Very prejudicial leases may be made ; though a nominal rent be reserved : and there may be most beneficial considerations for a lease though no rent be reserved.

What seems decisive is, "that the lessee can, in no case avoid the lease, on account of the infancy of the lessor : " which shews it not to be void, but voidable only. And it is better for infants, that they should have an election.

As to the second—the authority of †<sup>1</sup> *Lloyd v. Gregory* was cited : and sayings arguendo, in †<sup>1</sup> *Thompson v. Leach*.

The case of *Lloyd v. Gregory* was determined upon the special verdict, by three Judges ; of whom, Sir William Jones and Croke were two.

Sir William Jones reports, "that the second lease being void made an end of the question ; and that the Judges gave no opinion upon the other points."

The note in Croke \*<sup>2</sup> does not say a word of the only ground of the judgment ; but rather supposes the second lease good, by arguing, "that there being no increase of term or diminution of rent, it had no semblance of [1807] benefit." Croke's note might be confounded with what passed upon the trial at Bar : for Roll states sayings to that effect upon the trial at Bar. 1 Ro. Abr. 728.\*<sup>3</sup>

But Sir William Jones is certainly right : for the second lease was void. And no surrender, express or implied, in order to, or in consideration of a new lease, would bind ; if the new lease is absolutely void : for, the cause, ground, and condition of the surrender fails.

In *Thompson v. Leach*, (which was a most favourable case for the plaintiff,) much is said, in argument, "to prove the surrender of an infant or lunatic to be void ; " to get rid of some doctrine laid down in *Whittingham's case*,†<sup>2</sup> "that the remainder-man, injured by the act could not avoid it." But more is said to overturn that doctrine. There is no difference, in this respect, between the heir in tail and the remainder-man : neither claims under him whose act is in question ; but both claim per formam doni.

In Palmer, 254,†<sup>2</sup> Dodderidge denies the doctrine ; and says, "he in remainder, and the donor, shall take advantage of infancy : " which is agreeable to Littleton's reasoning, § 635—"It should seem against reason, that a feoffment made by an infant shall grieve or hurt another, to take from them their entry, &c."

Suppose the comparison between an infant and a man non compos just, (which it is not,) the point of "the surrender being void or voidable" was not necessary to the judgment in that case.

I know of no judgment, upon the ground "that such a surrender is void." Most undoubtedly, the other party can not say so. If an infant was to surrender an unprofitable lease ; and, after acceptance, the premises should be burnt, overflowed, or otherwise destroyed ; the lessor never could say the surrender was void. There is no instance where the other party to a deed can object, on account of infancy. Con-

\*<sup>1</sup> V. also S. C. in Benlo. 195. Owen, 64. Dyer, 337 a.

†<sup>1</sup> *Lloyd v. Gregory* is reported in Cro. Car. 502, and Sir William Jones, 405, and is abridged in 2 Ro. Abr. 24, title "Faîtes," letter I. pl. 6 and 495, title "Surrender," letter F. pl. 7, and in 1 Ro. Abr. 728, title "Enfants," letter B. pl. 2 and 3.

†<sup>1</sup> 3 Lev. 284. 2 Ventr. 198, 199. 3 Mod. 296, 301. 2 Salk. 618. Parliament Cases, 150. 1 Shower, 296. Comberb. 438, 468. Carthew, 211, 435. Equity Cases, abridged, p. 278, pl. 3. 3 Salk. 300. 12 Mod. 173, and Holt, 357, 623.

\*<sup>2</sup> Cro. Jac. 502.

\*<sup>3</sup> Pl. 3.

†<sup>2</sup> 8 Co. 43, H. 45 Eliz.

†<sup>2</sup> In *Darcy v. Jackson* (to the 3d point of that case).

sequently, the infant may let the surrender stand, or avoid it ; which proves it to be voidable only.

If a new case should arise, where it would be more beneficial to the infant, "that the deed should be considered as void ;" if he might incur a forfeiture, or be subject to damages, or a breach of trust, in respect of a [1808] third person, unless it was deemed void ;—the reason of the privilege would warrant an exception, in such case, to the general rule.

Powers of attorney are an exception to the general rule, as to deeds ; and a power to receive seisin is an exception to that. The end of the privilege is "to protect infants." To that object, therefore, all the rules and their exceptions must be directed.

But be the point upon the solemnity of the delivery, as it may, (for there are respectable sayings the other way ;) it is not necessary to our determination. For we are all of opinion, "that the 109l. received, and the other circumstances of the transaction, shew a semblance of benefit, sufficient to make it voidable only, upon the matter of the conveyance."

If it be voidable only, the second point is, "whether the infant, by his entry before the assizes, (which appears to be during his minority,) has avoided it."

At the common law, the only conveyance in pais, of the freehold and inheritance of land, with transmutation of possession, was by feoffment. If it was tortious, the disseisee was obliged to enter, to revest his possessory title : and then he might bring an action of trespass. So, in the case of feoffments by an infant : he might enter during his minority, to revest his possessory right, for the sake of the profits ; but still the feoffment was voidable only : and he might elect to confirm it, when he attained his full age.

The reason why an infant cannot bring any writ analogous to a *dum fuit infra ætatem*, during his minority, is, that his election may not be found by the judgment."

Whether an entry be of any use in the present case, is not material : it is sufficient, that it cannot have any larger effect, than in the case of a feoffment. The infant is alive, still a minor. The defendant cannot elect for him : he is a mere stranger, in every view ; and has no estate affected by the conveyance.

We are all of opinion, "that the plaintiffs ought to recover." And it is well for the defendant, we are of this opinion. He would get nothing by defeating the plaintiffs, here : for, finally, in another mode of proceeding, the conveyance must be confirmed, and the defendant would be to pay all the costs here and there.

[1809] It is fortunate for the suitors on both sides, when, consistent with rules and forms of proceeding, that justice, which must be the final determination of the question, may be done in the first stage of the litigation.

The consequence of what has been said, is, that

The *postea* must be delivered to the plaintiffs.

PETER GANDER'S CASE. 1765. Party in a lock-up house not considered as in actual custody under an insolvent Act.

On a motion made by Mr. Jones, and supported by Sir Fletcher Norton,

The question was, "whether a person was intitled to be discharged under the late † Insolvent Debtor's Act ;" whose case was this—

The man was not in the actual custody of the gaoler, on the day specified in the Act ; but was in the custody of an officer, in a house of safety (a spunging-house). He was not included in the first part of the gaoler's list : but he was in the second part.

The Court of Sessions of London had holden him not to be intitled to his discharge, as an object of this statute.

Lord Mansfield inclined, that the sessions were in the right ; as this was a positive law. And the jurisdiction is given to the Quarter-Sessions : so that there seems no way of coming at it, if they were wrong.

The recorder was very candid, in offering to come into any method that could be thought of. But

Per Lord Mansfield—We can do nothing in it.

REX *versus* THOMAS ROGERS, SAMUEL MATTHEWS, AND JOHN KING. Monday, 25th Nov. 1765. Identity of the person of a felon to be tried instanter.

The defendants were brought to the Bar, upon the returns of two writs of habeas corpus; the two former, from Winchester Gaol; the last, from Maidstone.

They were the felons who broke out of Maidstone-[1810]-Gaol, last summer, after having first murdered John Fletcher the gaoler, &c. and became a terror to the neighbouring country, for a considerable time.

The respective writs and returns were read: by which it appeared that they were in custody upon convictions of felony for highway-robberies; and detained upon warrants from the coroner of Kent, on inquisitions found for wilful murder.

Then the certioraris and returns of the respective convictions for felony in committing highway-robberies were read. It appeared, that Thomas Rogers had been capitally convicted of felony for a robbery upon the King's highway: and sentence of death passed upon him: and that Samuel Matthews and John King had also been capitally convicted for a highway-robbery; and sentence of death passed upon them likewise, for the same.

Mr. Attorney General prayed that they may be asked "what they had to say why the Court should not proceed to award execution against them upon these attainders for the said felonies."

Accordingly, they were respectively asked that question.

Thomas Rogers, being first arraigned, denied the identity: and the Attorney General averred it. Whereupon a jury was immediately impanelled and sworn.

Rogers prayed the assistance of counsel; and desired the Court to name one for him: but afterwards, he himself named Mr. Dunning.

Proclamation was made: and the indictment read.

N.B. The two others were permitted to sit down, whilst this issue was trying.

Then Mr. Barlow (Mr. Athorpe, Secondary of the Crown-Office being absent,) charged the jury with the present issue upon the identity of Thomas Rogers.

The identity was clearly proved: and the jury found him to be the man.

[1811] Mr. Dunning asked, "whether he was intitled to a copy of the record."

The Court answered, no: it was refused in *Mr. Charles Ratcliffe's case*.\*

Mr. Justice Wilmot, (the second Judge) pronounced the award of execution upon the former sentence (for the felony and robbery).

Then John King, being called upon in the same manner, denied the identity: and the Attorney General affirming it, issue was joined as before.

Mr. Dunning was, at the prisoner's desire, assigned his counsel. He asked time, to take instructions from his client. But

The Court denied it; as there was no pretence for it, nor could it be of service to the prisoner. *Mr. Radcliffe's case* was very different from this. There was, in that case, a doubt how he should plead; whether the non-identity, or the Act of Grace: but in the Act of Grace, there was an exception of persons who had broken out of gaol; (which Mr. Radcliffe had none). Such issues are to be tried instanter: indeed the Court may, upon circumstances, give time. But here is no sort of pretence for it.

The jury was sworn, and charged; proclamation made; and the identity clearly proved and found, as before.

Mr. Justice Wilmot awarded execution, as before.

Samuel Matthews being called upon, denied the identity; which was averred by Mr. Attorney General: and issue was joined. The same counsel was desired and assigned; and the same jury sworn, and charged; and the same form repeated, as before.

But when the cryer was beginning to make proclamation,

The Court stopped him; saying that this proclamation was improper.

The fact being proved; and the identity found;

Mr. Justice Wilmot awarded execution according to the former judgment and sentence: as he had done against *Rogers and King*.

[1812] Mr. Attorney General then prayed execution; and that a particular day

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\* It was so, (on 24th Nov. 1746, M. 20 G. 2, B. R.). It was also refused to Roger Johnson, Mich. 1727, 2 Geo. 2, B. R.



might be fixed; and that Maidstone might be the place, (at the request of the county).

The Court were of opinion, not only that it was not incumbent upon them to name the day; but even that it was more proper for them not to do it. It is not usual at the assizes. The sheriff will do as he thinks proper. There must be a rule "to deliver those two that came from Winchester, to the custody of the Sheriff of Kent, being present here in Court."<sup>1</sup>

Take the prisoners from the Bar.

Memorandum.—These desperate fellows remained chained together, during this whole proceeding.

REX *versus* MARSDEN, ET AL'. Tuesday, 26th Nov. 1765. [S. C. 1 Bl. 579.]  
Information quo war. will not lie for encouraging the exercise of a franchise.

[Followed, *Moseley v. Chadwick*, 1782, 3 Dougl. 124; 7 B. & C. 49 (n.). Referred to, *Great Eastern Railway Company v. Goldsmid*, 1884, 9 App. Cas. 958.]

On Tuesday, 12th of June last, Sir Fletcher Norton moved for an information in nature of quo warranto against the defendants for holding a public fair or market, at Wakefield on every other Wednesday.

He had moved it a day or two before: but the Court had some <sup>\*2</sup>doubt "whether such an information would lie:" viz. an information in the nature of a quo warranto, in the name of the Clerk of the Crown, at the application of a private person.

He therefore now endeavoured to shew, that the Court had, both upon principle and precedent, a power to grant such an information: and he cited several cases; particularly, 1 Salk. 376, *Rex v. Mayor and Aldermen of Hertford*, and 2 Hawkins, P. C. 262, sect. 7, to shew that all informations in nature of quo warranto are within 4 & 5 W. & M. c. 18, and the same book and page, sect. 9th, to shew that fairs and markets are franchises that concern the public: and that an information in nature of quo warranto will lie in such case: though not for setting up a warren, which is wholly of a private nature. And therefore this case is not like *Sir William Lowther's case* in 2 Lord Raymond, 1409, or *Lord Lisburn's case* there cited; both which were for setting up warrens. And he said the 9 Ann. c. 20, had no relation to this sort of informations; it relates only to corporate offices.

[1813] He also cited a case of *Rex v. Duffey et Al'*, M. 32 G. 2, B. R. and another, of *Rex v. Griffith, Dixon, et Al'*, P. 18 G. 2, B. R. The former, he said, was for holding a market in Chester: the latter, for holding a market at Broseley in Shropshire; where the rule to shew cause was made absolute. (It was *Rex v. Wilkinson and Three Others*. V. post, 1818.)

The Court thereupon gave him a rule; which was drawn up in this form, viz. "to shew cause why an information in the nature of a quo warranto should not be exhibited against these persons, to shew by what authority they hold, or promote and encourage the holding of a public show, fair, market or sale at a place called Wakefield Inge within the town of Wakefield, in the county of York, on every other Wednesday throughout the year, or upon any particular Wednesday, for the exposing to sale and buying and selling all sorts of cattle, goods, wares and merchandizes."

Upon shewing cause now, the counsel for the defendants were Mr. Wedderburn, Mr. Serjeant Burland, Mr. Stowe, and Mr. Wilson; and for the rule, Sir Fletcher Norton, Mr. Fearnley, Mr. Dunning, Mr. Lee, and Mr. Wallace.

The counsel for the defendants said, that as to any private injury the prosecutor may have suffered—he had taken his remedy, by action.

<sup>\*1</sup> Sir Richard Bellenson, Bart. was the sheriff, and was in Court.

<sup>\*2</sup> N.B. The like motion had been twice denied. *Rex v. Owen et Al'*, upon the first motion, in H. 12 G. 2, and *Rex v. Anderson*, M. 14 G. 2, for holding a market at Rawcliffe in Yorkshire.(a)

(a) from a MS. note of this case it appears that the information was granted against some of the defendants, though as to others discharged; and it could not have been granted against any, if the subject had not been proper for such an information.

(And it appeared that actions had been brought, and were now depending.)

And as to the prerogative of the Crown—The Attorney-General is to judge of that. And he will choose to act with caution; if he attends to 2 Inst. 282, or the Statute of Gloucester. *The Abbot of Fischamp's case*, there cited, is very strong, to shew the danger to the officer of the Crown from his interfering; for William de Penbrugge, King's Attorney, was committed to gaol for prosecuting that quo warranto without a precept.

This case is not within those misdemeanors which the Act of 4, 5 W. & M. c. 18, meant that the Court should interfere in. And it is not within 9 Ann. c. 20: for it is not a franchise in a borough or corporation. Indeed, there is not any claim of any franchise at all: no demand of toll; no clerk of the market; no court of piepowder. It is only a private transaction; a sale here would not be within the protection of a market overt. It can not be an usurpation upon the Crown, without a demand of toll. 2 Show. 201. *Tremaine*, 449, S. C.

[1814] They mentioned *Rex v. Sir Thomas Reynell*, 2 Sir J. S. 1161. *Rex v. Wilkinson*, 18 G. 2, B. R. and *Rex v. Mary Daffey*, 21 G. 2, B. R.

This is an application by Mr. Scot; who pretends to receive a private injury. But, in fact, he is not injured.

Wakefield is a much more convenient place for this purpose, than Adwalton is, where the prosecutor has a market: if it was not so, it would sink with its own weight. And it is no injury to the proprietor of Adwalton-Market. In discussing which assertion, he cited Briton, 159, cap. 63, and Bracton, fo. 235, c. 46, "Si mercatum aliquod levatum sit, ad nocumentum vicini mercati."

The counsel for the prosecutor observed that the defendants had made two objections: 1st. That the usurpation of a fair or market is not, in general, a ground for the interposition of this Court, by way of information in the nature of a quo warranto; and 2dly. That the present case, in particular, does not afford a foundation for such an information.

To which they answered—1st. The Court will always grant such an information where there is an usurpation upon the Crown, by which the public may suffer: though if it be a mere usurpation upon the Crown, they will leave it to the care of the officer of the Crown, the King's Attorney-General.

Here, the public are greatly interested. Fairs and markets concern the trade and commerce of the kingdom: and the Crown can not grant one without previous steps; an ad quod damnum, &c.

As to 4, 5 W. & M. c. 18—it extends to all informations; to informations in the nature of quo warranto, as well as others.

The case of *The Company of Merchants Adventurers v. Rebow*, in 3 Mod. 126, 2 Jac. 2, 1686, shews that these informations were grantable before that Act.

As to instances—It falls within the general rule of granting informations where the Government or the public are concerned. *Rex v. Wilkinson*, P. 18 G. 2, B. R. for holding a fair at Broseley in Shropshire, is a precedent: cause was shewn; and the rule made absolute. *Rex v. Mary Daffey*, M. 32 G. 2, B. R. for holding a market in Chester.

[1815] The cases of *Rex v. Sir Thomas Reynell*, in 2 Str. 1161, for setting up a ferry at Laleham, and *Sir William Lowther's case* in 2 Lord Raym. 1409, taken together, shew that the question turns upon its being of a private nature, or not. The distinction is between public and private injuries. And this distinction was antecedent to the Acts of Parliament of 4, 5 W. & M. and 9 Ann.

Markets and fairs are of a most public nature: and somebody ought to be answerable to the public. Whereas here is no check at all; no authorized regulations, even by their own confession: and there ought, in all markets, to be the privilege and protection of a market overt.

The 2d objection depends upon facts.

All that promoted and encouraged this illegal act are liable to an information for convening and holding this unlawful assembly which is a market in all respects, but those in which it ought to be one. Mr. Serjeant Hawkins is of opinion, "that these public meetings, &c. are not justifiable."

Toll is not incident to a fair or market. However, here it is sworn "that they do collect duties;" and this is not denied, "that they have collected stallage or pennage." So that if they do not meddle with the onus, they take the commodum.

If they can do this, there is an end of any more grants from the Crown of fairs or markets.

If it is so convenient; let them apply for a legal grant, and take the proper steps.

The action is brought by the owner of another market, for a private injury: this information that we pray is *diverso intuitu*, for a public offence and usurpation. However, the action is dropped; it is discontinued: but if it subsisted, it would be an inadequate remedy.

Lord Mansfield.—If it were necessary to determine “whether the Court could grant an information for holding a fair or market,” I should desire time to consider: for, it does not sufficiently appear, whether before the \* Act, the King’s Coroner and Attorney could file such an information. If he could, the power is not taken away from him to do it now by leave of the Court: if he could not, it is not given to him.

In the case first cited,<sup>†1</sup> it appears that this Court, in 12 W. 3, before the Act of 9 Ann. granted an information [1816] in the nature of a *quo warranto*. And if they did it in one case, they may in others. The Court (taking that power for granted) held that the King’s Coroner and Attorney ought to take a recognizance; and set aside the process, for want of one. But if he could not file such an information before, it would be going very far, to say “that that Act gave him the power of doing it.”

*Rex v. Sir Thomas Reynell*, in Strange,<sup>†2</sup> is a very short note. But no case or even dictum appears, or any instance, where the coroner and attorney did file these informations before the Act of 4, 5 W. & M.: nor by the records of the office, is there any sort of proof of it, therefore I should desire the records to be searched, if it were necessary to form an opinion on that point. But that is not, at present, necessary; because I think this rule ought to be discharged on another point.

Therefore on the former point, I give no opinion, nor have formed any.

But as to the second—Upon the circumstances of this case, I am clear that there ought not to be an information in the nature of a *quo warranto*.

This rule is drawn up, “that the defendants shall shew cause why they hold, or encourage and promote the holding a fair or market.”

Now though it were admitted, that an information in the nature of a *quo warranto* might go, to put the defendant to shew by what title he holds it; and that therefore the former part of the rule might be right; yet a *quo warranto* will not lie for encouraging and promoting the holding one. Therefore the rule ought to have been drawn up in this form. Here, all the defendants are only encouragers or promoters: no one is charged with actually holding a market or fair, or with claiming to hold one. There are no marks of a fair or market; no toll claimed or taken by the lord of the soil. The defendants are only guilty of a misdemeanor, at the most: there is no usurpation of a franchise.

Therefore this rule ought to be discharged.

Mr. Justice Wilmot said, he should doubt much if an information in the nature of a *quo warranto* could lie, upon a private application, for this usurpation upon the Crown; because the defendants could have no costs beyond the 20l.

[1817] However, he gave no opinion on this head.

The reason why a fair or market can not be holden without a grant, is not merely for the sake of promoting traffic and commerce; but also, for the like reason as in the Roman law, for the preservation of order, and prevention of irregular behaviour; “*ubi est multitudo, ibi debet esse rector.*”

Therefore this is not a question “whether this is or is not a legal assembly:” (that is a very different question).

The present question is “whether the Crown’s name can be made use of at the instance of a subject, for this particular purpose.”

The immediate injury is to the Crown: the rest is consequential.

The old writ of *quo warranto* is a civil writ, at the suit of the Crown: it is not a criminal prosecution. It probably dropped with eires: which is the more likely, because the *quo warranto* was to be determined in eire. But be that as it may, this was the true old way of inquiring of usurpations upon the Crown, by holding fairs or markets; viz. by writs of *quo warranto*.

\* V. 4, 5 W. & M. c. 18. V. also 9 Ann. c. 20, s. 4.

†<sup>1</sup> 1 Salk. 374, 376.

†<sup>2</sup> V. 2 Sir J. S. 1161.



Then informations in the nature of a quo warranto came into use and supplied their place.

In all the cases I could find, (and I searched all that I could meet with,) all informations of this sort were filed by the Attorney General; none by the King's Coroner and Attorney. And this is natural, and easily to be accounted for; because it is a private right of the Crown.

How then could the Statute of 4, 5 W. & M. alter this? That Act was made to prevent the Master of the Crown-Office from vexing and oppressing the subject; and intrusted this Court with the power of inspecting the filing of informations, and seeing that he did not exercise his power to the oppression of the subject, or without sufficient ground and foundation. So that that Act was made to check and control the power of the Master of the Crown-Office; not to give him a right to exercise a power which he never exercised before: quite the contrary. It is contrary to all principles, to suppose that he should [1818] have such a power. Even this Court can have no authority, but by common law, or prescription, or by Act of Parliament.

How came, then, the case of *Hertford* \* to extend the recognizance to these cases of informations in the nature of quo warranto? This case I own is a great authority, and staggers one: otherwise I should have had no doubt about it. And I think that that case ought to be carried no further than to corporation-offices.

If any cases are to be found between 4 & 5 W. & M. and 9 Ann. where the Master of the Crown-Office has exercised this power, they will only prove that he had exercised that authority before 9 Ann.

But I find no cases that have any weight with me, upon the present occasion. *Rex v. † Wilkinson and Others* was clearly chargeable with an inaccuracy; it was issued as upon 9 Ann.; which it ought not to have been: and it was without argument; at least, this point was not debated. The other case (*Rex v. Mary Daffey*) was only a rule to shew cause.

If this matter had depended upon the former point, I should have desired time to consider upon so important a point.

But on the second point, what my Lord Mansfield has said, is decisive.

Erecting a warren is a misdemeanor; yet not within the Act: therefore all misdemeanors are not within it.

If an action is not yet brought, or does not go on; yet an action may be brought, in future.

The Crown will not grant a fair or market, without an *ad quod damnum*. And if the Crown do grant one, yet the owner of another market may bring an action, or obtain a *scire facias* against the grant.

This is only a private dispute between two private persons about holding this market; which affects, in interest, the market of the other person: it is a dispute about a [1819] private property, confessedly. Are we, then, to interpose, as for an usurpation of a franchise upon the Crown? Here is no claim of a franchise. The pittance is only taken *ratione soli*.

This has not all or any of the great badges of a fair or market; no court of pie-powders, no clerk of the market, &c. No person now before the Court claims such a franchise. Therefore there is no reason for us to grant this information.

Mr. Justice Yates—The first point is a question of infinite moment; "whether an information in the nature of a quo warranto, for usurping a fair or market upon the Crown, can be granted upon the application of a private person."

In informations in the nature of quo warranto, there is a punishment for the misdemeanor, and also a judgment of ouster of the franchise.

A private person may indeed apply, as for the misdemeanor: and every usurpation of a franchise is a misdemeanor. Therefore I should concur, as to this, in the

\* 1 Salk. 374, *Rex v. The Mayor and Aldermen of Hertford*.

† This case was determined upon Monday, 20th May, 1745, by Ld. Ch. J. Lee, Mr. J. Denison, and Mr. J. Foster. No toll was there taken or demanded; nor did any particular person claim the right of holding a market. Yet the Court were unanimous in making the rule absolute for the information: and Ld. Ch. J. Lee cited a case of *Rex v. Browning, et Al*, for erecting a skin-market at Smithfield Bars, as a strong case in point.

case of *Hertford*: and with the leave of the Court, an information might, I think, be granted for the misdemeanor.

But can a private person thus call upon another man to shew his title, where there is no mixture of criminality?

This might be attended with very bad consequences. It might be prejudicial to the Crown, by collusion; and it would furnish the subject with means of oppression: and the defendant could have no costs beyond the 20l. Which, in a quo warranto information, is an inconsiderable sum; though it may bear some proportion to the cost of an information for a misdemeanor.

The Statute of 9 Ann. extends only to corporation offices: a fair or market is not within the intention or construction of that Act.

But I give no fixed or determinate opinion upon this first point; and only throw out what strikes me at present.

On the second point, he concurred with Lord Mansfield and Mr. Justice Wilmot.

Mr. Justice Aston did not think proper to give an opinion on a question not necessary to be now determined; and where the proper persons are not before the Court.

[1820] The Crown might bring a quo warranto; or the subject, an assize of damages.

But he would give no opinion, he said, "whether the subject can demand of another person to shew his title to hold a fair or market, in this method of application."

He added this further—I find I have a case that has not been mentioned before: it was in 14 G. 2, B. R. *Rex v. Owen et Al.*† Where an information in nature of a quo warranto was prayed for holding a market at Llanbrinmair; in which, this point was much discussed, but not settled.

The taking pennage weighs nothing with me; because the owner has a right to the soil.

I have no notion that 4, 5 W. & M. can extend the power of the Master of the Crown-Office. It is restrictive of his filing oppressive or malicious informations: and the Court have, since that Act, always refused to grant informations for trifling batteries or misdemeanors.

But what guides me in the present case is, that there is not a sufficient claim of a right of holding a market or fair charged upon the defendants, by any thing that has been laid before the Court. And I think (with Lord Mansfield) that the rule ought not to have been drawn up as it is.

Therefore he concurred.

Sir Fletcher Norton was not satisfied with what seemed to be the Court's opinion on the 1st point; and mentioned a case of *Rex v. Gouge*—† for holding a court-leet. And he said he believed there were several such informations granted by the Court, in cases not within 9 Ann. c. 20.

Lord Mansfield—Any one case of the Court's granting such an information before the statute would be material: so are all those granted since the statute, if not within the reason of the *Hertford* case. That case goes [1821] upon the supposition, that there was no other way to try it, nor to redress the parties concerned. So does the case in *Strange*, and a constable is within the same reason.

But Mr. Justice Wilmot, said he did not see that these cases were conclusive; because he thought that such informations seemed confined to usurpations upon the Crown. He said, he remembered an information applied for litigated, about a

† I have very full notes of that case. It was first moved and denied in H. 1738, 12 G. 2. It came on again, in Trin. 1739, 13 G. 2, and a rule made to shew cause. It came on again in P. 1740, 13 G. 2, and again in H. 1740, 14 G. 2, when the rule was (of course) made absolute against several of the defendants who neglected to shew any cause; but was discharged as against Mrs. Owen and her son; because they had neither taken toll, nor set up or encouraged the market, nor pretended any right to a market, but, on the contrary, disclaimed it. The rule in *Rex v. Peele et Al.*, H. 10 G. 1, and the rule in *Rex v. Browning et Al.*, Trin. 10 G. 1, were there produced: both which were made absolute. They were for setting up skin markets in Smithfield.

† 23 G. 2, qu.

tumultuous assembly at Brentwood. He also remembered *Rex v. Owen*:<sup>†1</sup> it was moved by Mr. Wilbraham.

Lord Mansfield—If the Court can do it, then it must depend upon the circumstances of the particular case.

It is said, that in 23 G. 2, an information in the nature of a quo warranto was granted for holding a court-leet. Now this is very material: for the case of holding a leet is no more within 9 Ann. than the present case is.

It was agreed on all hands, that an action would not be an adequate method of determining the merits of the question between the parties.

Upon the whole—

The Judges all declared expressly, that they were far from giving any opinion one way or another upon the first point; but meant to let it remain open to any future light that might be procured upon the subject, by cases or precedents or otherwise, and particularly by searches after what the Master of the Crown-Office had done in these cases, before the two Acts of Parliament of 4, 5 W. & M. and 9 Ann.

As to the second point—They were clear and unanimous, that the defendants were not sufficiently shewn to have usurped upon the Crown this franchise, of holding or even claiming to hold a fair or market.

Rule discharged.

On the next day (viz. Wednesday 27th November) Mr. Justice Wilmot mentioned his note of the case of *Rex v. Owen*, P. 13 G. 2, B. R. and repeated it—Mr. Wilbraham moved, &c. <sup>†1</sup> and said there was no toll, nor weights or measures; and therefore it was no legal market. Per Cur. No market is claimed by any particular persons. If it be attended with inconvenience to private persons who have markets near adjoining it, they may bring their action.

[1822] And I find this further addition at the bottom of my note “However, at the prosecutor’s instance, the rule was enlarged.” I have made a quere “why.” \* I suppose it came on again because my brother Aston’s note of it is of a future term.

Mr. Justice Aston—My note is of H. 14 G. 2, (which he repeated). I took the opinion of the Court, the second time it came on again; but not the first time,<sup>†2</sup> when my brother Wilmot took his note.

Mr. Justice Wilmot—I have another case: which was in Tr. <sup>†2</sup> 11 G. 2, B. R. *Rex v. Cann*. The Chief Justice being absent—The Judges Page, Probyn, and Chapple refused to grant the information in the nature of a quo warranto; because it was a private matter, where the party might have a remedy by action, if he was prejudiced.

I have also a long note of *Rex v. Sir Thomas Reynell*; § where the Court held “that if Sir Thomas had claimed an exclusive ferry, it had been the proper subject of an information in the nature of a quo warranto.”

In P. 6 G. 1, B. R. *Rex v. Nicholson et Al*,—trustees for enlarging the port of Whitehaven; an information in the nature of a quo warranto was granted; because it was a matter of a public nature.

Lord Mansfield—You see, these cases support our determination of yesterday: and they also support the general ground upon which the motion was founded.

Mr. Justice Wilmot—They are strong, I own: but that is a matter of future consideration, if any future application shall be made.

Lord Mansfield recommended (in such case, of any future application,) a search in

<sup>†1</sup> See his report of it, *infra*, and in next page, (1822,) and my note of it, ante, 1820, in the margin.

<sup>†1</sup> V. ante, p. 1820, et supra.

\* The rule was enlarged that Ld. Ch. J. Lee might look into the affidavits.

<sup>†2</sup> No opinion was given, in p. 13 G. 2.

<sup>†2</sup> It was in Trin. 1737, 10 and 11 G. 2, (Saturday, 25th June,) for holding a court-leet in the manor of Olveston in Gloucestershire.

§ So have I. It was on Monday, 25th Jan. 1741, I find I have subjoined to the end of my own note, the following words:—“So that it was agreed that an information would lie for setting up an exclusive ferry across a navigable river; provided the charge was sufficiently made out.”



the Crown-Office ; whether there are many instances of informations in the nature of a quo warranto filed by the Clerk of the Crown, in corporation causes, before 9 Ann.

N.B. The first point stands quite free from bias from any opinion one way or the other ; as all the Court [1823] declared themselves open to such conviction or alteration of sentiment, as might arise from precedents which may be produced in future, or from future reasoning upon the subject.

WHAROD *versus* SMART. Thurs. 28th Nov. 1765. Rule not to commit waste pending a writ of error.

Mr. Francis Smart having brought a writ of error in Parliament, upon an ejectment on the demise of Boughey,—

The Court obliged him to enter into a rule “not to commit waste or destruction during the pendency of this writ of error.”

Mr. Smart did not oppose it : and accordingly, he entered into the rule ; and also justified (to 400l.).

The end of Michaelmas term 1765, 6 G. 3.

[1824] HILARY TERM, 6 GEO. III. B. R. 1766.

REX *versus* INHABITANTS OF UNDER-BARROW AND BRADLEY FIELD.  
Monday, 27th Jan. 1766.

This case is already published, in the quarto-edition of my Settlement-Cases, pa. 545, No. 175, with a note upon it.

WILSON *versus* MACKRETH. Tuesday, 28th Jan. 1766. Trespass vi et armis will lie, wherever there is an exclusive right.

[Referred to, *Low Moor Company v. Stanley Coal Company*, 1875, 33 L. T. 444 ; *Sutherland v. Heathcote*, [1891], 3 Ch. 518 ; [1892], 1 Ch. 475].

This was an action of trespass for entering the plaintiff's close called Carr-Moss ; and digging and carrying away his turf and peat : and the general issue was joined.

It was tried at the last assizes for Westmoreland, before Mr. Justice Gould : and upon the trial it appeared in evidence—

That the plaintiff was seised in fee of a freehold tenement in the manor of Upper Staveley, whereof Lord Suffolk and Sir James Lowther, Bart. were lords, in which manor there is a large waste called Staveley-Head-Fell, upon which there are divers large mosses, out of which turves and peats are usually dug.

That the plaintiff, and all those whose estate he hath in his said tenement, hath time out of mind had and used an exclusive right of digging turves in a certain moss in the said waste called Carr-Moss, marked and bounded out from six other tracts of moss in the said waste by certain meer-stones ; which tracts are and have been also used and enjoyed in the like manner as turbaries by the owners [1825] of six other tenements, whereof other persons are in the like manner seised in fee, and lying within and holding of the said manor ; saving that two of the said turbaries have been sold off from two of such tenements, and used by the purchasers.

That all these mosses lie contiguous and open to the rest of the waste ; and the other tenants of the said manor, as well as the owners of the said tenements, have common of pasture on the said waste, and feed on these mosses as well as on the rest of the waste.

That the other tenants of the said manor also got turves on other mosses in the said waste, but not in any of the above seven mosses.

That the plaintiff and other owners of the seven mosses have sold the peats arising from those mosses respectively.

That the defendant dug and carried away peats in the place in question.

Whereupon a verdict was given for the plaintiff, subject to the opinion of this Court upon the following question.

"Whether, upon the above state of the case, this action was maintainable." (a)

Mr. Wallace, for the plaintiff, insisted that he was intitled to maintain an action of trespass.

Their objection is "that it ought to have been an action upon the case."

To prove that trespass would lie in this case, he cited 2 Ro. Abr. 540. Moore, 302, *Welden v. Bridgewater*, and Bro. Trespass, 55.

Here, the plaintiff had an exclusive right, and held it separate from every other right; though charged with an incumbrance for the purpose of pasture only. The plaintiff is the owner of the soil.

Mr. Wedderburn, contra, for the defendant.

The plaintiff had no right of ownership, either in the soil, or in the profits of the soil. Therefore he can not maintain trespass quare clausum fregit.

[1826] This moss has been allotted to several persons, for the purposes of turbary only: but other tenants of the manor of Upper Staveley have the right of common upon it.

This division of this moss amongst the tenants of the seven tenements has been made for the mutual convenience of the general number of the tenants of the manor intitled to common of turbary for firing.

The plaintiff has no ownership of the soil: he has no right to dig for any thing else, but turf only. And if the land was drained or rendered fit for culture or pasture, he would have no right to any improvement of it. It is only a right of turbary in gross.

The cases which have been cited are not applicable. The vesture of the land is a right to the land itself.

Mr. Wallace was going to reply. But

Lord Mansfield said, there wants nothing to answer the objection, but to state the case: which I will do, for the sake of the students.

Then he stated the case, verbatim.

The plaintiff's right is in a several piece of ground, butted and bounded; a separate right of property, to take the profit of the turf, and to dig it for that purpose.

The plaintiff has this right exclusively of all others, and the defendant has disturbed him in it. Therefore trespass lies; though he has not the absolute right to the soil. (b)

Mr. Justice Wilmot—If this was only a right of common of turbary, trespass quare clausum fregit would not lie.

But this is an exclusive right to dig turf.

It appears from 1 Inst. c. 1,\* under the word "land," that is not necessary he should have the whole property of the land.

This must be taken to be a grant from the lord of the soil. He stands in the place of the lord of the manor.

[1827] The property of the turf is in the plaintiff. No other person could maintain this action. Therefore he may.

There is a difference between exclusive rights, and right of common. In the former case, the grantee may take away thorns cut: but the commoner can not. Yelv. 187, 188. *Dewclas or Dowglas v. Kendall*, Cro. Jac. 256, S. C.

These mosses are severed, and six of them enjoyed by other people; therefore decisively a separate right. And therefore the plaintiff may support this action of trespass.

Mr. Justice Yates said it was a clear case: for wherever there is an exclusive right, trespass lies. And this is clearly an exclusive right.

I do not see that this right differs from a right to a sole and separate pasture, for a time: and in that case, during that time, trespass lies.

Mr. Justice Aston was of the same opinion. And he mentioned the case of *Hoe v. Taylor*, in Moore, 355, where the second error assigned was "that trespass did not lie

(a) It did not appear that the defendant was tenant to Lord S. and Sir J. L.; if not it seems the action lay; but if he was, then query whether a general action of trespass or case lay. See 20 Vin. 448 (L).

(b) Qu. whether it will lie against the owner of the soil? Vide 2 R. Abr. 550, or 20 Vin. 448, L. 4.

\* V. Co. Litt. p. 4 a. b.

quare clausum fregit; because the soil was not granted." But all the Court held "that it did lie;" although they granted, that the soil did not pass: for, he who has herbage, pastura, &c. shall have trespass vi et armis.

Per Cur. unanimously,

Let the postea be delivered to the plaintiff.

REX *versus* SPENCER, Common Council-Man of Maidstone. Wednes. 29th Jan. 1766.  
Number of electors may be warranted by a bye-law.

Sir Fletcher Norton, Mr. Serjeant Leigh, Mr. Burrell, Mr. Ashhurst, and Mr. Dunning, on behalf of the defendant, on Saturday last (the 26th of January) shewed cause against arresting the judgment for the defendant, and entering judgment for the King against the defendant. A rule to that purport had been made on Monday the 11th of November 1765, on the motion of Mr. Cox; who objected to the validity of the bye-law under which the defendant justified his election into the office. He urged, that it was a bad bye-law, as it restrains and narrows the number of electors without any authority from the [1828] charter, and even contrary to it; and without the consent of the electors, takes away their rights; and is vague, indefinite, and uncertain; and that such a restriction of the number of electors can not be allowed in the case of a common council-man's election, whatever might be the case of the election of the principal officer.

Sir Fletcher, having first objected to the rule as drawn up, proceeded to the merits; and urged, that the prosecutor ought regularly and properly to have demurred to the defendant's plea: but as he had elected to plead to issue, he was now bound by the verdict, and could not have recourse to a motion in arrest of judgment.

It was an information in the nature of a quo warranto for usurping the office of a common council-man of Maidstone.

The defendant justified under a bye-law dated 18 August 1764, and made by the mayor, jurats and common council, by virtue of letters patent of 21 G. 2. It recites the power given by the charter "for the mayor, jurats and commonalty to elect common council-men;" and recites "that the commonalty were very numerous, and the admission of them to vote at the election of common council-men had been found by experience to be attended with many inconveniences, and had from time to time occasioned divers riots and disorders and great popular confusions, and very much disturbed and broken in upon the peace, good order and government of the said town and parish;" and further recites "that such inconveniences would be likely to be remedied, if the right of electing of the common council were to be confined to the mayor, jurats and common council, and such of the common freemen, as had executed parochial offices in and for the said town and parish in manner therein after mentioned:" and then (for preventing of the like inconveniences for the future, and for the avoiding of popular confusion and disorder in the election of common council-men,) it ordains "that upon every or any future election of a common council-man or common council-men of the said town and parish, the mayor, jurats and common council for the time being, of the said town and parish, and such of the common freemen for the time being, who should reside in, and should respectively have gone through and served for the space of one whole year respectively the several offices of churchwarden and overseer of the poor, respectively, for the said town and parish, or the major part of such mayor, jurats, common council-men and common freemen qualifi-[1829]-ed as aforesaid, should meet and assemble themselves together in the court-hall of the said town and parish; and being then and there so met and assembled together, the said mayor, jurats, common council and common freemen of the said town and parish qualified as aforesaid, or the major part of them so met and assembled together should, by themselves, without the presence or concurrence of any of the commonalty of the said town and parish, elect and choose one or more of the principal inhabitants of the said town and parish to be a common council-man or common council-men of the said town and parish."

Note.—The charter directs the nomination and election of common council-men to be by the mayor, jurats and commonalty, and their successors, or the majority of them, out of the principal inhabitants of the said town and parish.

Note also.—The new letters patent of incorporation bear date 17th June, 21 G. 2, and incorporate them by the name of "mayor, jurats and commonalty;"



to consist of a mayor, 13 jurats (including the mayor,) and 40 common council-men: and power is granted to the mayor, jurats and common council to make bye-laws.

To this bye-law pleaded by the defendant, the prosecutor replied: 1st. That the common council were not duly assembled; 2dly. That they had no power to make such a bye-law: and issue was joined thereupon. Both these issues were found for the defendant.

Sir Fletcher insisted, on his behalf, that the prosecutor could have no more than a rule to shew cause "why this judgment should not be arrested:" whereas the present rule is drawn up not only to shew cause "why the judgment should not be arrested;" but also, why judgment should not be entered "for the King against the defendant."

He then answered their objections to the bye-law:—premising, 1st. That corporations have incident power to make bye-laws. 2dly. That that power is lodged in the body at large: unless placed expressly elsewhere, 3dly. Wherever the Crown gives it expressly elsewhere, the power will reside where the Crown has vested it. 4thly. Wherever the power is lodged, it is equally strong; it is the legislative power of the corporation, and [1830] binds all their members. 5thly. A bye-law may, to prevent confusion, restrain popular elections: it may restrain the number of electors.

The defendant's counsel then repeated the prosecutor's objections, and answered them.

1st. It is objected, that this is a bad bye-law, because it is not warranted by the charter; which only extends to cases where penalties are annexed: and that the penalties must be inflicted by the whole body.

Answer.—But the power of making bye-laws is one thing: the power of annexing penalties is another. And here the bye-law is a good one, though it should have no penalty annexed to it. It is, "to restrain the number of electors to such of the commonalty as have executed the office of churchwarden and overseer."

Besides, the words do not require such a construction as they put upon them: for the same persons are intended to be the makers of the bye-law, and the annexers of the penalty.

However, the true answer is "that the bye-law does not require a penalty: the members are amovable, if they disobey it."

2dly. It is objected that the bye-law is contradictory to the charter, which requires the election to be by the body at large: so that it is repugnant to the charter both in letter and spirit.

Answer.—The bye-law is not contradictory to the charter: for it continues the election in the same set of persons, though the number of them is restrained. It is restrained to such of the commonalty as have served parish-offices: it has only narrowed their number; not taken it from their body. It remains virtually and substantially in the same parts of the corporate body.

3dly. This objection was split: and it was said, that the number of electors ought not to be narrowed as to the election of a common council-man; however it might have been, if it had been the head-officer.

Answer.—But the reverse of this objection is the truth. So that the reasoning holds inverted. (V. 4 Inst. 48, 49. 4 Rep. 77 b. 78 a.)

4th Objection. That the bye-law takes away the power of the commonalty, without the consent of the commonalty: and the case of *Corporations* in 4 Co. 78, and 3 [1831] Bulstr. 71, the case of *The Corporation of Colchester* is urged in support of this objection.

Answer.—But wherever the power of making bye-laws is lodged, those persons have the full power of making them: and the consent of the rest is included.\* Which is an answer to *The Colchester* case in 3 Bulstr. 71, and the case of *Corporations* in 4 Co. does not affect this case. For there no bye-law appeared: the Judges were forced to presume one.

However, it still rests virtually in the body of the commonalty, though restrained as to the particular persons.

They further observed, upon the case of *Corporations* "that as a bye-law was there presumed; and no particular clause in the charter appeared to give a power of making bye-laws: it must be presumed to have been made by their incidental power, and consequently to have been made by the whole body." They also observed, that the

\* V. Jenkins's Centuries, p. 273, case 93.

body at large having themselves chosen the common council, the body at large might be said to have actually and personally consented to what these their representatives had enacted into bye-laws.

5th objection. That the bye-law is vague, indefinite, and uncertain.

Answer.—Id certum est, quod certum reddi potest. And here it must appear, at the time of election, who are those substantial electors, who have served public offices; they are sufficiently described and defined.

They therefore prayed that the rule might be discharged, and the judgment stand.

Mr. Morton, Mr. Cox, and Mr. Wallace, contra, pro Rege.

They admitted Sir Fletcher Norton's two first positions; but denied the third, together with its consequences: and they insisted,

That the valuable franchise of a vote given to an individual can not be taken away without the consent of such individual.

That the power of making bye-laws is to be taken strictly: and therefore this power to make bye-laws shall not be extended further than what appears to be the manifest intention of the charter.

[1832] And that this bye-law does not only restrain, but totally varies the mode of election established by a charter not yet 20 years old.

The charter recites the mischiefs and grievances arising from disputes about elections; and was obtained upon the representation of the commonalty. It directs, specifies, and settles a certain and indubitable method of election, that the town may enjoy peace and quiet. Then it directs and specifies the particular rights, and the persons who shall have such rights; and prescribes the mode of election: and the mode of election is directed and prescribed, subsequently to the clause which gives the power of making bye-laws; and it describes what species of bye-laws they are to be. Surely, this is a negative upon a bye-law afterwards made to the contrary of it.

The charter only intended to give the select body a power to make by-laws for correcting offenders, for regulating trade, and matters of the like kind: in short, such bye-laws as might be enforced by penalties; not such as would take away the rights of election.

And they can make no bye-laws but such as are within the power given them by the charter. So was the opinion of the Lord Chancellor, in the case of *Child v. Hudson's Bay Company*, 2 Peere Williams, 209.

The charter now under consideration expressly gives the right of election to the commonalty. But this bye-law totally alters, overturns and changes the nature of the election: it takes it quite away from the commonalty, and places it in a few house-keepers, who have served certain parish-offices.

They said, they would not contend for any distinction between the election of principal officers of corporations, and subordinate ones: (which distinction might perhaps be argued for, from the case of *Corporations* in 4 Co.).

But, certainly, an integral part of the corporation can not be struck off: nor can the makers of a bye-law take the power of election from those to whom the charter has given it, and place it in themselves. Whereas here the makers of this bye-law have, in a great measure, placed the election in themselves. For, as the charter contains a clause of ne intromittas as to the county justices, the borough-justices have the power of appointing over-[1833]-seers: and three of these reduced electors are borough-justices by their office.

The power of voting (a very valuable franchise) can not be taken away without the consent of the voters.

The King himself can not take it away, when he has once given it. A man once possessed of a franchise can not lose it without his own consent. 4 Co. 77, le case de *Corporations*. Bulstr. 71, the case of *The Corporation of Colchester*. Comberb. 316, *Rex v. Larwood*, and 1 Salk. 190, *Butler v. Palmer*.

This bye-law totally changes the nature of the election: it reduces it from 800 voters to ten. It varies and alters the qualifications of the electors: it does not only restrain their number.

This kind of restriction is what this Court will never allow. It is narrowed, restrained and limited to those very few who have served the offices of churchwardens and overseers. There is a vast difference between 800 commonalty, and a few parish-officers: some of which are to be appointed by the parson of the parish, and others by the corporation-justices.

Besides, many persons fine for these offices, and do not actually serve them : others are privileged by their professions ; others are exempted by Tyburn tickets. Shall these persons lose their rights of voting ? This bye-law flies in the face of the charter, and contradicts the King's intention : and it would not even answer the end it professes, of avoiding popular confusion and disorder.

Upon this first argument,

Lord Mansfield said, he saw reasons to doubt of the bye-law ; and desired to consider of it.

It is now settled,\*<sup>1</sup> "that the number of the electors may be restrained by a bye-law : but a bye-law can not strike off an integral part of them ; neither can it narrow the number of the persons out of whom the election is to be made."

The charter gives the right of election to the commonalty. But the bye-law restrains it to a few of them : [1834] and those few, under a particular description, namely, such as have been churchwardens and overseers. The corporation-justices appoint overseers : and several persons may be exempted or excused from serving that office at all. These persons would be totally excluded from ever voting. So that some votes would be preserved, of persons nominated by the mayor and jurats, and others could never vote at all. It deserves consideration, "whether this is a reasonable restriction : " though this select body have a power given them by the charter to make bye-laws.

Mr. Justice Wilmot inclined to think the bye-law unreasonable.

He thought, the Court ought to take care that the persons impowered to make bye-laws, exerted their power in a reasonable manner.

They ought not to take the power of election from others, and place it in themselves. Here, the jurats, &c. being corporation justices, have the appointment of overseers. Consequently, this bye-law puts it into their power to say who shall be the electors. And, as some of the overseers are to be named by the parson, it so far puts the election into the power of the parson : or, at least, it may put it into the power of other persons, not corporators, who may have the right of choosing churchwardens.

As to the objection of the want of the consent of the commonalty to the bye-law—He thought them as much included in and bound by a bye-law made by the select body to whom the charter gives the power of making bye-laws, as if they had actually given their own consent.

Mr. Justice Yates, and Mr. Justice Aston thought it bad. A bye-law may narrow the number of electors ; not altering the constituent parts. But here they have gone out of the charter, and imposed qualifications not mentioned in it, nor at all connected with the corporation.

The commonalty are, by the charter, an integral part of the constitution. And this bye-law admits those of them to have a vote, who have served these offices : and excludes those of them who have not ; though some of them may be incapable or not obliged to serve them, and though this qualification has no connexion at all with the corporation. And the corporation-justices have the [1835] appointment of overseers, in their own hands.

In the case of *Rex v. Tucker, Mayor of Weymouth*\*<sup>2</sup>—A bye-law by the mayor and aldermen, "that the mayor should be chosen out of the aldermen," was held bad.

So here, they have restrained the electors, not generally, but with such a distinction as in effect places the election in themselves.

Lord Mansfield said, these observations struck him very strong.

The bye-law introduces a new description not mentioned in the charter, not at all connected with their corporate character, as a qualification to enable them to elect ; and excludes such of them from the right of electing, as have not this qualification.

\*<sup>1</sup> It was settled, not only in the case of *Rex v. Phillips Mayor of Carmarthen*, hereafter mentioned, but also in a later case of *Lee v. Wallis et al*, 27th January, 1756, in this Court, "that a bye-law may narrow the number of the electors, but not of the eligible." [See 4 Bur. 2519.]

\*<sup>2</sup> It was P. 14 G. 2, B. R. and in Dom. Proc. 1742-3, when the Lords affirmed the judgment of this Court. The charter directed the election to be made out of four persons to be nominated out of the burgesses or inhabitants at large. The bye-law directed it to be made out of four persons to be named out of the aldermen, or at least one of whom should be an alderman.



Sir Fletcher Norton observed that this was new matter, as to which he had never been heard.

Lord Mansfield—You ought to be heard to it.

Let it stand over till Wednesday.

Adjourned till Wednesday the 29th.

On which Wednesday, the 29th, the counsel for the defendant, Sir Fletcher Norton, Mr. Serjeant Leigh, Mr. Burrell, Mr. Ashhurst, and Mr. Dunning, endeavoured to answer the objections.

It has been objected, 1st. That an integral part of the corporation cannot be struck off; 2dly. That the bye-law places the power in themselves; 3dly. That it imposes a qualification not at all connected with the corporation.

First.—The case of *Corporations* in 4 Co. 77 b., 78 a., is an authority for us, standing unimpeached: it was there resolved, “that where the charter gives the election to the commonalty, an election by a certain selected number of the principal of them, commonly called the [1836] common council, and not in general by all the commonalty, may be good.” The point “about an integral part of the electors being excluded,” was not determined in the case of *Rex v. Philipps*, in Carmarthen, Trin. 1749, 22, 23 G. 2, B. R. That determination was, “that a bye-law may restrain the number of the electors, but not the number of the objects of election.”

Here the common council are not a distinct integral part of the corporation; for they remain part of the commonalty: whereas in Carmarthen, the common council were chosen out of the burgesses, and not out of the commonalty; and they had never been part of the commonalty. But this corporation of Maidstone consists only of a mayor, jurats, and commonalty. Therefore the commonalty are not here excluded: it is only a reduction of 800 to a smaller number of the same persons; which is allowable.

Secondly.—This bye-law does not put the corporation into the power of the mayor and jurats, as is objected. For whatever may be said about the overseers, yet still the churchwardens may very well represent the commonalty: they are not chosen by the borough-justices, but appointed by quite other persons. The 43 Eliz. c. 2, gives the nomination of them to the parish; the justices are, in their case, only ministerial. The power of appointment of overseers is not in them.

In the case of *Rex v. Justices of Dorchester*—upon a mandamus to the justices “to sign a rate”—It was holden “that their signing a rate was a matter of form only:” they are obliged to sign it.

If this bye-law had in fact tended to place the election in themselves, it would not have made it a bad one: for the Court can not get at the fact, how far the balance of influence is altered. And they will not presume any improper design or consequence: so far from presuming that they will act wrong, it shall be presumed that they will act right.

This bye-law being made by the persons impowered by the charter to make bye-laws, is to be considered upon the same foot as if it had been made by the corporation at large: and they have a right to restrain the number of electors to any number, how small soever. And the very case is put in the case of *Corporations*, 4 Co. by way of illustration: it precisely supposes it. And in that case, there was a common council; which must have been by charter, or at least by prescription.

Thirdly.—As to the objection “that this qualification does not at all relate to their corporate capacity—”

[1837] This bye-law is only descriptive of such of the commonalty, as shall have a right to vote. It describes the most substantial of the commonalty, by their having gone through these public offices. And surely, the bye-law will not be the worse for superadding a qualification. This is not introducing a new class of men under this description: it is only a restraint of the same persons, and confining them to such as are so qualified.

Lord Mansfield—From the cases cited or alluded to, it appears to me, that where the power of making bye-laws is by charter given to a select body, they do not represent the whole community; and therefore cannot assume to themselves what belongs to the body at large: but where the power of making bye-laws is in the body at large, they may delegate their rights to a select body; who become the representative of the whole community.

Now here the charter appoints the election of the mayor to be by the jurats; and

of the jurats, by the mayor, jurats, and common council-men, (excluding commonalty;) and of the commonalty, by the mayor, jurats, and commonalty.

I remember, the charter was much litigated at the time of passing it. And it was matter of deliberation, "whether the power of election should be fixed in the body at large, or in the select body."

I understand the charter as if it had said in express words "that the commonalty shall vote for themselves, and not be represented by the common council."

It is by no means to be compared to cases where there is a common council who are supposed to have been created by the commonalty, and therefore have the original power of the commonalty in them.

Here the common council is no part of the commonalty, but a distinct body. They are constituted *eo nomine*, as common council-men; which is an office for life.

This alone, would be a sufficient objection to the bye-law.

But further, they have here confined the qualification to what does not relate to or concern the corporation; to having been churchwardens, persons appointed annually by the parson; or overseers, persons nominated by the justices.

[1838] This is an abuse of their power for the private benefit of those that have exercised it.

I am therefore clearly of opinion "that it is a null and void bye-law."

Mr. Justice Wilmot declared himself of the same opinion.

The true test of all bye-laws is the intention of the Crown in granting the charter, and the apparent good of the corporation. And upon this principle stands the power of controlling by a bye-law the words of a charter, as far as relates to the distinction between narrowing the number of electors, and narrowing the number of those out of whom the election is to be made. A bye-law may restrain the number of the electors; but it cannot narrow the objects of election. The former tends to avoid popular confusion and riot: but that reason does not apply to the objects of election. This was settled in *The Carmarthen case* (*Rex v. Philips, Jun. Mayor of Carmarthen*, Trin. 1749, 22, 23 G. 2, B. R.) and it was there holden "that a bye-law can't exclude an integral part of the electors."

I do not say, that any integral part is here struck off: which, I think, could not be done.

But a qualification is required, which is neither mentioned in the charter nor at all connected with their corporate character. The charter says the election shall be by the mayor, jurats and commonalty. The bye-law says it shall be confined to the mayor, jurats, and common council, and such of the commonalty as shall have served the offices of churchwarden and overseer of the poor for one whole year.

The charter having named the common council shews that they were meant to be a distinct body or class. No bye-law could have confined it to the common council alone: neither can a bye-law confine it to such of the commonalty as are under such a qualification as is here required.

The Crown have added no qualification to the votes of the commonalty. The bye-law cannot superadd a qualification when the Crown have not; and which has no relation to or connexion with their corporate character and capacity. It is in the teeth of the grant.

[1839] Besides, this is, in effect, putting the power in themselves: for they have the nomination of overseers. The churchwardens are not, indeed, appointed by themselves: but they are appointed by strangers to the corporation. The makers of the bye-law had no right to impose such qualifications.

Therefore this bye-law is void. It not only restrains the number of electors, but imposes qualifications contrary to the intention of the charter. Therefore it is not justified by the case of *Corporations* in 4 Co. 77, 78.

Mr. Justice Yates—Corporations cannot make bye-laws contrary to their constitution. If they do, they act without authority. This bye-law is made by the mayor, jurats, and common council; to whom the power of making bye-laws is given by the charter.

The common council cannot be considered as the representatives of the whole body of the commonalty.—The common council mentioned in this charter, are plainly a distinct body from the commonalty.

This bye-law was not actually made by the whole body.

The Carmarthen bye-law was supposed to be a bye-law made by the whole body:

so was the case of *Corporations* in 4 Co. Whereas, here, the mayor, jurats and common council, (which common council are a distinct body from the commonalty,) make the bye-law, and place the election in the mayor, jurats and common council, together with a part of the common freemen.

This part of the bye-law I therefore hold to be unreasonable, illegal, and bad.

Then as to that part of it which imposes the qualification upon the freemen—It requires from the electors appointed by the charter, a qualification not mentioned in the charter; the having executed quite distinct offices, not at all connected with the corportion. I can not conceive that even the whole body could have thus varied an essential part of their constitution.

These officers (churchwardens and overseers) are alien to the corporation; and depend upon the will of others, and partly upon the nomination of some of the very makers of the bye-law.

The bye-law is, in my opinion, clearly void.

[1840] Mr. Justice Aston—The common council, though part of the corporate body, are a distinct class from the commonalty: they are part of the select body to whom the power of making bye-laws is given. A bye-law may narrow the number of the same electors: but it can not transfer the right of election to different persons.

There was no common council distinct and as a select body, either in *The Carmarthen-case*, or in *The Corporation case*, in 4 Co. 77 b: therefore they remained as part of the general body: here, they are a distinct class.

The intention of the whole charter is to be considered in the construction of it.

You can not change the right of the electors from one body to a different body, or intermix other persons with those who have a right in them.

This bye-law is a manifest scheme of the makers of it, to put the power of election in themselves.

And the qualification here annexed is a suspension of their right, till they shall have served these offices, respectively, for a whole year: so that it is a suspension for two years, at the least. There is no end of qualifications of this sort.

It is a bad bye-law.

The bye-law being thus holden to be bad, the judgment was arrested. And the Court declared, that there ought to be no costs of the trial or motion, on either side.

V. post, pa. 2204, *Rex v. Cutbush*, 30th April 1768.

#### REX versus INHABITANTS OF SILCHESTER. Saturday 1st Feb. 1766.

This case is already in print. See it at large in my *Settlement-Cases*, No. 176. pa. 551.

[1841] FOTTEREL versus PHILBY. Monday, 3d Feb. 1766. A committitur in execution must be entered within two terms.

Mr. Stowe shewed cause against the defendant's being discharged out of the custody of the marshal; a rule for that purpose having been made on Sir Fletcher Norton's motion upon the following fact, viz.

A committitur in execution was entered in the marshal's book; but no committitur-piece was filed; nor was the committitur entered on record within two terms.

In 2 Strange 1215, *Unwin v. Kirchoffe*—The Court held "that the committitur must be actually entered \* on record before the end of the second term."

Here is no entry of the defendant's commitment on the roll; nor any committitur-piece filed, to authorize its being so entered on record.

Therefore Sir Fletcher prayed that the rule might be made absolute for discharging the man: and

The rule was made absolute, accordingly.

REX versus CROOKES. Wednes. 5th Feb. 1766. Indictment for selling by false weights, not to be quashed upon motion.

The Court refused to quash upon motion an indictment found at the Quarter-

\* V. post, *Woodbridge v. Forth, Esq.* B. R. 11th July 1773, Trin. 13 G. 3, accord. [And see 1 East, 407. 3 Bosan. 459.]



Sessions for selling by false weights; though Mr. Wallace made two objections; viz. 1st. That the charge was "that the flour-scale was the lighter;" from whence he inferred that the defendant must injure himself, not his customers who bought flour of him: 2dly. That the charge was only of selling by those false scales, generally, not saying where: so that it did not appear that the offence was committed within the jurisdiction of the justices.

The Court said they were not obliged to quash on motion: and as this was an indictment for such an offence, they might demur to it.\*

Motion denied.

[1842] REGULA GENERALIS. Thursday, 6th Feb. 1766. Enlarged rules to a subsequent term to be on fixed days, and Judges to have copies thereof the day before the beginning of every term.

Lord Mansfield mentioned and declared that the Court was come to a resolution—

That every rule which shall be enlarged to the next subsequent term, shall be fixed to a particular peremptory day, within the first five days of such subsequent term; namely, the first five, to be appointed for the first day; the next five, for the second day; the next five, for the third day; the next five, for the fourth; the next five, for the fifth; and then round again, in addition to each day; and shall be called by the officer, after the whole Bar shall have moved.

His Lordship observed that this will be a very great convenience to the gentlemen at the Bar, especially those who are in great business; as they will know when to be ready and prepared, by being apprized of the exact time when the motions are to come on; and also to the attornies, who will then know with certainty, when to attend their motions, and not be obliged to attend from day to day at an absolute uncertainty when they may chance to be heard.

Whereupon I took the liberty to mention to the Court, how very proper and convenient this regulation would be in another respect also, viz. in saving expence to the suitors of the Court: for that the bills of costs which came before me for taxation were at present full of numerous charges for attending motions for a great many days together; upon all which days they alledged that they had actually and necessarily attended; the truth of which assertions it was almost impossible for me to judge of, and consequently to know how many attendances it was reasonable to allow them for.

Lord Mansfield mentioned this to the Bar, and said that in this respect also, it would be a great convenience to the attornies as well as the client; for that it was not worth their while to attend here several days at an uncertainty, for the common fee allowed for an attendance; and by this regulation, the particular day will be punctually ascertained.

Master Owen informed his Lordship (which he also mentioned to the Bar) that it would be still more advantageous to the attornies on the civil side; as he never allowed them any more than one attendance, be their actual attendances ever so many.

[1843] Lord Mansfield added a direction, "that after every term, there be a list made out, and fixed up in the offices, both on the Crown and civil side, of the rules so enlarged, and the particular days when the respective motions are to come on: and that a copy of such lists be delivered to the Judges respectively, the day before the beginning of every term."

Memorandum.—The next day (Friday the 7th of February) at the sitting of the Court—

Lord Mansfield spoke to both the clerks of the rules, and told them that instead of going on with five causes for five days, and then round again, (which would overload those five first days,) it would be better, and he accordingly directed, that the method should be as follows, viz. "To appoint the first five enlarged rules (either on the criminal or civil side of the Court, as they might happen,) for the first day of the next term: the second five, for the second day of it; the third five, for the third day; and so on, toties quoties, to the 6th, 7th, 8th, 9th, 10th and following days of such subsequent term, without returning back at all to the first day."

N.B. An attorney now present in the Court, declared publicly, upon his cause

\* They afterwards refused to quash upon motion, an indictment for selling coals by false measure, *Rex v. Osborn*, Monday 28th April, 1766.

being put off till to-morrow, "that he had attended it fourteen days, but had not been able to get it on;" some or other of the counsel concerned in it, being either absent or otherwise engaged.

This rule, and the appointment of particular days for special motions, have had a wonderful effect.

Formerly, no rule to shew cause came on, till it was moved by counsel; and no counsel might move oftener than once. Matters of the most consequence and greatest length were postponed. The leading counsel could keep back what they pleased. Business was thrown off to the end of the term; and so great a load upon the last day of it, that though the Court sat till mid-night or later, nothing could be gone into, but was of course adjourned till the next term; and with a little management (where delay was wished,) from term to term. But now, though the business is greatly increased, and increases daily, the whole is gone through [1844] with ease; the counsel know what to be prepared upon; the attornies know when to attend; and every possibility of affected delay is cut off: nobody attempts it; because they know, it would be in vain.

HERNAMAN *versus* BAWDEN, ET AL', Executors of Ford. Saturday, 8th Feb. 1766.

Sailors wages not recoverable if ship taken or lost before the end of the voyage.  
[See 15 Vin. 235, pl. 15. 4 East, 43. Ld. Raym. 739.]

This was an action by a sailor for wages in a voyage "to Newfoundland; and from thence to Spain or Portugal, or some port in the Mediterranean."

A verdict had been given for the defendant: and the Judge (Mr. Justice Gould) gave the plaintiff leave to move for a new trial, without payment of costs; upon a question which arose at the trial.

The question was "whether the sailors in such voyages are intitled to their wages, at Newfoundland, or not till the ship's arrival at the port of delivery of the fish."

The contract was "that the wages should be paid at that port at which such wages were usually due."

The fact was "that this ship was taken, after its arrival at Placentia in Newfoundland; and upon its voyage from Newfoundland to its port of delivery of the fish."

It was insisted on the part of the defendant, that in the course and nature of this particular trade to Newfoundland for fish, the whole is considered as one entire voyage; and is not understood to be finished, till the ship's arrival at the port of delivery of the fish: though they admitted that the general rule in other voyages, was, "that the wages are due upon the ship's arriving at its first port of destination or delivery."

Contra—for the plaintiff, it was denied that this is the course or custom in those Newfoundland voyages; unless it be particularly specified in the contract: which, the plaintiff's counsel said, was usually done, when this was intended by the parties.

They argued, that freight is the mother of wages: and that the quantum of the freight is quite immaterial.

Here, no such custom, as is alledged, has been proved.

Indeed, a special contract may control a general law: but this contract does not do so. Nor can the opinion of [1845] two or three witnesses, or even of the jury, establish it as a custom.

And its being usually inserted in the contract, proves "that there is no such general custom."

Lord Mansfield—It depends upon a matter of fact, whether this case is within the general rule of law: which matter of fact is "where the first place or port of delivery, upon this voyage or contract, is."

It is a voyage from Barnstaple to Portugal or Spain, or other port in the Mediterranean, taking in a cargo of fish at Newfoundland. And so is the very contract itself: which describes it as one single voyage: which is to end either in Spain or Portugal or some port in the Mediterranean, at the election of the freighter.

And the ship was lost before it arrived at its port of delivery.

Therefore the verdict is right.

Mr. Justice Wilmot concurred. Newfoundland is not the delivering port; but the loading port: there the cargo is to be put on board; which cargo is to produce the profit of the voyage.

This is a contract for a voyage from Barnstaple to some port in Spain or Portugal, or some port in the Mediterranean, going round by Newfoundland.

Mr. Justice Yates concurred. It is all one entire voyage. The fish is the only lading of the ship: no matter where taken in. And the ship was lost before its arrival at the port of delivery. As the freighter lost his cargo, the mariner ought to lose his wages. The verdict is right.

Mr. Justice Aston declared himself to be of the same opinion.

The postea was ordered to be delivered to the defendant.

**BENSON *versus* SIR THOMAS FREDERICK, BART. 1766.** Excessive damages alone on a writ of inquiry not a cause for quashing the same.

Lord Mansfield reported the evidence given upon a writ of inquiry which had been executed before him; and upon which, 150*l.* damages had been given.

It was an action brought against the defendant, who was Colonel of the Middlesex Militia, for ordering the [1846] plaintiff, who was a common man therein, and had a furlough from the major, to be stripped, and to receive 20 lashes from two drummers.

Mr. Morton had moved to set aside this verdict, for excessiveness of damages; and had obtained a rule to shew cause.

The counsel on both sides left it upon his Lordship's report.

Lord Mansfield said, he had no doubt but that it might be right to give an opportunity of reconsidering verdicts where excessive damages had been given.

But in the present case, he was not dissatisfied with the verdict: for Sir Thomas had manifestly acted arbitrarily, unjustifiably and unreasonably. He had ordered this innocent man to be flogged (though unjustly and improperly,) merely out of spite to his major; because the major (Spinnage) who gave the man the furlough, had offended him: in which, he acted *malo animo*, and out of mere spite and revenge. And the man, though not much hurt indeed, was scandalized and disgraced by such a punishment. The defendant is a man of such substance as to be very able and sufficient to pay this sum; and could only save a part of it by having a new writ of inquiry, if we were to direct one. His Lordship acknowledged that he thought the damages were very great, and beyond the proportion of what the man had suffered: and yet, under the whole circumstances of the case, he was not for granting a new trial.

Mr. Justice Wilmot concurred; and observed, that it was rather owing to the lenity of the drummers than of the colonel, that the man did not suffer more. Therefore, though he had no doubt but that the Court might look upon these damages to be too high, in a common and ordinary case, and had power to set aside the verdict and award a new writ of inquiry; yet, as in this case, the defendant had acted very arbitrarily, and was well able to pay for it, he did not think the Court were obliged to set aside the verdict that the jury had found.

Mr. Justice Aston concurred. He was very full in vindicating the discretion of the Court, to grant new trials, even when the damages were ideal: and cited the case of *\* Wood v. Gunston*. But as, in the present case, the defendant had acted very arbitrarily and unjustifiably, [1847] and under the circumstances that appeared upon the report, he did not think this to be a proper occasion for the Court to set the verdict aside.

Per Cur. unanimously,  
Rule discharged.

**HESKETH *versus* BRADDOCK. Tuesday, 11th Feb. 1766.** Bye-law in restraint of trade bad.

This was a writ of error from the Great Sessions for the county of Chester; who had reversed the judgment of the Portmote Court of the City of Chester, in an action of debt brought there for recovering a penalty of five pounds, upon a bye-law made by the Corporation of the City of Chester. The breach of the bye-law was assigned in the defendant's keeping an open shop, and exercising the trade of a grocer within the said city; though he was not a freeman of the city.



The original action was brought by Peter Ellames and Henry Hesketh the Treasurers of Chester, in the said Court holden before the mayor called the Portmote Court; and judgment was there given for the plaintiffs: after which judgment, Peter Ellames died.

The declaration states an ancient custom, "that no person, whatsoever, not being free of the said city, might or ought to sell or put to sale any wares or merchandizes within the city or the liberties thereof by retail: or keep any open or inner, or other place or room for shew, sale, or putting to sale of any wares or merchandizes by retail; or to use or exercise any art, occupation, mystery or handicraft within the same city: the time of the fairs excepted." Then it states a custom "that the mayor, aldermen and common council might ordain fit remedy for any customs that might seem difficult or defective; or if any things newly arising, where remedy before was not ordained, should need amendment."

Then the declaration states, that at a common council holden on 26th September, 9 G. 2, before the mayor, &c. duly assembled according to the aforesaid custom, &c. a bye-law was made, "that no person whatsoever, not being free of the said city, should, at any time after the Feast of St. Michael the Archangel then next ensuing, by any way, colour or means whatsoever, either directly or indirectly, by himself or any other, shew, sell or put to sale any wares or merchandizes whatsoever, by retail; or keep any shop or other place what-[1848]-soever inward or outward, for shew, sale or putting to sale any wares or merchandizes whatsoever, by way of retail; or use any art, trade, occupation, mystery or handicraft whatsoever, within the said city or the liberties or suburbs of the same, (the time of fairs in the said city excepted;) upon pain to forfeit the sum of five pounds, &c. to be recovered by action of debt, bill or plaint, to be prosecuted in the name of the treasurers of the said city, in the abovementioned Court of Portmote, to be held before the mayor, &c. &c. with costs of suit; and that (after the costs of suit had been deducted,) one-third part of such forfeiture should be distributed among the prisoners in Northgate gaol of the said city; and another third part should be paid to him or them who should first give information of such offence."

Then the declaration assigns the breach, as is above mentioned.

The defendant pleaded "nil debet:" and issue was joined thereon; and a venire awarded to the Sheriffs of the City of Chester.

The defendant, on the return day of the venire, challenged the array of the pannel, because it was arrayed and made by the sheriffs who were citizens and freemen of the said city. Wherefore he prayed "that the said pannel might be quashed."

To this challenge of the array of the pannel, the plaintiffs demurred. And the defendant joined in demurrer. After which joinder in demurrer, the record immediately proceeds thus—"And hereupon it is judicially taken notice of, by the said Court here (the Portmote Court) and is known to the same Court, that by the custom and constitution thereof and of the city aforesaid, no person or persons can or ought to array the pannel of any jury within the jurisdiction of the said Court or in any civil suit within the said city, other than the sheriffs of the city for the time being, or one of them, or by reason of any default in the said sheriffs, the coroners of the said city for the time being, or one of them; and that by the custom of the said city from time immemorial, no person or persons can or ought to be sheriffs or coroners of or within the said city, but citizens and freemen of the same city."

The record then states the judgment of the Portmote Court, "that the said challenge of the defendant to the said array of the said pannel be disallowed; and that the said pannel of the aforesaid jury so arrayed as aforesaid, be allowed and taken."

[1849] Then the record goes on and states that the defendant, ore tenus, in open Court challenged the polls; because the jurors and each of them were citizens and freemen.

This challenge was also disallowed by the Portmote-Court: and thereupon the issue was tried; and a verdict found for the plaintiff; and judgment accordingly.

A writ of error was then brought in the Court of Great Sessions: and the judgment of the Portmote-Court was reversed there. Upon which judgment of reversal, the present writ of error was brought here.

On Tuesday, the 28th of January last, this case was argued by Mr. Davenport for

the plaintiff in error, (who was also the original plaintiff below;) and Mr. Ashhurst, for the defendant, (who was the original defendant below).

Mr. Ashhurst declaring that he did not mean to dispute the custom, nor the \* bye-law, nor the form of the declaration; but chiefly objected to the interest of the sheriffs and jurors;

Mr. Davenport applied himself to answer that objection.

It was in the Portmote-Court objected, on the part of the defendant, "that the sheriffs and jurors were citizens and freemen of the City of Chester."

He first cited Co. Litt. 156, 157, and then endeavoured to shew that the sheriffs were either not interested at all; or if at all, at least in so small and trifling a degree, that it could be no objection to their returning the venire: and that the interest of the jurors was likewise either none at all, or not sufficient to ground the least suspicion of bias upon. Indeed, the objection does not lie at all against such of the freemen as are not traders.

One third part of this penalty is to be given to the prisoners; one third to the informer; and one third is unappropriated: the freemen have no benefit in it, as such. If they had, it would not be a sufficient objection: as appears by 2 Lev. 231, *Rez v. Mayor, Citizens, &c. of London*.

[1850] Admitting "that there may be a small remote interest," the case of *Ball and Bostock*, in 1 Strange 575, shews that a person, though in some degree interested, may yet be a witness.

In the course of his argument, he endeavoured to shew that the bye-law was a good one; and cited Carthew, 480, *The City of London v. Vanacker*. 1 Ld. Raym. 496, S. C. (with respect to the City of London fining those who are elected and refuse to serve the office of sheriff). 1 Lev. 14, *Mayor and Commonalty of London v. Bernardiston*. 2 Keble, 295, *Mayor and Commonalty of London v. Gould*. 12 Mod. 669, *The City of London v. Wood*. 1 Salk. 397, S. C. 8 Rep. 121, *Waganor's case*. 2 Brownl. 289, S. C. *Waggoner v. Fish*. *Wakeman v. Harris*, B. R. Trin. 1753, 26, 27 Geo. 2, in Worcester. *Bodwick v. Fennell*, M. 1748, 22 G. 2, B. R. on a like bye-law as the present; at the Devizes. *Errington v. Geekie*, Pasch. 9 G. 2, B. R. there cited.

The same objection must lie against a Judge, as against a jury: because one is to judge of the law; the other of a fact.

Here, the mayor, sheriffs, coroners, and jury were all of them citizens and freemen.

No part of the penalty appears, upon the face of the record, to belong to the city: nor is it necessary that every freeman should be considered as interested.

He therefore prayed that the judgment of the Great Sessions of Chester should be reversed.

Mr. Ashhurst, contra, for the defendant.

The sheriff, at the time of arraying the pannel, was a citizen of Chester; and appears upon the face of the record to be so: and this is a good cause of challenge Co. Litt. 157. 12 Mod. 687.

The interest of the sheriff is either direct, or at least so consequential as to affect him.

The penalty is divided one third to the prisoners, one third to the informer; and one third remains undisposed of, and therefore belongs to the plaintiff (the treasurer) for the benefit of the corporation. (For which, he cited a [1851] case in H. 3 G. 1, B. R. *Hollings v. Hungerford*.) And the sheriff is confessed, by the demurrer to the challenge, to be a citizen; and, as such, to be intitled to a part of it.

He cited the case of *Anstey v. Dawning*, 2 Str. 1253, in answer to the minuteness of the interest not making any difference. Any degree of interest is an objection. So it is to witnesses with regard to the repair of county-bridges. So it is to corporators: 1 Vern. 254, *Corporation of Sutton Coldfield v. Wilson*. So it is to parishioners: 2 Vern. 317, *Dodswell v. Nott*;—where the suit related to the loss of money given for the benefit of the parishioners, and the question was "whether any inhabitant of

\* It had been objected below "that the bye-law was a bad one; and that even the custom itself, upon which it was founded, was a bad custom; in as much as appeared thereby, that none could array the pannel, but persons who were themselves freemen."

the parish ought to be admitted as a witness ; " and it was insisted " that the interest was so minute and inconsiderable, that it could not be presumed to influence or bias the witness in his evidence." But the Court, in that case, said " the cases, where the party was concerned in interest, though never so small, have always prevailed : and it was so resolved, upon great debate, in the case of *The City of London* concerning the water-bailiff."

Therefore the minuteness of the interest is out of the case.

But if the sheriff's interest is not direct, it is at least consequential, and a principal cause of challenge.

The case of witnesses is applicable to the present question. They are not admissible, if interested ; as, for instance,

A commoner—to a right of common ;

A parishioner—to a modus ;

A pilot—about steering a ship, 1 Salk. 287, *Martyn v. Kendrickson*—in which last case, Holt, Ch.J. would not suffer the pilot to be a witness ; because he was answerable, if faulty in steering, to the master. Indeed, the objection lies stronger to a juryman than it does to a witness—there is a check on the one : none on the other.

This being a plea of nil debet, it was necessary to prove the whole declaration ; and, consequently, to prove the custom, and also the bye-law : and therefore the jury ought not to have been returned by citizens and freemen, who must have a bias in its favour.

[1852] As to the reason given in the record, why the Court below did not allow the challenge—It is an arbitrary reason : it should have come by way of counterplea.

Besides, such a custom as is ante, 1848, alledged, " that none but sheriffs and coroners can array the pannel," is a bad custom.

This bye-law does not nor could exclude this Court from trying this cause : nor could hinder it from being tried elsewhere than in the Portmote-Court. Therefore if the sheriffs and coroners could not return a jury, the plaintiffs might have tried the cause elsewhere.

He then answered the cases cited on the other side.

The cases in 1 Ld. Raym. 496, Carthew 480, and 1 Lev. 14, were upon returns to writs of habeas corpus : this is by way of challenge. 2 Keb. 295 is as much for me, as for Mr. Davenport. 2. Lev. 231 does not hold so strong, as in the case of a sheriff.

In the case of *Bodwick v. Fennel*, there was no challenge : and the whole penalty was given to the informer, in that case.

As to *Wakeman v. Harris*—No proper bill of exceptions was tendered or signed : therefore they could not take advantage of the exceptions there.

Therefore he prayed that the judgment might be affirmed.

Mr. Davenport, in reply—It is not necessary for the Court to infer here, that the treasurers are trustees for the corporation. No such thing appears upon the record.

As to *Hollings v. Hungerford*—The chamberlain was a stranger to the corporation. But if not, yet this has never been objected to the Mayors of London bringing these actions.

As to commoners, parishioners, pilots, &c.—There the interest is considerable : here, it is nothing, or next to nothing.

This custom does not depend upon the success of this action.

They can make no effectual bye-law, if they can not support this bye-law.

All Courts must take notice of their own customs : and their customs can be tried no where else.

[1853] But Mr. Ashhurst says " that if it can not be tried elsewhere, it is a bad bye-law."

Answer—The bye-law is a good bye-law : it is admitted to be so ; and the case of *Bodwick v. Fennel* proves it.

Returns to writs of habeas corpus are as much in point, as other cases. And in the present case, there was a procedendo granted by the Chancery Court of Exchequer at Chester : \* therefore those cases of procedendos are in point.

Lord Mansfield—We will look into the cases : and if we have any doubt, we will

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\* This appears upon the record.



let you know ; that it may be argued again. If we have no doubt, we will let you know our opinion.

I think this is the first case where the objection has been taken upon the record.

Cur. advis. or ulterius concilium ;

(Eventually, as the Court should direct).

On Friday the 7th of February it was ordered to stand for judgment on Tuesday the 11th.

And now—

Lord Mansfield delivered the resolution of the Court to the following effect.

This was an action of debt for the penalty of a bye-law, which the defendant was supposed to have incurred by keeping a shop within the City of Chester, not being a freeman.

The action was brought in the Portmote-Court, which is holden before the mayor ; and was prosecuted by the plaintiffs, as treasurers of the city, (who are similar to chamberlains in other corporations).

The declaration states a custom in the City of Chester, “that no person who is not a freeman could keep any shop, or expose goods to sale by retail, within the said city ; excepting at fairs.”

And then the bye-law is set forth : which ordains [1854] that no person who is not free of the city, should sell goods by retail, or keep any shop for a retail sale, within the said city, excepting at fairs ; upon pain of forfeiting 5l. for every offence.” This penalty is directed by the bye-law to be recovered by action of debt, to be prosecuted in the name of the treasurers of the city, in the Portmote-Court to be holden before the mayor : and one third of the penalties (deducting the costs allotted to the poor prisoners in the Northgate gaol of that city ; another third, to the person who should first give information of the offence ; and the remaining third is left undisposed of. The declaration then charges, that the defendant had kept an open shop in the city, not being free : in violation of the custom and bye-law aforesaid : and therefore, the plaintiffs, being treasurers of the city, demand this penalty.

To this declaration the defendant pleaded “nil debet :” and issue being joined thereupon, a venire was awarded to the sheriffs of the city, to return a jury of twelve free and lawful men of the city.

When the jury were returned, the defendant challenged the array ; because the sheriffs were citizens and freemen.

The plaintiffs demurred to the challenge : and the defendant joined in demurrer.

In this part of the record, an extraordinary entry is introduced, as a suggestion of the Court, that it was judicially taken notice of, “that, by the custom of the city, no person could array any jury, within the jurisdiction of that Court, but the sheriffs or coroner of the city, or one of them :” and “that none could be sheriffs or coroners, but citizens and freemen.”

After this suggestion, the Court gave judgment on the challenge, “that the same should be over-ruled, and the array allowed.”

The defendant then challenged the polls of the jury ; because they were, all of them, freemen.

And this challenge was also disallowed.

And thereupon, the jury (thus returned and objected to) proceeded to try the issue : and a verdict and judgment were given for the plaintiffs.

[1855] Upon this judgment, the defendant brought a writ of error in the Court of Pleas for the County Palatine : and there the judgment of the Portmote-Court was reversed.

And upon this judgment of reversal, the present writ of error was brought in this Court.

The errors for which the judgment was reversed in the County-Palatine Court, were—

1st. Because the two sheriffs who returned the jury, and the jurors themselves were freemen of the city, and (as such) were interested in the matters to be tried ; and therefore that the challenges were erroneously over-ruled : 2dly. That as it appears from the suggestion introduced into the record, “that in the Portmote-Court, no jury could be returned, but by sheriffs or coroners, who are freemen of the city ; the bye-law which confines the action to such a jurisdiction (where the sheriffs and jury must necessarily be interested) is, in that respect, a bad and illegal bye-law.”

In answer to these objections, it was argued for the plaintiffs, "that neither the sheriffs nor the jurors were interested at all, in the present suit."

It was admitted, "that where a corporation are parties to the suit, or immediately interested in the very issue in question, no freeman can be either a juror or a witness." Co. Litt. 157. 3 Keble, 12, 295. But it was said, that, in this case, the corporation are no parties to the action, nor any way concerned in the point in issue. That the suit is by the treasurers in their separate capacity; and, whatever be the event of it, the corporation can neither pay nor recover any costs. That in this action, the object of litigation is merely the penalty of the bye-law; and in that penalty, the corporation have no share or interest.

It was further argued, that though the bye-law is founded on a custom "to exclude all foreigners from the city;" and the freemen may be said to have an interest in that exclusion; yet this is a remote consideration, which, at most, can affect only such of the freemen, as happen to be traders. That the circumstance of a freeman's being a trader, is a particular uncertain incident; which, if it happens to occur in any of the jurors, might indeed warrant a challenge for favour (where the fact would be tried :) but that a mere possibility of such an interest is no sufficient ground for a principal challenge.

It was also observed, that the verdict for this penalty would not avail the corporation, in any suit upon the custom. For if the custom were to be litigated in a Superior Court, the corporation could not give this verdict in evidence.

And as to the suggestion—It was insisted, that every Court must judicially take notice of their own customs: and, as none but freemen could possibly be either sheriffs or jurors, if the present objection should prevail, this bye-law would be left without a remedy to enforce it; and consequently there would be a failure of justice.

This is the substance of the arguments which were offered in support of the judgment of the Portmote-Court.

But we are all very clearly of opinion, that in this case neither the sheriffs nor jury were competent; and therefore the challenge was improperly over-ruled at the Portmote-Court.

There is no principle in the law more settled than this—that any degree, even the smallest degree of interest in the question depending, is a decisive objection to a witness, and much more to a juror, or to the officer by whom the jury is returned.

The law has so watchful an eye to the pure and unbiassed administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If, therefore, the sheriff, a juror or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment; and therefore will not trust him.

The minuteness of the interest will not relax the objection. For, the degrees of influence cannot be measured: no line can be drawn, but that of a total exclusion of all degrees whatsoever.

In the present case, every member of the corporation was evidently interested in the very issue to be tried. For, the custom "to exclude all strangers from trading in the city," is the main foundation of the action: it is the only ground upon which such a bye-law could, in any case be valid. For, a bye-law "to exclude," without a custom to support it, would be void, as an illegal restraint upon the common right of the subject.

[1857] It was therefore necessary for the plaintiffs to alledge this custom in their declaration. And the defendant's plea of "nil debet" puts the whole declaration in issue. Upon that issue, the plaintiffs must prove the custom "to exclude," as well as the bye-law: and the jury must form their verdict upon the whole. For, all the facts alledged must concur, to prove the defendant indebted to the plaintiffs. If there was no such custom, the bye-law was a nullity; and consequently, the defendant could not owe the penalty.

So that here every freeman was interested in the very issue to be tried. They may indeed, have no share in the penalty itself: but they are interested in the facts on which the penalty depends.

The exclusion of foreigners is a monopoly to the freemen themselves. The enforcing of this exclusion, by bye-laws and penalties, is securing that monopoly. And in this action, the very freemen who were to gain by securing this monopoly, were the

jury to determine it. Therefore every freeman had an interest and bias in the matter of the issue to be tried in this cause.

It is no answer to the objection, to say "that they were to have no part of the penalty:" for still they had a bias upon them in relation to the question to be tried. Whatever the action may be, if a juror be interested in any of the matters in issue, he is unfit to try them. The incapacity arises from his bias in the particular facts he is to try: and whatever be the facts which that bias touches, he is incapable of trying those facts.

In the case of *Day v. Savadge*, in Hobart 87, the suit was an action of trespass between two private persons. But an issue being taken upon a custom in London "for every freeman to be discharged of wharfage," the Court would not suffer this custom to be proved by the recorder: and on that occasion they held that "where the issue concerns a corporation, though they be not directly parties to the suit, if they are to make the pannel, or any of their body are to go upon the jury, it is a cause of challenge."

None of the cases which Mr. Davenport has cited on the part of the plaintiff, come up to the present case. *Vanacker's case* was on a bye-law that affected their own members only; and where the parties on both sides were equally freemen.

[1858] In the case of *Bodwick v. Fennel*, it was stated at the Bar, "that no exception or challenge was taken." And as a party may waive all exceptions, if he pleases; if he does not object, it is a virtual acquiescence.

In *Wakeman v. Harris*, there was also no challenge; and the bill of exceptions was not sealed: and therefore the Court could not take any notice of it.

The case of *The City of London v. Wood* was cited on both sides. Mr. Davenport relied on the words of Lord Chief Baron Ward, that the objection to the mayor's sitting as Judge in a cause of the corporation was not so much in point of interest, as inconsistency. But is not the interest a great ingredient in that inconsistency? And hence comes the rule "that no man shall be Judge in his own cause." And the same rule will equally apply to a juror.

It was said, "that if the defendant's challenges be allowed, the corporation will be left without remedy on the bye-law."

The answer is, that if the fact be true "that they can impanel no jury but freemen," the fault was their own, in confining the action to their own Court. On the other hand, if they had a power (as the city is a county of itself,) to have impanelled non-freemen, it was their own fault that they did not.

In the regulation of their own members, they may indeed make bye-laws, and enforce the observance of them by prosecutions amongst themselves; because every member of the corporation is bound by the jurisdiction into which he voluntarily enters; and being all of them freemen, their circumstances are equal. But if corporations were to try their own suits against strangers upon a bye-law "for excluding all traders but themselves," there would be an end of the distinction which has long been established, "that a bye-law which lays this restraint upon trade is void, unless there be a custom to support it."

If the custom be a necessary foundation for supporting such a bye-law, it is necessary to prove it. But if the freemen themselves might determine upon it, they would not be very exact in that proof; and bye-laws themselves, without any such custom, would soon have an equal effect.

Had this bye-law been general, without limiting the action to the treasurers, or to their own Court, they might [1859] then have tried it in a Superior Court; and the whole would have come to a proper decision.

Therefore we are all of opinion "that the judgment of the Court of Great Sessions reversing the judgment of the Portmote-Court, ought to be affirmed."

Judgment of the Great Sessions affirmed.

#### REX versus INHABITANTS OF DUNCHURCH. 1766.

See this case at large, in the quarto-edition of my *Settlement-Cases*, No. 177, p. 553.



SIR GEORGE COLEBROOKE, BART. *versus* ELLIOT. 1766. The leet hath jurisdiction in respect of loaves short of weight, under 31 Geo. 2, c. 29, but not on 3 Geo. 3, c. 11.

This was an action of debt brought by the lord of the manor of Stepney, for an amercement set and affeered in the court-leet of that manor. Nil debet was pleaded; issue was taken thereon; the cause tried before Lord Mansfield; and a verdict found for the plaintiff.

On Monday the 27th of January 1766, Mr. Bainham moved on behalf of the defendant, for a new trial; reserving a claim to a future motion in arrest of judgment: and he now proposed no less than seven objections. But the discussion of them was adjourned to the following Wednesday.

On which Wednesday (the 27th of January 1766) he was supported in his motion, by Mr. Serjeant Burland: and they obtained a

Rule to shew cause "why the verdict should not be set aside, and a new trial had;" with liberty to move afterwards, in arrest of judgment.

On Saturday the 8th of February 1766, Lord Mansfield reported the evidence given at the trial: and

Sir Fletcher Norton, Mr. Morton, and Mr. Dunning shewed cause why there should not be a new one.

[1860] They were answered by Serjeant Burland, Mr. Stowe, and Mr. Bainham.

Lord Mansfield said it would be proper to look into it: and it stood upon a Curia advisare vult.

On Wednesday the 12th of February 1766,

Lord Mansfield delivered the resolution of the Court, which was to the following effect.

This is an action of debt for amercements set and affeered in the court-leet belonging to the manor of Stepney.

The facts charged in the declaration and presentment (which is set forth in the declaration) is the defendant's having in his custody, and exposing to sale, a loaf of bread pretended to be and as and for a quartern loaf of the weight of 4lb. 5oz. and a half; whereas it wanted four ounces and a half. "Nil debet" was pleaded; and issue joined: the cause was tried; and a verdict given for the plaintiff.

Upon the trial it was objected, "that the presentment given in evidence was neither sealed nor indented, as it ought to have been by the Statutes of Westm. 2, c. 13,\* and 1 Edw. 3, stat. 2, c. 17."

Leave was then given to the defendant, to move for a new trial, without payment of costs.

Afterwards, another objection was taken here at the Bar, "that the court-leet had no jurisdiction."

Some other objections were also taken; which have been since dropped.

In our opinion, it is not necessary that a presentment of this kind should be either sealed or indented.

The turn, and the leet (derived out of it) were anciently the principal Courts of Criminal Jurisdiction; coeval with the establishment of the Saxons here. There were no traces of them, either amongst the Romans or Britons: but the activity of those Courts is marked very visibly both amongst the Saxons and the Danes.

[1861] By Magna Charta, cap. 17, their jurisdiction is abridged; their power "to hear and determine" is taken away; but not their power "to take indictments, and apprehend the parties indicted."

That power was abused. They took people up, to extort money from them, upon pretence of their having been indicted in their turns de furtis et aliis malefactis, when in fact they had not been lawfully indicted. The Statute of Westm. 2, c. 13, recites that grievance; and directs that sheriffs in their turns shall inquire by twelve lawful men, at the least, de hujusmodi malefactoribus; qui hujusmodi inquisitionibus sigilla sua apponant: et sicut dictum est de vicecomitibus, observetur de quolibet ballivo libertatis. And 2 Inst. 388, says "this Act extends to leets;" and it certainly does. But it respects only such inquisitions, as are a foundation for imprisonment. That was the grievance intended to be obviated—to prevent fictitious imprisonment, upon

pretence of inquisitiones de furtis et aliis malefactis. The Act does not relate to inquisitions for offences where the party cannot be apprehended, but the proceeding against him is only by amercement ; where the delinquent can either be taken up in the first instance, or even punished for the offence by imprisonment.

The universal practice is not to seal these inquisitions.

And as to the indenting—it is not necessary that such an inquisition should be indented. The Act of 1 Edw. 3<sup>\*1</sup> extends to courts leet : but the reason of the law fixes the true construction of it. It was made, to prevent the altering or embezzling such indictments as were to be delivered over to the justices : it does not relate, therefore, to presentments, which were to be proceeded upon in the turn or leet, and not to be delivered over to the justices.

But it was not necessary to have determined these points ; because we are all of opinion “ that the offence presented is not within the jurisdiction of the court leet ; because it is a new offence, created by Act of Parliament, and can be prosecuted only in the manner directed by the Act.”

The Assize of Bread is an ordinance ascertaining the weight, and the price of it, which is to be regulated by the price of corn. The intention was, to preserve a due proportion between them ; making the baker a reasonable allowance : (a very wise provision, to derive the effects of plenty upon the poor).

[1862] If that assize was broken, (whether set by the court leet, or not,) the breach of it was always presentable and punishable in the court leet. But the assize must fix both price and weight : and it would be very incomplete and imperfect, if it were to fix only the weight, and leave the price with a seller.

The 51 H. 3 (Assisa Panis et Cervisiæ) fixes both : and the variations in that assize, occasioned by the different prices of corn, always took in both.

The 8 Ann. c. 18, repeals the 51 H. 3, but directs how the assize shall be set ; and exhibits a plan for that purpose. But it takes in both the price and weight, according to the true principle of the law.

The 31 G. 2, c. 29, repeals all former laws ; but still proceeds upon the same principle of fixing both the price and weight : and the plan of an assize exhibited in it, shews that both are fixed by it. This Act saves the jurisdiction of courts leet : and therefore, whenever and wherever an assize is made according to the directions of 31 G. 2, (c. 29,) the court leet may inquire and punish for the breach of it.

But the 3 G. 3, c. 11, upon which this presentment is grafted, does not fix the price ; but was made, to meet with some inconveniences in cases where no assize was set ; whereas the setting the assize is the basis of the jurisdiction of the court leet. If we should support this presentment, it would be giving them a jurisdiction where no assize is set ; though their jurisdiction arises only and can only attach, where it is set.

The offence, cognizable there, is *fractio assizæ*.

The counsel for the plaintiff were aware of the objection ; and therefore insisted “ that this Act of 3 G. 3 is an assize ; because it fixes the weight.” (a)

But it wants one of the essential characteristics of an assize, price ; price regulated by the price of corn in the market. And it would be a strange construction of this Act, to give it the effect and operation of an assize, when it was intended only to supply the defects of an assize, and to operate where and because there was none.

[1863] The Act directs,<sup>\*2</sup> that a quartern loaf shall be four pounds five ounces

<sup>\*1</sup> Stat. 2, cap. 17. [Dalt. Sher. 389.]

<sup>\*2</sup> V. sect. 6.

(a) Assize is sometimes taken for an ordinance for putting things into a certain rule and disposition, 4 Com. Dig. 104, (B. 94,) and Lit. sec. 234, is there cited. Littleton, at the end of sect. 234, is thus, viz. “ Sometimes assize is taken for an ordinance, to wit, to put certain things into a certain rule and disposition, as an ordinance which is called *Assisa Panis et Cervisiæ*.”

The Assize of Bread is broke when bread is not made according to the size or quantity limited by some ordinance. 4 Com. Dig. 128, (L 8,) Lit. s. 234.

In 1 Wils. 248 an action of debt was brought for an amercement in a court leet : the declaration set forth a custom for six ale-conners to be appointed by the steward to view, search into, and weigh all the loaves of bread within the manor, not exceeding threepenny loaves, or half quartern loaves, to see whether the same be of due

and an half; under the penalty of not more than five shillings nor less than one shilling for every ounce of every loaf which shall be deficient; and not more than two shillings and sixpence, nor less than sixpence for any defect under an ounce, but, in cities, towns corporate, &c. or within the weekly bills of mortality, the complaint must be made, and the bread weighed, within twenty-four hours; and in other places, within three days: and a summary jurisdiction is given to justices, to convict and levy the penalty.

It is unnecessary to speculate upon the utility of the regulation. So far it goes, that when a person buys a quartern loaf, it must weigh 4lb. 5oz. and a half: but, as it does not fix the price of that quartern loaf, it reaches only one half of the evil.

But whatever benefit may arise from this provision, it is not a provision made by the common law; but introduced by this statute: and the presentment describes the offence in the very words of the statute; and was plainly meant to enforce the execution of the statute, and to apply the right of punishing for the breach of the assize, to the punishment of a violation of an Act of Parliament.

The bread must be weighed in twenty-four hours or three days; whereas, this presentment may punish at three months distance. The Act says, "he shall be summoned,† and have an opportunity of making his defence." The presentment can not be controverted in the court leet; but accuses and punishes, at the same instant.

There is a saving of the jurisdiction of the leet, in the 31 G. 2.† Because that Act keeps an assize in its view, from one end to the other; and the settling that assize is the great object of it. But in this Act there is no such exception; because it was providing for cases where the court leet had no jurisdiction.

These courts were very properly adapted to the customs, manners, genius, and policy of a people upon their first settlement: but, like all other human jurisdictions, vary in the course and progress of time, as the government and manners of a people take a different turn, and fall under different circumstances.

[1864] From Magna Charta to this time, they have been always gradually abridged; never enlarged. Experience shews the wisdom of widening (instead of contracting) the circle of both civil and criminal jurisdiction.

But the point is not, now, upon abridging the jurisdiction of the leet: the present question is "whether we shall increase it, and give them power to hold plea of an offence against an Act of Parliament, which is formed upon a plan that has been uniformly and universally pursued from the Conquest to this day." (b)

Upon the first and other objections (which were waved,) I gave leave to move for a new trial, without costs. The second objection was not then made. As it now comes out, the defendant should have had a verdict; which would have carried costs.

The plaintiff could not have maintained his action of debt for this amercement;

weight, and are to present every baker whose bread is found wanting in its due weight, and to present bakers hindering them from searching, after request: that the defendant was an inhabitant within the manor, that six ale-conners were sworn at the leet, and afterwards went to the defendant's house to weigh the bread, and then state a presentment, amercement, and afferment to a certain sum: Mr. Jodrel for the defendant, page 251, admitted the ale-conners had power to perambulate the leet, and might buy the defendant's bread, and if under weight convict him in the leet by a proper jury, but denied the legality of the custom to enter the defendant's house.

But no judgment nor any opinion was given by the Court as to the amercement; but there were two other counts, and the judgment was given only upon the last, which was debt on a mutuatus.

† V. sect. 14.

† Sect. 43.

(b) By 1 Jac. 1, c. 22, several new regulations are made concerning tanners, curriers, shoe makers, and other artificers, occupying the cutting of leather; and several new penalties are inflicted for offences against that Act; and by sect. 32, power is given to lords of liberties, fairs and markets, to appoint searchers and sealers; and by sect. 50, power is given to all Justices of Assize, of Gaol Delivery, and to all stewards of franchises, leets, and law days, within their jurisdictions, to inquire of all the premises in their sessions, leet, or law days, and to hear and determine the same; and also by their discretions examine all persons suspected to offend against this Act, or any parcel thereof; and many Acts long since Magna Charta have given the leet a jurisdiction where they had it not at common law.



because, it appears upon the whole of the case, that there is no debt due to him. The plea of nil debet puts the whole matter in issue: and upon the whole matter, nothing is due to the plaintiff.

But the defendant can not have any costs, under the present form of proceeding. Here is no demurrer; but a verdict against him: nor did he insist at the trial upon a case to be stated for the opinion of the Court. So that there can be no possibility of entering a verdict for him, nor can the Court give judgment for him. All we can do, is to set aside the verdict against him, and grant him a new trial.

Therefore—Let this verdict be set aside, and a new trial had, without costs.

His Lordship then addressing himself to the defendant's counsel, said—In the shape it now stands, you can not have costs. You may take it either of these two ways; either as I have just now pronounced the rule, or by having judgment arrested: but you can not have costs. The truth of the matter is, the defendant suffers by a slip; by not seeing the objection sooner. If he had seen it sooner, he might have demurred, instead of pleading “nil debet:” and then he would have been intitled to his costs. But this he has not done.

It was very properly laboured by the counsel for the plaintiff, as upon an assize set by 3 G. 3: for it is certain-[1865]-ly necessary “that an assize should be set, in order to support this action”

The counsel for the defendant chose to take the rule as it was before pronounced; viz.

That the verdict be set aside, and that there be a new trial; but without payment of costs.

REX *versus* INHABITANTS OF STAUNTON UNDER BARDON. 1766.

See this case at large in the quarto-edition of my Settlement-Cases, No. 178, page 558.

The end of Hilary term, 1766, 6 G. 3.

[1866] EASTER TERM, 6 GEO. III. B. R. 1766.

MAYOR AND COMMONALTY OF COLCHESTER *versus* SEABER, Executor of William Seaber his late Father. Friday, 18th April, 1766. [S. C. 1 Bl. 591.] A corporation disabled to act taking a new charter become a corporation again the same as the old one.

[Referred to, *In re Higginson and Dean* [1899], 1 Q. B. 331.]

This was an action of debt brought upon a bond in the penalty of fifty pounds, dated 28th September 1735, conditioned for one John Bennall's repayment of 25l. then advanced to the said John Bennall, by the Corporation of Colchester (according to the intent of Sir Thomas White, Knt. deceased, and of certain articles, &c.) at the expiration of ten years: for the payment whereof, William Seaber, the defendant's father, was one of this John Bennall's sureties.

The defendant pleaded “non est factum testatoris:” and thereupon issue was joined.

The cause (a) was tried before Lord Mansfield at Westminster, at the sitting after last Michaelmas term, when a verdict was agreed to be given for the plaintiffs, subject to the opinion of this Court upon the following facts, admitted by the counsel on both sides, viz.

That Colchester is a borough by prescription.(b)

That by letters patent, dated 6th December, 1 Ric. 1, power was given to the burgesses to appoint, from amongst themselves, their own bailiffs and justices: and

(a) See 2 East, 82. 2 Durn. 524, 547. 3 Durn. 207, 215, 224, 231. 6 Vin. 284. 2 Doug. 25, 37.

(b) By 2 W. and M. sess. 1, c. 8, s. 3, it is declared and enacted “that the Mayor, Commonalty and Citizens of the City of London, shall for ever thereafter be and prescribe to be a body corporate without any seizure or forejudger, or being thereof excluded or ousted, for or upon any pretence of any forfeiture or misdemeanour at any time theretofore or thereafter to be done, committed, or suffered.”

by letters patent dated 1st March, 1 Ed. 4, they (the bailiffs and burgesses) were incorporated, and made to consist of two bailiffs and one commonalty, in perpetual succession.

[1867] That in 15 C. 2, by letters patent dated 3d August in that year, the free burgesses were made one body corporate and politic by the name of "mayor and commonalty of the borough," to consist of one mayor, (to be chosen annually from amongst the aldermen,) eleven aldermen, eighteen assistants, and eighteen common council: and that this charter was confirmed by letters patent dated 27th July 5 W. & M. to the mayor and commonalty and their successors.

That on 28th September 1735, William Seaber, the defendant's testator, duly executed the bond to the said mayor and commonalty, upon which the present action is brought.

That in 1740, there were judgments of ouster against all the persons then claiming in fact to be mayor and aldermen of the said corporation.

That the said persons were all dead before the year 1763.

That from the year 1740 to 1763, no person, in fact, took upon himself or claimed to be a mayor or alderman of the said corporation.

That in 1763, the <sup>\*1</sup>present charter was granted and accepted; and has been acted under, ever since.

The question was—"Whether the present corporation could maintain this action."

Sir Fletcher Norton argued for the plaintiffs.

This depends upon the question "whether the old corporation was dissolved in 1763;" (though perhaps the action may be maintained under the new charter).

An old corporation can be dissolved but by three ways; 1st. By abuser or misuser; and thereby a forfeiture. 4 Mod. 52, *Sir James Smith's case*, 2 Inst. 222; 2dly. By surrender, accepted on record; 3dly. By the real death of all the natural members. 1 Ro. Abr. 514, title Corporations, letter I.

Now this corporation was not dissolved (in 1763) by any of these three ways.

1st. Not by forfeiture. The usurpation of individuals can not dissolve the body.

[1868] 2dly. Not by surrender. The only colour of pretence for that, is a recital in the charter of 3 Geo. 3. "That it has been represented to the Crown, that the said corporation is now dissolved, or at least incapable of enjoying and exercising their said liberties and franchises."

3dly. Nor by the natural death of all the members: for the special case only finds "that the ousted mayor and aldermen were dead." But the rest of the corporation (the burgesses, &c.) were not dead in 1763.

Then, though this new charter gives a mayor, aldermen, assistants, and common council, to the two former integral parts, the mayor and commonalty; yet it is no more than the charter of 15 C. 2 had done: for that charter gave those very two new integral parts, to the then burgesses. And this new charter shall not take away the rights of the old corporation. All the Court held the old power to remain in Raym. 439, *Haddock's case*—"For the charter does not merge or extinguish any of the ancient privileges; but the corporation may use them as before."<sup>2</sup> If it should be otherwise, it would be very mischievous to most of the corporations in England, who have taken new charters, but were ancient corporations before." And in the case in 3 Lev. 238, of *The Mayor, Aldermen, and Burgesses of Scarborough versus Butler*, which was an action brought by the corporation by this their new name, for a debt which had originally become due to the old corporation by the name of bailiff, &c. and judgment was given for the plaintiffs: and at the end of the case, it is said that "no doubt was made of the debt due to the first corporation remaining due to the new, after the names changed by the letters patent."

Consequently, this bond is good; and the action upon it, maintainable.

But even supposing the corporation to have been dissolved—lands would indeed revert to the grantor: (1 Ro. Abr. 816, title Eschete, letter A, pl. 2, 3). But goods and chattels would go to the Crown. And the Crown have granted them, by the new charter, in as full and ample a manner as words can express.

Mr. Dunning, contra, for the defendant.

This is a new corporation totally distinct from the old one.

<sup>\*1</sup> It is dated 9th September, 3 G. 3.

<sup>\*2</sup> V. 1 Vent. 355, S. C. accord.

[1869] This bond is a chose in action: and therefore, though I were to admit that it was granted to them by the Crown by the new charter, as a chattel devolved upon it by a former dissolution, yet the new corporation could not bring the action in their own names. But they have not recited any such grant. They have declared upon this bond, as a bond given to the present plaintiffs.

The question is, whether the corporation to whom this bond was given does still exist.

I do not say that the corporation was dissolved by either forfeiture or the natural death of all the members: nor do I say that the acceptance of a new charter amounts to a surrender of former rights compatible with the new grant.

But I say that it was dissolved by being rendered incapable of exercising any of its functions.

The facts stated in the case shew that the bond was given to a corporation consisting of a mayor, aldermen and commonalty.\*<sup>1</sup> Now one (at least) of these integral vital parts being extinct, the body is dead. And this corporation could not, by any power of its own, be re-animated.

The mayor is to be chosen out of the aldermen; and as there remained neither mayor nor aldermen, two integral parts were irrecoverably gone; and the remaining common burgesses (if any such did in fact remain) could not create either an alderman or a mayor, under their former constitution.

This therefore is, in point of law, a dissolution; and as much so as if all the corporators were actually dead.

And this was the state of the corporation for above twenty years. Whereupon the Crown, in 1763, created a new corporation.

And the Crown could grant no more rights than they had.

Sir Fletcher Norton, in reply—

This is not a case of the death of every natural member: many of them are still living. The old root therefore remains. And I say, the corporation is not dissolved; though some of the limbs are irrecoverably lopt off: and I say too, that the mayor and aldermen are not vital parts, but only like limbs to the natural body.

[1870] If it were so, "that the loss of a limb would be fatal to the corporate body," every corporation which, before 11 G. 1, had slipt the annual election of a mayor, would have become irrecoverably dead and dissolved.

These limbs are not vital parts, as to this matter. The other members remain intitled to their estates and rights: and they still proceeded to elect members to Parliament. The constitution was left: that was not dissolved. And the new charter put it into action again.

The new and the old corporation have the \*<sup>2</sup> same name: therefore this makes no difference in the action, nor in the declaration. They have declared rightly and properly: and could not have declared otherwise.

Lord Mansfield—Many corporations for want of legal magistrates have lost their activity, and obtained new charters. Maidstone, Radnor, Carmarthen, and many more are in the same case with Colchester. And yet it has never been disputed, but that the new charters revive and give activity to the old corporation; except, perhaps, in that case in Levinz, where the corporation had a new name; and even there, the Court made no doubt.† Where the question has arisen upon any remarkable metamorphoses, it has always been determined "that they remain the same, as to debts and rights."

It now comes on, as a question, "whether the old corporation exists after this judgment of ouster against the mayor and all the aldermen, and the new charter." And it is argued, "that this new corporation is totally distinct from the old one."

But there is no authority,(c) no dictum for it: and the consequences are obvious, and would be most inconvenient.

\*<sup>1</sup> The words of the bond—"Bound unto the Mayor and Commonalty of the Borough of Colchester in the County of Essex." [See 6 Vin. 283, pl. 25.]

\*<sup>2</sup> The new charter incorporates the free burgesses by the name of "The Mayor and Commonalty of the Borough of Colchester in the County of Essex."

† V. ante, p. 1868.

(c) There are many authorities, or at least dicta of Judges, that before the Statute 11 G. 1, if a corporation lapsed the time appointed by the charter for choosing the



Without an express authority, so strong as not to be gotten over, we ought not to determine a case so much against reason, as that the Parliament should be obliged to interfere to set it right.

The corporation is not dissolved by the judgments of ouster and subsequent deaths of the mayor and aldermen; though they are without their magistracy: their constitution is not destroyed and gone. Their former rights remain. Would not a free-man of Colchester still conti-[1871]-nue to have a right in common? or to vote for members to Parliament?

So it stands upon general reason. And *Sir James Smith's case* in 1 Show. 274, and in 4 Mod. 52, is in point, "that the corporation is not dissolved by the judgment." Notwithstanding this judgment of ouster, a right may remain, so as to be capable of being again raised and revived. The corporation cannot act without legal magistrates: but their rights may be revived, and put in action again, by a new charter from the Crown, giving them legal magistrates.

I am clear, upon principles of law, that the old corporation was not absolutely dissolved and annihilated, though they had lost their magistrates; and that by virtue of the new charter they are so revived as to be entitled to the credits, and liable to the debts of the old corporation.(d)

Where there is a judgment against the corporation itself, the cases would be of a different consideration

Mr. Justice Wilmut concurred—Wherever a corporation accepts a new charter, it remains, to every intent and purpose, as it did before, though the name be altered. *Haddock's case* in Sir T. Raym. 439, is in point, on this head.

The case of *The Corporation of Scarborough*, in 3 Levinz, 238, is also very strong upon a new charter. There the action was brought by the corporation by the new name. And the book says, "there was no doubt made of it."

Then, the law being clear, "that a new charter does not destroy the right of the old corporation," the question is, "whether this corporation was dissolved by the judgment of ouster against individuals."

Clearly, it is not. The difference is between a judgment against the corporation itself, (for that may be a forfeiture,) and a judgment of ouster against individuals. God forbid that the rights of the innocent(e) should be lost and destroyed by the offence of individuals!

[1872] Before the Act of 11 G. 1, c. 4, (which took its rise from a case of *The Corporation of Banbury*), the corporation that had slipt the time of election of their chief officer

mayor or other head officer, the corporation was dissolved, unless there was a provision in the charter for the old mayor to hold over. 10 Mod. 346. 8 Mod. 36, 129. And the preamble of the statute 11 G. 1, c. 4, as well as the enacting part thereof seems founded on that supposition, and applies a remedy to that mischief, and Lord Hardwicke in *Cases temp. Hardw.* 178, was of that opinion; and so was Page J. Ib. 179, and Ryder Ch.J. in *Sayer's Rep.* 213, must have been clearly of the same opinion; for he held if the electors of the mayor are reduced below a sufficient number for choosing a mayor, that the corporation would be dissolved even since the statute; and as to any objection against these opinions that if the law was so, then every corporation would be dissolved by the death or removal of the mayor, the answer is, that in such a case the corporation would have a power as an incident to their being, to choose a new mayor, even though no provision was made for it by the charter. 8 Mod. 129. And if the charter gives a power on death or removal of an officer to elect another within eight days, yet they may elect one at any other time. 1 Roll. Abr. 513, 514.

(d) Lord Mansfield did not say in this case that the corporation could act, or that it was not dissolved to some purposes, but only that the King might renovate it, and when renovated all the former rights would revive and attach on the new corporation. Per *Ld. Kenyon* in 3 *Durf.* 241.

(e) The rightful members of the corporation might by legal proceedings have prevented the corporation's falling into the state it was in, and therefore if they were to suffer, it would be owing to their own fault, in not pursuing proper measures for removing the persons who got illegally into the corporation, and getting others legally elected; and there is no right which may not be lost by the offence of others and the acquiescence of those who are injured by it.

could not proceed by their own power: but the King might have given them the power, by reviving and reanimating them. The corporation only lay dormant and quiescent, till revived and restored to their activity.

And here the Crown have restored and revived all the rights and privileges of this corporation.

The consequences, if it were otherwise, would be fatal: I mean, if the rights of common, of election to Parliament, and other rights of 500 innocent persons were to lie at the mercy of some of the members only.

Therefore judgment must be for the plaintiffs.

Mr. Justice Yates concurred, "that the corporation could not be dissolved, by a judgment against individuals."

A distinction was made, in *Sir James Smith's case*,\* between a judgment against the corporation itself, and a judgment against particular members of it.

Colechester is a borough by prescription: and they are afterwards incorporated by such and such names, &c. and the officers given to them. But the removal of their officers cannot extinguish their rights: no more can the change of their name; as it is laid down in *Luttrell's case*, 4 Co. 87 b. expressly.

As to the debt now demanded—*The Scarborough case* in 3 Lev. 237, 238, is very applicable. There, the name in which the action was brought was the new name.

In 1 Lutw. 508, *Knight et Ur. v. Corporation of Wells*, where the corporation were sued by their old name, the objection was made to the name only; none at all, to the action.

As to the retaining rights of common and other rights—He mentioned the case of *Mellor v. Spateman*, in 1 Saund. 343, where it was agreed "that a corporation, by the change or alteration of the name of the corporation, does not lose their franchises."

Old rights must remain: it would be very unreasonable, if it should be otherwise.

Mr. Justice Aston declared his concurrence; and that he founded it upon 4 Co. 87, *Luttrell's case*, and *Haddock's case*, in 1 Vent. 355, and Raymond, 439.

[1873] As to the Statute of 11 G. 1, c. 4—The intent of it was not to consider such corporations as dissolved, and to grant them new powers, or, as it were, new charters, as bodies dissolved; but to revive their activity, and to put them again in motion.

Though a new charter should grant new rights, or a new name, yet the acceptance of it does not destroy the former rights, privileges or franchises of the corporation: but the corporation may use and enjoy them, as they did before. This is expressly laid down in 4 Co. 86, *Luttrell's case*, and in *Haddock's case*, Raym. 439.

It has formerly been doubted, "in which of the names the action should be brought:" but of late, the new name has been thought the most proper to be used.

He was therefore of opinion with Lord Mansfield and the rest of the Court, that in the present case, the corporation was not dissolved; and that the judgment ought to be for the plaintiffs.

Mr. Justice Wilmot—In those cases of non-elections upon the fixed day, before 11 G. 1, c. 4, the corporation having slipt their day or time of election, the nomination remained in the Crown: so that that was just the same case then, as this is now.

Rule—(by the unanimous opinion of the Court) that the postea be delivered to the plaintiffs.

CHAVE *versus* PETER CALMEL, ESQ. Monday, 21st April, 1766. Tithes lie in grant.

Sir Fletcher Norton shewed cause against a prohibition to the Consistorial Court of the Bishop of Exeter, to stay their proceeding in a cause instituted there, for subduction of tithes.

The short of the case was (as it appeared to the Court) that Calmel, the impropiator, had employed one Finnimore as his agent, to collect and compound for tithes. The plaintiff in prohibition (Chave, the occupier, had agreed) [by parol] with Finnimore, after the corn was cut and ready to be housed, for 5l. Whereupon he housed his whole crop, without setting out the tithes. Chave's agreement with Finnimore was only by parol. The impropiator libelled in the Ecclesiastical Court

\* V. 4 Mod. 58, and 1 Shower, 278 to 281.

against Chave, for not setting out his tithes. The defendant below, (Chave, the occupier) tendered the 5l. and offered a plea "that he [1874] had purchased the tithes, for five pounds." The Ecclesiastical Court rejected this plea.

Mr. Thurlow and Mr. Dunning were for the rule.

The only question was "whether this was matter of appeal, or of prohibition."

The Court were unanimous in the latter opinion. And they founded it upon this rejection of the plea being a gravamen irreparable; and upon an apprehension "that the Ecclesiastical Court must have grounded their rejection upon a supposed difference between their law and ours;" that is to say, they took it for granted, that the Ecclesiastical Court were of opinion, agreeable to what is laid down by their favourite writer, Gibson (who takes it from a note in Noy 19.† ("That an agreement with the agent of a proprietor of tithes will not bind the proprietor:" whereas, by our law, and in common sense and common justice, a composition by the occupier with the agent of the proprietor does bind and ought to bind his principal.

\*1 Indeed, where the Ecclesiastical Court have jurisdiction, and proceed therein according to their law, where it does not differ from ours, the rejection of a plea would be matter of appeal.

But where the ecclesiastical law differs from the common law; and the Ecclesiastical Court would require greater proof from the defendant below, than the common law requires; or would esteem an agreement not to bind the impropiator, which at common law would bind him; there an appeal could be of no service to the defendant in the Ecclesiastical Court; because the Superior Ecclesiastical Court would equally adhere to their own law, as the Inferior Ecclesiastical Court had done; and would determine alike, as being guided by the same principle of determination.

Therefore, as the Judges of this Court supposed that in the present case the Judge of the Consistory Court rejected the plea, because he thought the agreement with the agent not binding upon Mr. Calmel the principal, which at common law did bind him, they held this to be matter of prohibition, and not of appeal.

And though it had been observed "that tithes lie in grant," yet they had no doubt that the occupier might, [1875] with sufficient propriety, be said to have purchased these tithes, notwithstanding the contract was only by parol. For, whatever might have been objected to its not being by deed, if this corn had been standing; or if it had been a sale by the proprietor of the tithes to a third person; yet the present case is by no means liable to such an objection: for the corn was here severed from the ground, and ready to be housed; and it was not a sale of the tithes by the proprietor to a stranger, but a composition between the proprietor and occupier, pro hoc vice tantum.

Rule for prohibition made absolute.

DR. BETTESWORTH *versus* HUGH PARKER BELL, ESQ. 1766. Hab. corp. "to do and receive" may be returnable immediately before a Judge.

Mr. Serjeant Whitaker had moved to set aside a habeas corpus cum causa, ad faciendum et recipiendum, &c. directed to the gaoler of Ailesbury, returnable before the Chief Justice, immediately.

His 1st objection was that such a writ can not be made returnable immediately, nor before the Chief Justice: for by a rule made in 1654,\*2 no habeas corpus ad faciendum et recipiendum, &c. can be returnable but in Court, and at a day in term; except in London and Middlesex.

2d objection. It is contrary to the statute of 4, 5 W. & M. c. 21, "for delivering

† Noy. 19, *Spencer's case*, and 2 Ventris 48. Sed. qu. [For there is no such thing nor any thing like it either in Noy. 19, or 2 Vern. 48.]

[\*1 Same principle, Carth. 143. Vin. Probi. (Q) Ld. Raym. 221.]

\*2 There is such a rule Michaelmas term, 1654, section 7, "that a habeas corpus cum causa ad satisfaciendum et recipiendum directed to any sheriff other than London or Middlesex not to be returnable immediate or in the vacation-time, but at a day certain in Court, in the term; unless it be to deliver over to prison, in discharge of his bail."



declarations to prisoners:"† for they have already declared against him in custody of the Sheriff of Bucks.

Sir Fletcher Norton now shewed cause.

1st. This writ issued in term: it is tested the 11th of February: and it is and ought to be returnable immediate; which only means within due and convenient time.

2dly. By 4, 5 W. & M. c. 21, the plaintiff may declare against a person in custody of the sheriff: and we have done so. But it does not follow, that we can not afterwards remove him.

That Act was made in ease and for the benefit of plaintiffs: and so the preamble expressly declares. It only permits the plaintiff to charge the defendant in custody of the [1876] sheriff: it does not hinder from removing him afterwards.

This is a mere matter of practice: and the practice is agreeable to what is here done.

Mr. Serjeant Whitaker, in reply—1st. As to being tested within the term—it is necessary that every writ should be so. But it was not delivered till the 3d of March. It must be returnable a day in term.

2dly. After charging him with a declaration in custody of the Sheriff of Bucks, they can not remove him by habeas corpus, till after judgment.

Mr. Justice Wilmot—There is no foundation for setting this writ aside. It is tested in term: which it ought to be.

The rule is an old rule made in 1654; and seems to have gone in desuetudinem. It was made long before the Act of 4, 5 W. & M. And that Act only gives the plaintiff leave to declare against him in custody of the sheriff: it does not take away the plaintiff's common law right "to remove him." He has a prior right to it: and the Act leaves him, as it found him, in that respect.

Mr. Justice Yates concurred.

The rule made in 1654 does not apply, since the Statute of 4, 5 W. & M. which takes away the reason of it. It does not stand in the way of this habeas corpus, now. And even under that rule, there is an exception where it is to deliver over to prison in discharge of bail.

2dly. The plaintiff has a right to change the custody of the defendant into that of the proper officer of this Court.

I am of opinion it is right.

Mr. Justice Aston concurred.

1st. The old rule seems to have been totally disused.

2dly. That Act of 4, W. & M. leaves the plaintiff as it found him. He is not precluded, by having charged him with a declaration, in custody of the sheriff, from afterwards removing him into the custody of the officer of this Court.

[1877] Per Cur.—Motion denied; and the defendant committed in the custody of the marshal.

REX *versus* INHABITANTS OF INGLETON. Saturday, 26th April 1766.

See this case at large in the quarto-edition of my Settlement-Cases, No. 179, pa. 560.

REX *versus* THE RECTOR OF ST. ANNE'S (SOHO). Monday, 28th April 1766.

Mandamus to a rector to appoint a parish clerk.

Sir Fletcher Norton, on behalf of Dr. Jackson, shewed cause against a mandamus prayed to be directed to the rector of St. Anne's within the liberty of Westminster, requiring him to nominate and appoint a parish-clerk for the said parish, according to the form of a \* statute in such case made and provided; in the room of ——— Pynyot deceased.

He said, Dr. Jackson had been already nominated and appointed by the rector, (Dr. Samuel Squire, Bishop of St. David's).

Mr. Serjeant Glynn, contra, objected that Dr. Jackson was nominated by the

† This Act (s. 2 & 3) gives leave to declare against prisoners in custody of gaolers; alledging "in custody of what sheriff or other person, &c. the prisoner is."

\* A private Act of Parliament, temp. Car. 3.

rector, only : whereas by the Act of Parliament, the consent of the vestry is necessary to confirm the rector's nomination or appointment ; which consent and approbation of the parish has not been given.

Therefore it is no election, or effectual nomination, or regular appointment of Dr. Jackson.

The fact appeared to be thus—Notice was given to the parish, “to meet on the 5th of December, to receive the rector's nomination.” The clause in the Act was read at that meeting ; which clause impowers the rector to nominate. Then his nomination (under hand and seal) was read. Eighty-nine of the principal inhabitants signed their approbation. None dissented, expressly ; but some of the parishioners demanded a poll, on behalf of one Mr. [1878] Moore. The churchwardens refused to take any poll ; alledging that there was no election, and therefore could be no poll for him as a candidate.

The Court held this to be no dissent to the rector's nomination of Dr. Jackson. It was an attempt to put up another for election ; supposing “that they had a right to elect ;” which, in fact, they had not. This was a mistake : and this demand of a poll was all nugatory and void. It was no dissent to the nomination of Dr. Jackson. If a poll had been taken, it does not appear that Dr. Jackson's nomination would have been dissented to. If the majority were really dissentient, they should have declared their dissent. But what was here done, was all lost and thrown away : it had no more effect, than if they had gone away without giving either assent or dissent.

Therefore there is in the present case no right that is worth trying : and consequently, it would answer no purpose “to put the parish to any further charges.”

Let the rule be discharged.

POSTLETHWAITE *versus* PARKES. Tuesday, 29th April 1766. Action for seducing a daughter per quod servitium amisit, does not lie, if she be in the service of another. [See 2 Durn. 166. 5 Durn. 358. 6 Durn. 628. 5 East, 46.]

This was an action of trespass vi et armis for an assault upon the plaintiff's daughter, and getting her with child : and the declaration concluded with a per quod servitium amisit.

It was tried before Mr. Justice Bathurst ; and a verdict was given for the plaintiff on the second count, and 40s. damages.

A special case was stated, to this effect—The plaintiff's daughter, being twenty-three years of age, hired herself to one Saul, as a servant ; and went to live with Saul her master, and served him some time. During her service, she was gotten with child, by the defendant ; and becoming big with child, and unable thereby to perform her service as she was used and ought to do, she was discharged by Saul her master, who paid her her wages in proportion to the service she had already done him ; and the plaintiff her father received her, when no one else would, and lodged and boarded her in his house. She was there delivered of a male bastard child, in November following : and the plaintiff her father maintained her in her lying-in, at his own expence.

The question which arose at the trial, and which was reserved for the opinion of this court is, “whether the plaintiff can maintain this action.” (a)

(a) There are two different kinds of action that may be brought in these sort of cases, viz. 1st, an action of trespass vi et armis for breaking and entering the plaintiff's house, and debauching his daughter, in which case, the action is a general action of trespass, and therefore ought to be laid vi et armis ; and the entering the house is the gist of the action, and therefore must be proved ; and if that be proved, the plaintiff will be entitled to a verdict, whether the debauching his daughter be proved or not ; for that, in this case, is only matter of aggravation to induce the jury to give greater damage ; or 2dly, an action may be brought for debauching the plaintiff's daughter without more ; but then it must not be a general action of trespass, but trespass on the case, in which the debauching the daughter is necessary to be proved ; for without it in this action the plaintiff cannot have any verdict, and in strictness the plaintiff ought to prove his loss of service ; and formerly some evidence, though slight, was thought necessary to be given of the daughter's doing some sort of service, but afterwards it was always sufficient to prove that she lived with her father, and

Mr. Davenport, for the plaintiff, endeavoured to shew [1879] that he could.

The first question is "whether the father and daughter can be considered as master and servant."

Second question "whether her age makes any difference in the case;" as she was upwards of twenty-one; viz. twenty-three years of age.

First—The action is maintainable by the father, upon the foot of being her master; as he has alledged "per quod servitium amisit." He agreed that no action would lie, but by reason of the loss of her service. So are the cases in 1 Bulstr. 373. 2 Lutw. 1497. 1 Ro. Rep. 393, 394. Cro. Eliz. 769, 770, *Barham v. Dennis*. Sir T. Raym. 259, *Hunt v. Wotton*, 31 C. 2, in Seace'. Style 398, *Norton and Jason*: which is cited in Raymond 260, and was an action for breaking and entering the plaintiff Jason's house, and assaulting his daughter, and getting her with child of a bastard, per quod servitium amisit. Roll. Ch.J. thought that the father might have an action for the loss of her service caused by this.\* So Bro. Abr. title Trespass, pl. 442, and *Russell v. Corne*, in 2 Lord Raym. 1032, and 6 Mod. 127, S. C. prove that it is necessary to say "per quod servitium amisit." But per Holt—"No action lies for assaulting and getting a daughter with child: but if he that has done it, enters his house, and assaults his daughter and gets her with child, he may maintain an action for entering his house and assaulting his daughter and getting her with child, per quod servitium amisit." It may be added as aggravation, inter alia enormia. And 1 Sid. 225, *Sippora v. Basset*, shews, in what cases damages may be given, and evidence allowed, for alia enormia.

Saul, the master, here sustained no damage: for he discharged her as soon as she became unserviceable to him; and paid her her wages only in proportion to her past service.

The father may justify an action for a battery brought against him by one who was assaulting his child. 1 Bacon's Abridgment, 155, letter C. A father has an interest in all his children: he had a writ quare filium et heredum rapuit. He must provide for them; and ought to receive comfort from them: and if any take them from him, he ought to have a remedy for the injury.†

Here, a daughter goes out to service, within three miles of her father's house: she is gotten with child, dis-[1880]-charged, and returned upon her father, helpless and unable, in that condition, to maintain herself. He is obliged by 43 Eliz. c. 2, to maintain her; and did so from the necessity of the thing. Therefore, from the consequential damage, an action is maintainable by the father: in whose house she resided; and where she must, in this case, be considered as a servant.

2d point—Her being twenty-three years of age makes no difference. This young woman's master could not bring an action against this defendant: no-body but the father could sue. And the damage is the same to him whether she be over or under twenty-one.

He argued, that this case could not be considered upon the foot of emancipation: and concluded with praying judgment for the plaintiff.

Mr. Wallace, contra, for the defendant.

The foundation of actions of this kind has been the loss of service.

The father's interest in the child, whatever it might have been during infancy, ceases at the child's coming to the age of twenty-one.

Many injuries may be done to a child, which are not the subjects of actions by the father.

Indeed an action will lie by a father, for taking away his son, or his daughter. F. N. B. 3d edit. pa. 260. And the father has an interest in his heir. *Radcliffe's case*, Plowd. 267 b.

But an action will not lie by the father for debauching his daughter. So was Holt's opinion, in 2 Lord Raym. 1032, *Russell v. Corne*.

that he lost her assistance, or was at some expence on account of her lying-in; and then though she was above twenty-one, and large damages were given, yet the Court would not set aside the verdict; and less strictness is requisite where the daughter is under twenty-one.

\* Roll. added, "But it is a pretty case, and fit to be argued. Therefore bring us books: and we will advise upon it."

† V. Cro. Eliz. 770.



If the father maintains the daughter in his own house, he is intitled to her service and may maintain an action for the loss of her service. But here, she was hired out to service in another man's house.

As to the father's being obliged to maintain her—such an obligation can arise only from 43 Eliz. c. 2. But here it is not stated, either that she was unable to maintain herself: or that the father was able to maintain her.

[1881] If she had been under age, and under her father's roof, I would agree that he had been intitled to an action as for the loss of service.

*Barham v. Dennis*, in Cro. Eliz. 769, 770, was not determined: but three Judges, (Anderson, Walmesley, and Kingmil,) held "that the father shall not have an action for the taking of any of his children which is not his heir."

Cro. Eliz. 55, *Gray v. Jefferies*: "trespass for beating the son, lieth not for the father."

The infancy was the ground of the action in Raym. 259, *Hunt v. Wotton*: the son was an infant under the age of discretion.

They can produce no instance, no precedent of such an action as this is: and their principle will not hold; because it depends upon the loss of service, (which was not the present case).

N.B. It appeared that the parties were poor.

The Court proposed a compromise; which was accepted; it was—"that all proceedings be stayed, without costs on either side."

Rule, by consent, accordingly.

Lord Mansfield, addressing himself to Mr. Wallace, said to him—"It is not upon any doubt, in point of law, that I propose this compromise:" meaning (I suppose) that he was clear with Mr. Wallace, "that this action could not be maintained." And on this supposition, I have ventured to report it, though it was not determined judicially and in form. However, there can be no doubt, but that the Court were all of opinion "that the action could not be maintained:" and therefore, in compassion to the plaintiff, whose daughter had been injured by the defendant, they wished to save him from the payment of costs.

ROSE, EX DIMISS. VERE, ET AL. *versus* HILL. 1766. Devise by testator to his five children and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common and not as joint-tenants, is a tenancy in common in fee. The words "survivors and survivor" relate to the death of the testator.

On the trial of this cause at Coventry Assizes, on 26th March 1766, it appeared that Thomas Hill, the father of the defendant, being seised in fee of the premises in question, upon the 9th of July 1754, duly made his will [1882] in such manner as by law is required for devising real estates; and thereby devised as follows; viz. "I will that my just debts and funeral charges and expences which I shall justly owe at the time of my decease, be, in the first place, paid by my executors hereinafter named: and as to my estate both real and personal, I dispose thereof as follows—First, I give and devise all that my messuage, &c. (being the premises in question, and the whole estate of which he was seised,) also all other my messuages, lands, tenements and hereditaments in the said City of Coventry or elsewhere, unto which I am in any wise intitled, unto my dear wife Mary, for and during the term of her natural life: and from and after her decease, I give and devise the same premises, every or any part thereof, to and to the use of Anne, Thomas, Mary, William and Nathaniel my sons and daughters, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants; chargeable with the mortgage or incumbrance already made by me, of the same premises or some part thereof, to Mrs. Yardley of the said City of Coventry, for the sum of 100l. and interest, and as to, for and concerning all the rest and residue of my goods, chattels, ready money, debts and securities for money, plate, household goods, utensils in my trade or business, and all other my personal estate whatsoever and wheresoever, and of what nature, kind, or quality the same are, and not otherwise by this my will given and disposed of, I give and bequeath the same and every part thereof unto Anne, Thomas, Mary, William and Nathaniel, my sons and daughters, and the survivors and survivor of them, and the executors and

administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants. And I constitute my said dear wife, my daughter Anne, my son Thomas, and my daughter Mary, executors of this my last will and testament."

That soon after making this will, viz, in August following, the testator died, without having revoked or altered the same, seized of the premises in question. That on his death, Mary his widow who survived him, entered and enjoyed the premises during her life. And that his said sons and daughters all survived him.

That his said daughter Anne married Richard Burbury; and died intestate, the 19th of November 1759, without issue.

That his said daughter Mary was never married; and died in September 1764, intestate.

[1883] That Mary, the testator's widow died in October 1764: and his said son William died intestate the 20th of January 1765; and was never married.

That the said Thomas Hill, the eldest son and heir of the said testator Thomas Hill, immediately upon the decease of his mother Mary, entered upon and took possession of the said premises; and afterwards, viz. on the 9th of February 1765, by indentures of lease and release dated 8th and 9th February 1765, made between himself on the one part and the said George Lilley (one of the lessors of the plaintiff) of the other part, conveyed one undivided moiety or full half part, undivided, of and in all the premises in question, to and to the use of the said George Lilley his heirs and assigns for ever; subject to redemption on payment of 340*l.* and interest, to the said Lilley, on the 9th August then next ensuing.

That the said Thomas Hill, the mortgagor died in May 1765: leaving the defendant Nathaniel (who was the youngest child of the testator Thomas Hill) his brother and heir; who, on his said brother's death, took possession, and has ever since been in possession, of all the real estate devised by his late father as aforesaid; claiming the whole thereof, and insisting "that under and by virtue of the said will, he is intitled to the whole thereof, as being the survivor of all his said brothers and sisters." It also appeared, that the mortgage referred to in the testator's said will was a term for years, which has since been satisfied, and by assignment vested in the said James Vere and Doreas Yardley, lessors of the plaintiff: and it was agreed by all parties in this cause, "that the said term should not be set up, but be considered as surrendered or otherwise determined;" and "that nothing should be insisted on by or between the parties on either side, but the true construction and legal operation of the said testator's will, as to what estates thereby passed to his children respectively."

It further appeared, that the said George Lilley was unpaid his said mortgage-money; and that this ejectment was brought to recover a moiety or half part, undivided, of and in the premises in question; to which the said George Lilley set up a title under and by virtue of the abovementioned indenture of lease and release: but the defendant insisted, that by his late father's said will, he, as surviving devisee, had a right to all the said premises, on the death of his said brother Thomas, notwithstanding the said indentures.

[1884] By consent of the counsel on both sides, the jury in this cause gave a verdict for the plaintiff; subject to the opinion of the Court of King's Bench upon the following question; viz.

"What estate passed from the said Thomas Hill, the eldest son and heir of the said testator Thomas Hill, to the said George Lilley, by the said indentures of the 8th and 9th of February 1765, in any and what part of the premises in question: and whether the plaintiff is intitled to recover any and what part thereof in this ejectment."

Mr. Wheler, for the plaintiff, argued that the lessor of the plaintiff was intitled to recover a moiety of the estate: for, it was either a tenancy in common, in fee, in the five children of the testator; or, it was a tenancy in common for life, and the reversion in fee remained in the testator; and three parts of that reversion in fee descended upon the lessor of the plaintiff.

Mr. Caldecot, contra, for the defendant, agreed, that if either of Mr. Wheler's constructions would prevail, the judgment ought to be for the plaintiff. But he argued thus—Nathaniel Hill, the defendant, is the survivor of all the five children: and the true construction of the will is "that it was a tenancy in common amongst the five children, for life: with survivorship to the longer liver of them." Therefore, upon this construction, the right is in the defendant: who is intitled to the whole, as the last survivor.

Mr. Wheler was stopt from replying: the Court thinking the case sufficiently clear, on his side.

Lord Mansfield stated the case and the will ; for the sake (as he declared) of the students.

After which his Lordship proceeded as follows—

The question is (a) “whether the conveyance of one half, by Thomas, be good, or not.”

An estate to more than one, with a benefit of survivorship, is a joint-tenancy. But the testator has expressly declared “that they shall not take as joint-tenants.” Mr. Caldecot’s construction is therefore too refined for the testator’s meaning. He meant to dispose of all his estate real and personal : and he meant to dispose of his real estate [1885] amongst his children, after the death of his wife. And he uses the same words in disposing of the real estate, as he does in disposing of the personal : and they explain each other. There are words in this will, which plainly show that he meant his estate to go to the representatives of his children, after their deaths ; though he has used improper terms.

It is plain that they were not to take as joint-tenants : and it is plain to me, that he considered that several of his five children might happen to die in his own lifetime ; and therefore makes a provision for such of them as should survive him, and be in existence at the time when the interest was to vest, and their representatives. He meant to prevent a lapse. And therefore we may rather apply the words to a fixed particular time, than give no meaning at all to them. And this is agreeable to the case of *Stringer v. Phillips*,\* 18th December 1730, at the Rolls.

But, as against the defendant, it is enough to say “that it cannot come to him by survivorship.”

Mr. Justice Wilmot concurred. He thought the true construction to be, that these words “survivors and survivor” were inserted in order to prevent the consequence of any lapse, by any of the testator’s children dying in his own life-time.

He meant his children to be all equal ; and if one only or more should survive the rest, at the time of his death, the clause means “that the share or shares of such survivor or survivors should go to them and their representatives” but he could never mean to exclude the children of any of his children who should leave any. This will give the absolute fee to all, as tenants in common : (for, “executors” is equivalent to “heirs,” in a will). But if it did not, yet the plaintiff would be intitled, as heir at law, to the reversion.

Mr. Justice Yates (who tried the cause) concurred.

The testator’s intention is as plain as can be. He says, “his children shall take as tenants in common, and not as joint-tenants.” And the words “survivors and survivor” shall not destroy and control this plain intention : in support of which opinion, he cited 3 Lev. 373, *Blisset v. Cranwell et Al*, and 1 Salk. 226, S. C. And also the case of *Stringer v. Phillips*, before-mentioned by Lord Mansfield.

Lord Mansfield and Mr. Justice Wilmot likewise mentioned the case of *Hawes v. Hawes*, 25th September, 1747, and *Marriot v. Townley*, 27th June, [1886] 1748. And a case of *Stones v. Hearteley et Al*, 25th November, 1748, in Chancery : which was this—John Stones having issue four children, viz. John his eldest son, and Dinah by his first wife ; and the plaintiff (Francis) and Mary, by his second wife ; by will, 13th April, 1723, inter alia directed that the remainder of his estate which he was intitled to at the death of his aunt Mawhood, should go to and be equally divided amongst his three children, Dinah, the plaintiff Francis, and Mary, and the survivor of them, and their heirs for ever. Four children survived the father. Mary, the plaintiff’s sister, died an infant, in the life-time of Mrs. Mawhood. John Stones, the son, died ; leaving his sister Dinah, of the whole blood, his heir. Dinah died ; leaving the defendant, her infant son. Question.—“Whether the plaintiff should take, as survivor.”

Lord Chancellor went upon the case of *Blisset and Cranwell* ; and held it to be a tenancy in common.

In the present case, the Court were unanimous, that it was a tenancy in common, in fee ; and that the words “survivors and survivor” relate to the death of the testator.

Per Cur.—Let the postea be delivered to the plaintiff.

(a) Holt, 370. 3 P. Wms. 472. 3 Ves. 206. 4 Ves. 553. 7 Durn. 638. 1 P. Wms. 96. 1 Vez. 13, 165. 2 P. Wms. 280. 14 Vin. 485, pl. 3, 486, pl. 11, 487, pl. 16.

\* See Eq. Ca. Abr. vol. 1, p. 292, c. 11.



WILLIAMS *versus* LEPER. Friday, 2d May, 1766. A promise from a broker to the landlord to pay the rent to prevent distress need not be in writing.

[Approved, *Castling v. Aubert*, 1802, 2 East, 336; *Bampton v. Paulin*, 1827, 4 Bing. 265. Distinguished, *Thomas v. Williams*, 1830, 10 B. & C. 670. Adopted, *Couturier v. Hastie*, 1852, 8 Ex. 56. Explained, *Fitzgerald v. Dressler*, 1859, 7 C. B. N. S. 395; *Harburg India Rubber Comb Company v. Martin* [1902], 1 K. B. 790.]

One Taylor, a tenant to the plaintiff, being three quarters of a year (which amounted to 45l.) in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed Leper, the defendant, as a broker, to sell the effects; and accordingly, he advertised a sale. On the morning advertised for the sale, Williams the landlord came to distrain the goods in the house. Leper having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent, if he would desist from distraining; and he did thereupon desist.

At the trial, a verdict was found for the plaintiff, for 45l.

The question was, whether the verdict should be entered up for 45l. or for a smaller sum (7l. 5s.) the promise not having been reduced to \* writing.

It was now argued by Mr. Morton and Mr. Walker for the plaintiff; and by Sir Fletcher Norton and Mr. [1887] Wallace for the defendant.

The counsel for the plaintiff spoke to this effect.†<sup>1</sup>

It is objected on the part of the defendant, "that this is an undertaking or special promise for the debt of another person, within the Statute of Frauds; and therefore ought to have been reduced into writing."

Answer—

But this is not such a special promise for the debt of another, as is within the Statute of Frauds. That statute only meant to prevent parol promises, where there was no new consideration moving from the party making the promise to the party to whom it was made: it was not meant to prevent direct undertakings; but only †<sup>2</sup> collateral ones, for the debt, default or miscarriage of others. Whereas here was a new consideration: for, the goods of Leper were, at the time of the promise, liable to the landlord's distress.

The case of *Rothery v. Curry*, Tr. 21 G. 2, in C. B. has been urged by the defendant's counsel, as in point. But that was only putting him off from suing; "in consideration that the plaintiff would not sue A. B." It was held to be within the statute.

2 Ld. Raym. 1085, *Buckmyr v. Darnall*.—"In consideration that the plaintiff would lend two geldings to A. B. and C. D. they should return them"—was held to be collateral and within the statute. 1 Salk. 28, S. C. (but there called *Bourkmire v. Darnell*).

Tr. 32, 33 G. 2, C. B. *Fish v. Hutchinson*, was for a debt of another: "J. S. being indebted to the plaintiff in 8l. 4s. the defendant promised to pay the costs, if the plaintiff would discontinue the action:" which he did. The promise, not being in writing, was holden void, by the whole Court.

But those were mere naked promises by persons not obliged to answer for the debt or demand, on their own account. The present case is a direct undertaking, for himself and not for another. The plaintiff had a legal interest in these goods, prior to the bill of sale; and has [1888] been deprived by the defendant of an advantage which he can never have again. The property of these goods was in Leper, as trustee for the creditors, at the time when he made this promise. It is an original undertaking.

The case of *Reid v. Nash*, Tr. 1751, 24, 25 G. 2, B. R. is in point—"In consideration that the plaintiff would withdraw his record, and not try the cause, he promised to pay 50l." That was an original undertaking. So in 5 Mod. 205, *Stephens v. Squire*—it was not a promise for a debt of another person: the defendant was himself originally liable. It was a promise to pay 10l. and costs of suit, in consideration "that the plaintiff would not prosecute the action."

\* V. 29 C. 2, c. 3, § 4.

†<sup>1</sup> It had been debated at the trial: so that the counsel were apprized of the arguments and cases that would be urged against them.

†<sup>2</sup> V. ante, 374, 375, 376, *Harris v. Huntback*.

This promise "to pay the arrears, if the plaintiff would desist from distraining," is a new express promise, and not within the statute. Therefore it was not necessary that this promise should be in writing. It was not a collateral undertaking; but an original one.

The counsel for the defendant insisted, that upon this declaration, coupled with the facts given in evidence, the plaintiff had no right to recover this 45l. For, the declaration expressly charges "that Taylor was indebted to the plaintiff in 45l. for three quarters of a year's rent; and that the defendant undertook to pay it:" which is directly within the words of the Statute of Frauds "a special promise to answer for the debt of another person."

Leper was in possession of the goods of the tenant, who owed the plaintiff three quarters rent: and about to sell them. The landlord comes to distrain for this three quarters of a year's rent. Leper promises to pay it, "if he will desist from distraining." He promises absolutely—"to pay it:" not "to pay it out of the goods sold," or under any other restriction.

A forbearance to sue, is a good consideration for an assumpsit.

Before the Statute of Frauds, all promises were binding; whether original or collateral. But that statute says,\* "that where one promises for the debt, default or miscarriage of another, the promise must be in writing."

The case of *Fish v. Hutchinson*, and *Reid v. Nash*, are both upon the same principle: both were collateral promises. The second promise did not extinguish the original debt: it did not extinguish the action. Therefore both were liable for the same debt. The original debtor remained liable: and therefore the promise was [1889] collateral, and consequently within the Act. Indeed, if the original debtor is discharged, then it is an original promise and not collateral: which was the case of *Reid v. Nash*: that was an action of trespass for assault and battery brought by Reid against Johnson: and the defendant promised "that if the plaintiff would withdraw his record, he would pay 50l. &c." It was an original tort. Therefore that case was not contrary to *Fish v. Hutchinson*; but determined upon the same principle.

The plaintiff cannot recover upon this declaration: it is upon a promise "to pay the debt to which Taylor was before liable:" and Taylor still remains liable, till actual satisfaction. Therefore this is a collateral promise: and both are liable. Consequently, it is within the Act.

If indeed the declaration had averred "that Leper promised to pay it out of the produce of the goods when sold; and that in consideration of that promise, he had desisted from distraining;—that had been a different case.

Lord Mansfield—The evidence went further than the declaration states. The declaration does not state whether the promise was in writing, or not: the evidence shews it was not. But both are consistent.

This case has nothing to do with the Statute of Frauds.

The *res gesta* would intitle the plaintiff to his action against the defendant.

The landlord had a legal pledge. He enters, to distrain: he has the pledge in his custody. The defendant agrees "that the goods shall be sold, and the plaintiff paid in the first place." The goods are the fund: the question is not between Taylor and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors: and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the Statute of Frauds. It is rather a fraud in the defendant, to detain the 45l. from the plaintiff, who had an original lien upon the goods.

Mr. Justice Wilmut thought this case out of the Statute of Frauds. This is not a collateral promise to pay the debt of another.

The case of *Reid v. Nash* does not clash with the other determinations on the Statute of Frauds. That was [1890] an original undertaking; the debtor was never liable for that particular sum of 50l.

But this case is not within the spirit or meaning of the Act. The tenant was here the original debtor. The plaintiff had two remedies against him. The defendant made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is in possession of the goods; having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise, in order to discharge the goods of

\* V. sect. 4.

this distress. I consider this distress as being actually made. Leper says, "If you will quit the goods and disincumber the fund, I will pay you."

Leper became the bailiff of the landlord: and when he had sold the goods, the money was the landlord's (as far as 45l.) in his own bailiff's hands. Therefore an action would have lain against Leper, for money had and received to the plaintiff's use.

Mr. Justice Yates—It was not necessary to state in the declaration, "that the promise was in writing."

This declaration states a promise "to pay the arrear of rent amounting to 45l." (a specific sum). The defendant was in possession of the goods, and about to sell them. The plaintiff entered, with intent to distrain them for 45l. The defendant says—"Let me go on to sell them: and I will pay you the 45l." He undertook to pay this, in all events, peremptorily and absolutely. This is an original consideration to the defendant.

Therefore he concurred in being of opinion for the plaintiff; and that the verdict should be entered for the sum of 45l.

Mr. Justice Aston—If this was a promise to pay the debt of Taylor, I should think it within the statute, upon Sir Fletcher Norton's distinctions; which are the true ones.

But I look upon the goods here to be the debtor; and I think that Leper was not bound to pay the landlord more than the goods sold for, in case they had not sold for 45l.

The goods were a fund between both: and on that foot, I concur.

[1891] But otherwise, I should have thought (with Sir Fletcher) "that the case of *Reid v. Nash* does not clash with the other determinations about collateral promises."

Postea to be delivered to the plaintiff: and the verdict to stand for the whole 45l.

BUTTER *versus* HEATHBY. Tuesday, 6th May 1766. Notice of setting out tithes must be given by the occupier to the owner.

This was an action upon the case against the defendant, for not fetching away his tithes in a reasonable time.\*1

The declaration states, that the plaintiff set out the tithes; and the defendant refused to fetch them away.

At the trial, the defendant's counsel insisted on a custom in the parish, "that notice should be given to the owner of the tithes, of the setting them out."

The proof of the custom was not entered into, at the trial: but the validity of the custom was discussed.

Mr. Justice Gould, who tried the cause, held the custom not to be a good one: and a verdict was found for the plaintiff, and thirty guineas damages; subject to the opinion of this Court upon the following

Question—"Whether this custom be good in law, or not."

A motion had been made for a new trial; and a rule to shew cause. It was argued on Thursday last, by Mr. Serjeant Burland, Mr. Thurlow, and Mr. Mansfield, on behalf of the plaintiff (the occupier;) and by Mr. Serjeant Davy and Mr. Dunning, for the defendant (the impropiator).

The counsel for the plaintiff denied this to be a good custom; 1st. Because it was only setting up the ecclesiastical law, against the common law of the kingdom: 2dly. [1892] This can not be done by custom in any particular district.

The farmer is not bound by common law, to give previous notice of the time of his setting out tithes.

Mr. Justice Wilmot—By the common law, no notice is necessary: \*2 by the ecclesiastical law, it is necessary. The question therefore is, "whether the ecclesiastical law can be introduced, under the notion of such a custom."

This was agreed to be the question.

The plaintiff's counsel objected, that this custom is not a reasonable or good one; because it is not founded upon any consideration. And admitting the canon law to

\*1 Note. It must be case: trespass vi et armis will not lie; because it is only a non-feasance, not a mal-feasance. V. Latch, 8, *Stillman v. Chanor*; and 1 Lord Raym. 188, *Shapcott v. Mugford*. [See Vin. 582.]

\*2 V. Noy, 19, *Spencer's case*, and 2 Ventr. 43, accord.



he as has been mentioned, yet it can not be set up against the common law of the kingdom: at least, it ought to have been pleaded. It can be no bar to this action, or to the form of it. For, it is not alledged "that these tithes were not fairly and honestly set out:" and if they were fairly and honestly set out, they ought to have been taken away by the impropiator.

The farmer can receive no benefit by giving such notice: on the contrary, he may be much incommoded by being bound down to set them out the particular time notified. For he can not carry any away, till he has set out the whole: and a lay-impropiator may reside out of the parish, and at a very great distance; or the farmer may not know to whom notice is to be given, or where; or have time sufficient to admit of giving such previous notice of setting them out.

Indeed notice to the owner of the tithes, "of their having been set out," is previously necessary to the bringing an <sup>\*1</sup> action for not carrying them away. And this notice was given.

But the defendant insists that there ought to have been previous notice "of setting them out."

*Beaver v. Spratley*, in *Bunbury*, 333, is the only case to be met with on such custom as this: and that case was never determined. Two Judges against one, seemed to think "that it was bad."

The counsel for the defendant, who argued in support of the rule for a new trial, admitted "that the common law does not require the notice of setting them out:" but this custom does require it; and they insisted that it is a good custom.

This custom falsifies the demand made by the declaration. For, the declaration alleges, "that the parishioner has been always used to set out the tithes so and so; [1893] and that he set them out in due manner; and the defendant neglected to take them away." The defendant shews this custom; and that, for want of pursuing it, these tithes were not in due manner set out. And if they were not set out in due manner, then he was under no obligation to take them away.

It is part of the definition of a custom, "that it differs from the common law." We do not say, "it is good, because it is agreeable to the canon law:" we only say, "it is good, as being the *lex loci*." "It is the law of the land, here in this parish."

The consideration of customs cannot be inquired into: however, if it were necessary to do so, honesty and piety are sufficient considerations for this custom. But customs must be presumed to have sprung from good considerations.

This custom prevails in half the parishes in the west of England: and as tithes depend, in a great measure upon custom, so also does the manner of setting them out.

The parson can not set them out himself: but by 2 Ed. 6, c. 13, § 2, he may come upon the land, and see it done. And this statute directs tithes to be set out according to the customs of the respective parishes.

The custom does not require the parson to be present; nor does it fix the tenant to reap his corn in bad weather: it is only a check against injustice being done to the parson. A reasonable notice is all that is requisite. If the custom should be abused, the tenant would be restrained from making an ill use of it.

From † Hutton's opinion to Lord Ch. J. Lee's time, and by Godolphin expressly, such previous notice of setting out, is necessary by the ecclesiastical law.

The case in *Bunbury* is an instance in support of the custom. There, indeed, † personal notice was insisted on. But we do not require personal notice: we say—"to himself, agent, or servant." And it is his own fault, if he leaves the parish, and leaves no agent.

In the cause at *Nisi Prius*, *Tannard v. Yarborough*,<sup>\*2</sup> at Lincoln Assizes, Lord Ch. J. Willes held such a custom to be good; and said, he wished it was the law of the land.

[1894] And it must be understood (in the present case) that this custom could have been proved.

Lord Mansfield said it had been very well argued. It depends upon general

<sup>\*1</sup> 2 Ventr. 48, accord. and 1 Ro. Abr. 643, title "Dismes," letter X. pl. 1, and Bacon's Abr. vol. 5, pa. 106.

† See Noy, 19, *Spencer's case*: "it was said by Hutton that by the civil law, &c."

† That does not perhaps, quite clearly appear, though there is enough to justify this observation, upon the strict words of the report.

<sup>\*2</sup> Mr. Wheeler mentioned this from his memory.

reasoning, and the case at Lincoln: for that in Bunbury does not ascertain any thing; it went off upon another point.\* We will think of it.

Mr. Justice Wilmot observed, that the canon law is no otherwise an argument in the present question, than as it may serve to shew that the custom has not been thought unreasonable.(a)

*Curia advisare vult.*

Lord Mansfield now delivered the opinion of the Court.

The only question is "whether this be a reasonable custom or not."

There is no authority that comes up to this point, but one: and that was a cause on the Midland Circuit before Lord Ch. J. Willes; who thought it a reasonable custom. I think so too.

I believe the doubt about it arose from a jealousy of receiving the ecclesiastical law in any case whatsoever; lest the clergy should introduce it by degrees.(b)

It is reasonable, as promotive of justice, and preventive of fraud.

Mr. Dunning said, as of his own knowledge, "that there were such customs in the west of England;" and I am told there are such in Lincolnshire likewise.

We are all clear "that it is a good custom." It is for the prevention of fraud, and for the convenience of the parties.

Therefore the rule must be made absolute, for a new trial; but without costs.

[1895] And I think it is such a custom that a very slight evidence would be sufficient to prove.(c)

Rule made absolute.

OATES EX DIMISS. WIGFALL *versus* BRYDON ET AL. 1766. The reason of confessing lease, entry and ouster. [2 Wils. 121.]

[Disapproved, *Gatenby v. Morgan*, 1876, 1 Q. B. D. 689.]

This was an action of trespass and ejectment of messuages, &c. in Sheffield. Not guilty pleaded. General issue joined. The cause was tried at the preceding assizes for Yorkshire, before Mr. Justice Bathurst; and upon the trial, it appeared in evidence, that Grace Green widow being seised in fee of some messuages, &c. and intending to intermarry with Samuel Wigfall, conveyed the same to trustees, to her own use for life; and after her decease, to such uses, &c. as she should either before the said marriage, or during her coverture, by her last will or otherwise, limit or appoint; and for want of such disposition, then to the use of the said Samuel Wigfall for life; and then to the use of her own right heirs.

The marriage took effect: and she did afterwards, in the lifetime of her husband, duly make her will; wherein, after divers pecuniary legacies, &c. (some of which legacies are to the three children of Thomas Brownhill; and others, to the four children of Samuel Water;) is the following devise—"I give to Samuel Wigfall, my

\* It did so. And with regard to this point it is only said "that Barons Carter and Comyns thought there was something in the objection; though the Lord Chief Baron thought it well enough."

(a) There never was till of modern times any doubt about it; and it does not appear from any former printed book that there is any such custom.

(b) It seems that constitutional jealousy against the canon law is at an end, for Wilmot J. above observed, that the canon law may shew that a custom has not been thought unreasonable; and according to Lord Mansfield's opinion, very slight evidence would be sufficient to prove a custom, for the canon law, in this particular instance, to prevail against the common law, in a matter where it is convenient for ecclesiastics, and not for both parties, and seems to make it a matter of no great difficulty for the ecclesiastics to introduce such a custom in any parish in the kingdom, and by degrees to drive the common law out of the kingdom.

(c) There ought certainly to be such evidence as would be sufficient to induce a belief of the fact to be proved in this and in every other case where the law requires any proof at all; and as civility very often is a reason for giving such notice, as observed by Lee J. in *Hewke v. White*, MS. cases, that is a reason for not allowing slight evidence in this case, even if it were in general to be allowed; and see Comyns, 510. Cowp. 807, 808.

dear and loving husband, the house where we now dwell, together with the stable and all other appurtenances thereunto belonging, for and during the term of his natural life; and after his decease, I give the said house and stable with all appurtenances unto the said Samuel Warbleton my brother, if then alive, for and during the term of his natural life; and after his decease, I give the said house and stable with the appurtenances, unto the said children of my cousins Thomas Brownhill and Samuel Water, or such of them as shall be then living, share and share alike. And if it happen that the said Samuel Warbleton be not living at the decease of the said Samuel Wigfall, then my mind and will is, that the said house and stable with the appurtenances be divided amongst the said children of my cousins Thomas Brownhill and Samuel Water, as aforesaid. And also all the rest of my estate which is not herein or hereby before by me given or disposed of, I do give unto the said Samuel Wigfall my husband." And she appointed her said husband, and brother Warbleton, executors.

The testatrix soon afterwards died: and her husband survived her, and held the estate until his death, which happened in August 1757. At the time of his death, and at the time of the death of the said Samuel Warbleton (who survived the testatrix, but died before her said husband), four of the said children of Thomas Brownhill and [1896] Samuel Water, were living: one of whom is still living: the other three died before the time of the demise laid in the declaration.

The premises devised to the children, at the time of making the will were, and still are worth 100l. to be sold, and no more: and the testatrix had no real or personal estate, except what is particularly mentioned in the will.

The defendant Brydon purchased the estate in question, of the children: the other defendants are tenants of the same, under him. No actual ouster was proved, previous to the bringing the ejectment. The lessor of the plaintiff is heir at law to Samuel Wigfall, the husband of the testatrix.

A verdict was given for the plaintiff, subject to the opinion of this Court on the following

Question—"Whether the lessor of the plaintiff be intitled to three undivided fourth parts of the premises; and can recover the same in this action."

It was argued on Thursday last by Mr. Fearnley for the plaintiff, and Mr. Wallace for the defendant.

Mr. Fearnley argued that the devise to the seven children was only during their lives.

Mr. Wallace insisted, that the seven children took an estate in fee, as tenants in common. And he also insisted, that the rule to confess lease, entry and ouster does not supply the want of evidence of the actual ouster of the tenant in common.

Mr. Fearnley replied, that they took only an estate for life. (See 1 Ro. Abr. 834, *Fawcett's case*. Cro. Eliz. 52, *Pettywood v. Cooke*; and Skinner, 339, *Middleton v. Swain*.)

And as to the objection to the entering into the rule to confess lease, entry and ouster—he acknowledged a dictum mentioned in 7 Mod. 39, where it is reported to be said per Holt—"In case of tenants in common, there must be an actual ouster of one by the other: or else, [1897] he shall not be compelled to confess lease, entry and ouster."

But here the defendants did confess lease, entry and ouster there, it is only said, "that he shall not be compelled to do it."

He cited 2 Ld. Raym. 750, *Little v. H Eaton*, and 1 Salk. 259, S. C. to shew that it is settled, "that proof of actual entry and ouster is not necessary in ejectment brought on breach of a condition of re-entry." And so is 1 Ventr. 248, *Anonymous*. He likewise mentioned 1 Siderf. 223, *Langhorne v. Merry*: where the Court held, "that an entry shall be intended, till the contrary be proved." (a) (And V. 2 Ventr. 332, *Anon*.)

The Court having taken a few days to look into the cases—

Lord Mansfield now delivered their opinion.

After stating the case particularly, and the question, "whether an actual entry was necessary to have been proved; or whether the confession of lease, entry and ouster be sufficient, without actual proof of it;" he observed that as there was no

(a) Qu. tamen 4 G. 2, c. 28, which was made on a contrary supposition, and dispenses with the necessity of the lord's re-entry only in the particular case there mentioned.



proof of actual ouster, no actual ouster could be supposed: but that slight proof would be sufficient to be left to the jury.

However, though no actual ouster can be supposed, yet

We are all of opinion that the confession of lease, entry and ouster, is sufficient to bar a nonsuit for want of proof of actual ouster.

We are glad to have it settled; because there have been different opinions.

The meaning of confessing lease, entry and ouster is, to bring the matter to the mere question of the plaintiff's possessory title.

In the case of *Dormer v. Fortescue*,\* an actual entry was holden necessary on the † statute: for that the word "action," in that statute, could not mean "ejectment." That was settled and established by many cases. Therefore, to avoid a fine, there must be an actual entry; and the demise can not be carried back beyond the actual entry.

In all other cases, the confession of lease, entry and ouster is sufficient. And so it is now settled that it is sufficient for an ejectment brought upon a condition broken.

As to this particular case of a tenant in common—there are cases enow, to justify our opinion. He repeated the case of *Johnson v. Allen*, 13 W. 3, reported in 12 Mod. 657. And indeed it is scarce possible, he said, that a tenant in common should bring an ejectment, but where there is an actual ouster. 7 Mod. 39. 1 Queen Anne,—“per Holt—he shall not be compelled when he does not dispute the title: but where he does dispute it, he shall be compelled to confess lease, entry and ouster.”

[1898] Therefore we are all clear that the confession of lease, entry and ouster is sufficient, in the case of a tenant in common, without proof of actual ouster.

Second point. As to the construction of the will—

The question is, “whether this house and stable were given to the seven children, only during their lives; or, as tenants in common.” (b)

The whole value is only 100l.

There must be something (c) by way of limitation, to shew the intention of the testatrix: otherwise it is for life only.

But few ordinary people make the distinction between land, and personal property.

As this rule of law often operates against the intention of the testator, it shall be construed to carry a fee, (d) where there are words of limitation, and the testator's intention appears.

This is a house and stable. They are given to the husband for life, expressly: so they are to the brother. If she had meant the like to the children, she would have done the like. But she gives to the seven children, after the two lives, a wasting property, share and share alike. Besides, she directs the house and stable to be divided amongst the seven children, in case her brother dies before her husband: that is, they must be sold, and the produce divided.

We are of opinion, that, upon the whole of this will, there is enough to shew that the testatrix intended the value of this house and stable to be divided amongst the seven children.

The sweeping residuary clause (e) does not alter the case: she does not dispose of all the money that she had to dispose of.

Plaintiff to be nonsuited: and the postea to be delivered to the defendant.

\* H. 11 G. 2, B. R. and afterwards in Dom. Proc. [Andr. 136, 137.]

† 21 Jac. 1, c. 16.

(b) This is put wrong, for there is not a colour of doubt as to their not being tenants in common; the words share and share alike leave no room for doubt, the only doubt in the case was whether they were tenants for life, or in fee.

(c) Qu. if it should not be something to shew by way, &c. 2 Vez. 49, 50.

(d) Qu. if it should not be “though there are no words of limitation, if the testator's intention appears.”

(e) Qu. For it is stated in page 1896 (line 5, 6) that the testatrix had no real estate except what is particularly mentioned in the will; for the words “all the rest of my estate, &c.” in the residuary clause are applicable to the real estate as well as the personal estate, she having disposed of part of both.

ARMSTRONG, EX DIMISS. TINKER ET AL', *versus* PEIRSE, ET AL'. 1766. Trustees not to dispute the possession of their *cestui que trust*.

This was an action of trespass and ejectment of a messuage and lands at Bishop's Canning in Wilts; on the several demises of John Tinker, Joseph Tinker, Benjamin Harring, and James Bartlet; Robert Preston and [1899] Thomas Hunt; and Hester Pitman. The cause came on to be tried at the Lent Assizes for the county of Wilts before Mr. Justice Aston: when a general verdict was found for the plaintiff, subject to the opinion of this Court upon the following

Case—Alice Rudman, spinster, being legally possessed of the premises in question, for the residue of a term of 99 years, determinable upon the death of herself and two other persons; and a marriage being intended between her and John Peirse, yeoman: by indenture dated 21st December 1733, between the said John of the first part, the said Alice on the second part, and Robert Tinker and William Harring of the third part, the said Alice Rudman assigned to the said Robert Tinker and William Harring all the premises in question for the remainder of the said term of 99 years, determinable as aforesaid; upon trust for the said Alice Rudman and her assigns until the said intended marriage should be had: and from and immediately after, upon trust that they the said Robert Tinker and William Harring and the survivor of them his executors or administrators should permit and suffer the said John Peirse and his assigns to hold and enjoy the premises, and to take the rents and profits thereof during so long of the residue of the said term as the said John Peirse and Alice Rudman should jointly live; and if the said Alice Rudman should survive the said John Peirse, then after his death, in trust wholly for the said Alice Rudman her executors, administrators and assigns, to her and their own use and benefit: and if the said A. R. should die in the life-time of the said J. P. then from and immediately after such her death, upon trust to permit and suffer such persons to hold and enjoy the same premises for the residue of the term, as she by any writing under her hand and seal, &c. or by her last will and testament, &c. should appoint.

The said marriage took effect.

The said William Harring died in 1733.

By indenture dated 29th September 1743, (which recited the former deed of settlement, and the trusts and limitations contained in it,) in consideration of the sum of 330l. paid to the said John Peirse and Alice his wife, the said Robert Tinker by the direction of Peirse and his wife, and also the said John Peirse and the said Alice Peirse assigned, and the said Alice, in pursuance of her power reserved to her, limited the premises in question, to Andrew Sealy his executors, administrators and assigns, [1900] for the remainder of the said term of 99 years determinable as aforesaid with a proviso for redemption upon payment of the principal and interest upon the 25th of March then next ensuing. In this indenture is a covenant for further assuring the premises upon non-payment, &c.

By indenture dated 18th November 1751, the said John Peirse and his wife, in consideration of 300l. assigned over the premises in question to Hester Pitman her executors, administrators and assigns for the remainder of the term determinable as aforesaid: with a like proviso for redemption, and covenant for further assurance as are above-mentioned.

The said John Peirse paid all the interest due on the said several mortgages, to the last day of payment respectively before his death, which happened in 1758. His wife survived him, but paid no interest after his death, either to Sealy or Pitman, or to any other person on their behalf: nor was any interest ever demanded of her.

The said Andrew Sealy and Robert Tinker are since dead; and the six first-named of the lessors of the plaintiff are, respectively, their legal representatives: viz. John and Joseph Tinker, B. Harring, and James Bartlett, are executors and legal representatives of Robert Tinker: and Robert Preston and Thomas Hunt are the executors and legal representatives of Andrew Sealy.

The said Alice Peirse continued in possession of the premises until her death, which happened in 1765; and, previous thereto, made her will dated 29th July 1759, whereby she devised the premises to the defendant her daughter in the following words—"I give unto my daughter Alice Peirse all that leasehold estate commonly called Reise's which I now hold by virtue of a settlement made before marriage with my late husband."

The defendant Peirse is in possession of part of the premises in question: and the other defendants, of the residue, as her under-tenants.

The question submitted to the Court was "whether the plaintiff was intitled to recover the premises in this ejectment."

Mr. Gould argued this case for the plaintiff: Mr. Thurlow for the defendants.

And the question they meant to make, was "whether a mere trustee could dispute the possession of his own cestuy qui trust."

[1901] But the Court, though they looked upon it as a settled point, "that the formal title of a trustee should not, in an ejectment, be set up against the cestuy qui trust: because, from the nature of the two rights, the cestuy qui trust is to have the possession;" yet in this case, that was not the question: for, here, the lessors of the plaintiff were not trustees for the defendant, but for the mortgagees.

And therefore they immediately gave judgment; and directed that the

Postea should be delivered to the plaintiff.(a)

REX *versus* LOOKUP. Wednes. 7th May, 1766. An offence charged in the indictment to have been done in the time of a late King, and laying it against the peace of the present is fatal.

On the 30th of June 1762, in the second year of His present Majesty, a bill was found against the defendant George Lookup, for wilful and corrupt perjury in his answers to a bill in Chancery filed by Sir Thomas Frederick, relative to money charged to be unfairly won by the defendant at play.

Upon this indictment, he was tried, and convicted.

He thereupon petitioned the King; and obtained a reference to Lord Mansfield; who chose to take the opinion of the Judges. They received his affidavits, and examined into his reasons and insinuations. After which, they declared themselves thoroughly satisfied with the verdict; and saw no foundation for granting a new trial. Whereupon, they proceeded to his sentence: which was—"That he should be set in and upon the pillory, at Charing-Cross, for an hour, between the hours of twelve and two; and that he should be afterwards transported to some of His Majesty's colonies or plantations in America, for the space of seven years; and be now remanded to the custody of the marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid."

On Wednesday 27th November 1765, (which was eight or nine days after the sentence had been pronounced,) he moved "to stay the entry of the judgment;" in order to give him an opportunity of moving in arrest of judgment; a fatal mistake having been since discovered; viz. "that the fact was charged to have been committed in the time of the late King;" whereas the indictment con-[1902]-cludes "against the peace of the present King:" and his counsel urged, that he was within time; as the motion was made during the same term in which the sentence was pronounced, and the entry-roll of the record not yet made up.

But the Court denied this motion. They thought, that in such a case, and upon such an objection, they were not bound or warranted to let in a motion in arrest of judgment, after sentence is pronounced.

His regular remedy was by writ of error.

The next day, the defendant's counsel moved to adjourn his standing in the pillory, on an affidavit (made by his physician) of his illness; and that his standing in the pillory in the open air, for an hour, would probably endanger his life.

Note—The rule is drawn up, "that the marshal deliver the defendant to the sheriff; and that the sheriff do set him in and upon the pillory, for an hour, between the hours of ten and twelve, on [leaving the day in blank;] and then deliver him to

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(a) This case was not worthy of a report, if it was determined, for the reason given by the reporter, viz. that "the lessors of the plaintiff were trustees not for the defendant but for a third person." Sed qu. if the mortgages were not both void, being made by a husband and wife possessed only in right of the wife, and the power for the wife to appoint being conditional only, in case the husband should survive the wife, and the trust of the estate (which was a term) being if she should survive her intended husband then for her, seems not assignable during the coverture being not only not vested but impossible to vest during the coverture.



the marshal, &c." and this blank is afterwards filled up, at the choice and nomination of the sheriff. In the present case, it had been filled up with the words "Saturday next, the 30th instant;" and had been actually delivered out to the sheriff.

Lord Mansfield—Let the rule be altered thus—"That upon reading the former rule, and upon reading the affidavit of Dr. Watson concerning the present indisposition of the defendant, the time appointed by the said rule for setting the defendant in and upon the pillory is enlarged; and that the said sentence be executed on the 17th day of December next, or as soon afterwards as the same can be done without danger from the defendant's indisposition."

The next day (the last day of Michaelmas term 1765,)

Eyre, Recorder of London, on behalf of the defendant, urged the Court (as he had before done, on the preceding day,) to reconsider their judgment, that is to say, their sentence: and he mentioned 1 Salk. 78, *The Queen against Darby, and Farresley* (7 Mod.) 100, S. C. and 2 Hales's Hist. P. C. 379, where Lord, Ch. J. Hale says, "if, by any mistake or oversight, the Court should give judgment against a clerk convicted of a felony within clergy; yet they may, and (as I think) ought to allow him his clergy, after his attainder." From whence he argued, that as in the present case the judgment ought [1903] to have been "quod cassetur" it is not only in their power to set it right now, but they are even bound ex officio to do so. And he said, there was no distinction, in criminal cases, between form and substance.

But the Court persisted in not doing this, without some precedent. They said, the citation from Hale's H. P. C. was not parallel to the present case. There, the judgment would only be corrected: this is a motion to arrest it. That was a capital case too; here, you are limited to a time. And even in capital cases, you have no instance of such a motion as this, after the expiration of the limited time.

Motion denied.

Whereupon, Mr. Lookup brought a writ of error returnable in Parliament, and assigned several errors. 1st. That the indictment is insufficient. 2d. That the offence in the indictment specified is not charged to have been done against the peace of His late Majesty; in whose reign it was alledged to have been committed. 3d. That the offence is charged to have been done against the peace of His present Majesty; in whose reign it appears not to have been committed. 4th. That no certain day or time is fixed, appointed or limited by the judgment, for setting the plaintiff in error in and upon the pillory. 5th. That no certain time is fixed, appointed or limited by the judgment, for the transportation of the plaintiff in error. 6th. That the Court of King's Bench had not any power or authority, by law, to adjudge or order that the plaintiff should be transported to some of His Majesty's \*<sup>1</sup> colonies or plantations in America for the space of seven years.

All the objections were considered as frivolous; except that which was discovered after sentence pronounced. But

On 5th May 1766, the following question was put, by the Lords, to the Judges—

"Whether the perjury being alledged in the indictment to have been committed in the time of the late King, and charged to be against the peace of the now King, is fatal, and renders the indictment insufficient."

The Lord Chief Baron delivered the unanimous opinion of the Judges, in the affirmative.

[1904] And upon this point, the judgment of the King's Bench was reversed.

Two days after, on 7th May 1766, Mr. Recorder moved on his behalf, (but without his being brought up into Court,) that he might be discharged.

And, the order of reversal being produced and read,

The Court ordered him to be

Discharged.\*<sup>2</sup>

It is very remarkable, that from Michaelmas term 1756, to the time of this publication (Michaelmas term 1771,) this is the only judgment of the Court of King's Bench, which has been reversed; though, from the importance and difficulty of the questions, there have been many writs of error in the Exchequer-Chamber and in Parliament.

\*<sup>1</sup> V. 2 G. 2, c. 25.

\*<sup>2</sup> V. post, 29th January, 1771.

REX *versus* HELLING ET AL. Friday, 9th May, 1766. Order made on Easter Wednesday for appointing overseers good.

Mr. Coxe and Mr. Dunning shewed cause against quashing an order made upon Easter Wednesday 1766, by two justices (Luke Robinson and Joseph Girdler, Esqrs.) appointed the defendants overseers of the poor of St. Andrews Holborn above the Bars, and St. George the Martyr.

It has been objected, that this is not an appointment under the statute of 43 Eliz. c. 2, being "for this present year 1766."

Answer—But this is the usual form in this parish. And the order says, "and to do all such things as their duty requires;" that is, (amongst other things) to stay in their office till others are appointed.

Sir Fletcher Norton and Mr. Walker, contra, argued for quashing the order.

They admitted, they could not go out of the order. But by 43 Eliz. c. 2, sect. 1, the overseers are to be nominated yearly, and this Act giving a jurisdiction, they are obliged to conform exactly to it. Consequently, they can nominate only for a year; (neither more nor less).

Whereas this appointment being made on Easter [1905] Wednesday, and appointing them for the year 1766, they were not obliged nor authorized or intitled to continue any longer than the end of the year 1766. It is not an appointment for a year.

Lord Mansfield—The real objections, I take it for granted, are not before the Court.

The only question before us is "whether the order is good upon the face of it, or not."

Now this order plainly means the overseer's year: and that year is from Easter 1765, to Easter 1766. You would make it bad, by understanding it to mean the year of our Lord. But you can not construe this order to be a bad one, by understanding it so: for it manifestly means quite another sort of year.

Mr. Justice Wilmot was silent, being a parishioner.

Mr. Justice Yates was absent.

Mr. Justice Aston concurred with Lord Mansfield; and said, that if the construction may be taken two ways: one of them making the order good, the other making it bad; he should take it in the sense that would make it good. Wherefore

Per Cur.—Rule discharged.

Order affirmed.

REX *versus* INHABITANTS OF ECCLESALL BIERLOW IN SHEFFIELD.  
Monday 11th May, 1766.

See this case at large in the quarto-edition of my Settlement-Cases, No. 180, pa. 562.

CARTER *versus* BOEHM. 1766. [S. C. 1 Bl. 593.] Concealment will avoid a policy of assurance.

[Discussed and approved, *Bates v. Hewitt*, 1867, L. R. 2 Q. B. 608. Principle applied, *Harrower v. Hutchinson*, 1870, L. R. 5 Q. B. 590. Observation adopted, *Gandy v. Adelaide Assurance Company*, 1871, L. R. 6 Q. B. 756. Dictum discussed, *Davenport v. Charsley*, 1886, 54 L. T. 344. Referred to, *Rowley v. London and North-Western Railway Company*, 1873, L. R. 8 Ex. 231. Dictum adopted, *Bristol, &c., Aerated Bread Company v. Maggs*, 1890, 44 Ch. D. 622. Referred to, *Seaton v. Heath* [1899], 1 Q. B. 790; [1900], A. C. 135. Adopted, *Gedge v. Royal Assurance Corporation* [1900], 2 Q. B. 222.]

This was an assurance-cause, upon a policy underwritten by Mr. Charles Boehm, of interest, or no interest: without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter.

[1906] It was tried before Lord Mansfield at Guildhall: and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday the 19th of April last, Mr. Recorder (Eyre,) on behalf of the defen-

dant, moved for a new trial. His objection was, "that circumstances were not sufficiently disclosed."

A rule was made to shew cause: and copies of letters and depositions were ordered to be left with Lord Mansfield.

N.B. Four other clauses depended upon this.

The counsel for the plaintiff, viz. Mr. Morton, Mr. Dunning and Mr. Wallace, shewed cause on Thursday the first of this month. But first,

Lord Mansfield reported the evidence—That it was an action on a policy of insurance for one year: viz. from 16th of October 1759 to 16th October 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough in the island of Sumatra in the East Indies, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count D'Estaigne, within the year.

The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the governor's brother (the plaintiff) to him: and the use made of these instructions was to shew that the insurance was made "for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides have been long in Chancery: and the Chancery-evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly, the weakness of the fort, and the probability of its being attacked by the French: which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother Roger Carter, his trustee, the plaintiff in this cause: the second was from the governor to the East India-Company.

[1907] The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the governor had 20,000*l.* in effects: and only insured 10,000*l.* and that he was guilty of no fault in defending the fort.

The first of these depositions was Captain Tryon's: which proved that this was not a fort proper or designed to resist European enemies: but only calculated for defence against the natives of the island of Sumatra; and also that the governor's office is not military, but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his Lordship had made his report,—

The counsel for the plaintiff proceeded to shew cause against a new trial.

They argued that there was no such concealment of circumstances (as the weakness of the fort, or the probability of the attack,) as would amount to a fraud sufficient to vitiate this contract: all which circumstances were universally known to every merchant upon the exchange of London. And all these circumstances, they said, were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. Dunning laid it down as a rule—"that the insured is only obliged to discover facts; not the ideas or speculations which he may entertain, upon such facts."

They said, this insurance, was in reality, no more than a wager; "whether the French would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river, or not."

Sir Fletcher Norton and Mr. Recorder (Eyre) argued, contra, for the defendant (the under-writer).

They insisted, that the insurer has a right to know as much as the insured himself knows.

They alledged too, that the broker is the sole agent of the insured.

[1908] These are general, universal principles, in all insurances.

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that he did not believe that the insurer would have meddled with the insurance, if he had seen these two letters.

All the circumstances ought to be disclosed.

This wager is not only "whether the fort shall be attacked:" but "whether it shall be attacked and taken."



Whatever really increases the risque ought to be disclosed.

Then they entered into the particulars which had been here kept concealed. And they insisted strongly, that the plaintiff ought to have discovered the weakness and absolute indefensibility of the fort. In this case, as against the insurer, he was obliged to make such discovery, though he acted for the governor. Indeed, a governor ought not, in point of policy, to be permitted to insure at all : but if he is permitted to insure, or will insure, he ought to disclose all facts.

It can not be supposed that the insurer would have insured so low as 4l. per cent. if he had known of these letters.

It is begging the question to say, "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose : and the presumption was "that the fort, the powder, the guns, &c. were in a good and proper condition." If they were not, (and it is agreed that in fact they were not, and that the governor knew it,) it ought to have been disclosed. But if he had disclosed this, he could not have got the insurance. Therefore this was a fraudulent concealment : and the under-writer is not liable.

It does not follow, that because he did not insure his whole property ; therefore it is good for what he has judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. advisare vult.

[1909] Lord Mansfield now delivered the resolution of the Court.

This is a motion for a new trial.

In support of it, the counsel for the defendant contend, "that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy."

The counsel for the plaintiff insist, "that the not mentioning these particulars, does not amount to a concealment, which ought, in law, to avoid the policy : either as a fraud ; or, as varying the contract."

1st. It may be proper to say something, in general, of concealments which avoid a policy.

2dly. To state particularly the case now under consideration.

3dly. To examine whether the verdict, which finds this policy good although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only : the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention ; yet still the under-writer is deceived, and the policy is void ; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

The policy would equally be void, against the under-writer, if he concealed ; as, if he insured a ship on her voyage, which he privately knew to be arrived : and an action would lie to recover the premium.

[1910] The governing principle is applicable to all contracts and dealings.

Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. *Aliud est celare ; aliud, tacere ; neque enim id est celare quicquid reticeas ; sed cum quod tuscias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire.*

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

There are many matters, as to which the insured may be innocently silent—he

need not mention what the under-writer knows—*Scientia utrinque par pares contrahentes facit*.

An under-writer can not insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waves being informed of.

The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation: as for instance—The under-writer is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of States from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, &c.

If an under-writer insures private ships of war, by sea and on shore, from ports to ports, and places to places, any where—he needs not be told the secret enterprizes [1911] they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waves the information. If he insures for three years, he needs not be told any circumstance to shew it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to shew there will be no deviation.

Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.

The question therefore must always be “whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run.”

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss for Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between the 1st of October 1759, and 1st of October 1760. It was under-written on the 9th of May 1760.

The under-writer knew at the time, that the policy was to indemnify, to that amount, Roger Carter the Governor of Fort Marlborough, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort Marlborough the 22d of September 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company, which the Company offered to put into my hands; but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

[1912] An objection occurred to me at the trial, “whether a policy against the loss of Fort Marlborough, for the benefit of the governor, was good;” upon the principle which does not allow a sailor to insure his wages.

But considering that this place, though called a fort, was really but a factory or settlement for trade: and that he, though called a governor, was really but a merchant—considering too, that the law allows the captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share—considering too, that the objection did not lie, upon any ground of justice, in the mouth of the under-writer, who knew him to be the governor, at the time he took the premium—and as, with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially too, as the objection did not come from the Bar.



Though this point was mentioned, it was not insisted upon, at the last trial: nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy: and if it had, we are all of opinion "that we are not warranted to say it is void, upon this account.

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a Court of Equity; where they have had an opportunity to sift every thing to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved without contradiction, that the place called Bencoolen or Fort Marlborough is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an European enemy; but merely for the purpose of trade, and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only security against European ships of war, consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was, in general [1913] well known, by most persons conversant or acquainted with Indian affairs, or the state of the Company's factories or settlements; and could not be kept secret or concealed from persons who should endeavour by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any attack by the French, until they attacked Nattal in Feb. 1760. That on the 8th of February 1760, there was no suspicion of any design by the French. That the governor then bought, from the witness, goods to the value of 4000*l.* and had goods to the value of above 20,000*l.* and then dealt for 50,000*l.* and upwards. That on the 1st of April 1760, the fort was attacked by a French man of war of 64 guns and a frigate of twenty guns under the Count D'Estaigue, brought in by Dutch pilots; unavoidably taken; and afterwards delivered to the Dutch; and the prisoners sent to Batavia.

On the part of the defendant—after all the opportunities of inquiry, no evidence was offered, that the French ever had any design upon Fort Marlborough, before the end of March 1760; or that there was the least intelligence or alarm "that they might make the attempt," till the taking of Nattal in the year 1760.

They did not offer to disprove the evidence, that the governor had acted, as in full security, long after the month of September 1759; and had turned his money into goods, so late as the 8th of February 1760. There was no attempt to shew that he had not lost by the capture very considerably beyond the value of the insurance.

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September 1759, which was sent to England by the "Pitt," Captain Wilson, who arrived in May 1760, together with the instructions for insuring; and also a letter bearing date the 22d of September 1759, sent to the plaintiff by the same conveyance, and at the same time, (which letters his Lordship repeated).\*

They relied too upon the cross-examination of the broker who negotiated the policy, "that, in his opinion, [1914] these letters ought to have been shewn, or the contents disclosed; and if they had, the policy would not have been under-written."

The defendant's counsel contended at the trial, as they have done upon this motion, "that the policy was void."—

1st. Because the state and condition of the fort, mentioned in the governor's letter to the East India Company, was not disclosed.

2dly. Because he did not disclose, that the French, not being in a condition to

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\* The former of them notifies to the East India Company, that the French had the preceding year, a design on foot, to attempt taking that settlement by surprize; and that it was very probable that they might revive that design. It confesses and represents the weakness of the fort: its being badly supplied with stores, arms and ammunition: and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly, that the French should attack and take the settlement; for, as they can not muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention, last year." And therefore he desires his brother to get an insurance made upon his stock there.



relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3dly. That he had not disclosed his having received a letter of the 4th of February 1759, from which it seemed that the French had a design to take this settlement, by surprise, the year before.

They also contended, that the opinion of the broker was almost decisive.

The whole was laid before the jury; who found for the plaintiff.

Thirdly—It remains to consider these objections, and to examine “whether this verdict is well founded.”

To this purpose, it is necessary to consider the nature of the contract, at the time it was entered into.

The policy was signed in May 1760. The contingency was “whether Fort Marlborough was or would be taken, by an European enemy, between October 1759, and October 1760.”

The computation of the risque depended upon the chance, “whether any European power would attack the place by sea.” If they did, it was incapable of resistance.

The under-writer at London, in May 1760, could judge much better of the probability of the contingency, than Governor Carter could at Fort Marlborough, in September 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know every thing which was known at Fort Marlborough in September 1759, of the general state of affairs in the [1915] East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company; and, particularly, from the governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an European power.

If there had been any design on foot, or any enterprize begun in September, 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter; because not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an incertain operation, which might or might not be attempted.

But the governor had no notice of any design subsisting in September, 1759. There was no such design in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the Dutch, which tempted Count D'Estaigue to break his parole.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealment.

The first concealment is, that he did not disclose the condition of the place.

The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistent with his duty. He knew the governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote.

By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed various ways: it was not a matter within the private knowledge of the governor only.

But, not to rely upon that—The utmost which can be contended is, that the under-writer trusted to the fort being in the condition in which it ought to be: in like manner as it is taken for granted, that a ship insured is sea-worthy.

What is that condition? All the witnesses agree “that [1916] it was only to resist the natives, and not an European force.” The policy insures against a total loss; taking for granted “that if the place was attacked it would be lost.”

The contingency therefore which the under-writer has insured against is, “whether the place would be attacked by an European force; and not whether it would be able to resist such an attack, if the ships could get up the river.”

It was particularly left to the jury, to consider, “whether this was the contingency in the contemplation of the parties:” they have found that it was.

And we are all of opinion, "that, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material only in case of a land-attack by the natives.

The second concealment is—his not having disclosed, that, from the French not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case: it is a mere speculation of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt, for the conquered to attack the conqueror in his own dominions. The practicability of it in this case, depended upon the English naval force in those seas; which the underwriter could better judge of at London in May, 1760, than the governor could at Fort Marlborough in September, 1759.

The third concealment is—that he did not disclose the letter, from Mr. Winch, of the 4th of February, 1759, mentioning the design of the French, the year before.

What that letter was; how he mentioned the design, or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account Winch wrote to the East India Company: which was objected to; and therefore not read. [1917] The nature of that intelligence therefore is very doubtful. But taking it in the strongest light, it is a report of a design to surprise, the year before; but then dropt.

This is a topic of mere general speculation; which made no part of the fact of the case upon which the insurance was to be made.

It was said—If a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud—I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumstance: because, it does not follow that they will cruise this year at the same time, in the same place; or that they are in a condition to do it. If the circumstance of "this design laid aside" had been mentioned, it would have tended rather to lessen the risque, than increase it: for, the design of a surprise which has transpired, and been laid aside, is less likely to be taken up again; especially by a vanquished enemy.

The jury considered the nature of the governor's silence, as to these particulars: they thought it innocent: and that the omission to mention them did not vary the contract. And we are all of opinion, "that, in this respect, they judged extremely right."

There is a silence, not objected to at the trial nor upon this motion; which might with as much reason have been objected to, as the two last omissions; rather more.

It appears by the governor's \* letter to the plaintiff, "that he was principally apprehensive of a † Dutch war." He certainly had, what he thought, good grounds for his apprehension. Count D'Estaing being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. And probably, the loss of the place was owing to the Dutch. The French could not have got up the river without Dutch pilots: and it is plain, the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the Dutch.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension, is, because it must have arisen from political speculation, and [1918] general intelligence; therefore, they agree, it is not necessary to communicate such things to an underwriter.

Lastly—Great stress was laid upon the opinion of the broker.

But we all think, the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court

\* Dated 22d Sept. 1759.

† His words are—"And in case of a Dutch war, I would have it (the insurance) done at any rate."

and jury were to determine the cause: and therefore it is improper and irrelevant in the mouth of a witness.

There is no imputation upon the governor, as to any intention of fraud. By the same conveyance, which brought his orders to insure, he wrote to the company every thing which he knew or suspected: he desired nothing to be kept a secret, which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February 1760, shewed that he thought the danger very improbable.

The reason of the rule against concealment is, to prevent fraud and encourage good faith.

If the defendant's objections were to prevail, in the present case, the rule would be turned into an instrument of fraud.

The underwriter, here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question.

If the objection "that he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be void; in order to gain, if the alternative turned out one way; and to make no satisfaction, if it turned out the other: he drew the governor into a false confidence, "that, if the worst should happen, he had provided against total ruin;" knowing, at the same time, "that the indemnity to which the governor trusted was void."

There was not a word said to him, of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection at the time, he ought not to have signed the policy [1919] with a secret reserve in his own mind to make it void; if he dispensed with the information, and did not think this silence an objection then; he cannot take it up now, after the event.

What has often been said of the Statute of Frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud—"That it should never be so turned, construed, or used, as to protect, or be a means of fraud."

After the fullest deliberation, we are all clear that the verdict is well founded: and there ought not to be a new trial: consequently, that the rule for that purpose ought to be discharged.

Rule discharged.

The end of Easter term, 1766, 6 G. 3.

#### [1920] TRINITY TERM, 6 GEO. 3, B. R. 1766.

#### REX *versus* INHABITANTS OF FROME SELWOOD. 1766.

See this case at large, in the quarto-edition of my Settlement-Cases, No. 181, p. 565.

CAMPBELL *versus* DALEY. Tuesday, 17th June, 1766. Special bail on appearing on an outlawry.

The question was "whether, in a case originally requiring special bail, and the defendant standing out to an outlawry,(a) he can come in and appear to the outlawry without putting in special bail."

See the stat. of 31 Eliz. c. 3, § 3; and 4, 5 W. & M. c. 18, § 4.

Per Cur.—There ought to be special bail; it would be very unreasonable, that the defendant should gain an advantage, by standing out till process of outlawry. He certainly ought not to be in a better case then, than if he had appeared at first. And accordingly, the direction given was "that the filacer should not issue a supersedeas, till the defendant had put in special bail. And a week was given him for that purpose.

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(a) *Lege Exigent*, vide 1 Tidd's Prac. 130, in notes, and see ante, 1484.



[1921] REX *versus* INHABITANTS OF ILMINGTON. Wednes. 18th June 1722.

See this case at large, in the quarto-edition of my Settlement-Cases, No. 182, p. 566.

REGULA GENERALIS. 1766. Sheriff to return writs within four days.

For the future, the Sheriffs of London and Middlesex, who before could not be compelled to return their writs and bring in the body, till after six days, shall be obliged to do it within four days.

SIMON *versus* MOTIVOS. 1766. [S. C. 1 Bl. 599. Buller, 275, 280.] Sales at auctions not within the Statute of Frauds. [See 3 Durn. 149. 1 Hen. Black. 84. 2 H. Bl. 65, 67. 9 Ves. 249. 7 Ves. 343, and Strange, 506.] [See 19 Geo. 3, c. 56, s. 3, 6, 11, 14.]

[Discussed, *Hinde v. Whitehouse*, 1806, 7 East, 568. Commented on, *Emmerson v. Heelis*, 1809, 2 Taunt. 45; *Maddison v. Alderson*, 1883, 8 App. Cas. 488.]

This action was brought against the defendant, who had bought goods at an auction, which were not taken away according to the conditions of sale, but put up again and resold.

There was a verdict for the plaintiff: and the defendant moved for a new trial.

The defendant was a broker; and bid for one Durant; but did not name his principal, till some days after.

The auctioneer when he knocked down the lots to the highest bidder, put down his name, in the usual manner, as the purchaser of those goods. The defendant came, the next day, and saw the goods weighed.

The objection now made was, "that this contract, not being in writing, was void by the Statute of Frauds."

But the Court were, all, clearly of opinion, that the auctioneer must be considered as agent for the buyer (after knocking down the hammer,) as well as for the seller; and that his setting down, in writing, the name of the buyer, the price, &c. was sufficient to take it out of the statute; and that the buyer's coming the next day, [1922] and seeing the goods weighed, was an additional circumstance that deserved attention. And they inclined to think "that buying and selling at auctions was not within the Statute of Frauds."

Upon the whole, (though no earnest was actually paid,) they discharged the rule which had been made upon the plaintiff, for him to shew cause why the verdict which he had obtained against the buyers should not be set aside, and why there should not be a new trial.

REX *versus* HONOURABLE PETER MACKENZIE. 1766. Husband's recognizance on articles of the peace exhibited against him by the wife, discharged, she being insane.

This gentleman's wife having sworn articles of the peace against him and others; and it having appeared fully to the Court, as well upon some collateral motions, as upon his own affidavit now produced, "that he had never used any force against her, any otherwise than what was necessary to the care and cure of her as a person disordered in her mind; and this too, in pursuance of Dr. Battie's advice; and that he had never, in any other respect, treated her with any sort of ill usage, but quite the contrary;"

The Court ordered his recognizance to be discharged, and that all proceedings against him be stayed.\*

CATCHSIDE, Widow and Administratrix, &c. *versus* OVINGTON. 1766. Spiritual Court cannot decide on inventory.

On the last day of the last Easter term, Mr. Wallace by leave obtained the day

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\* V. ante, pa. 806, *Rex v. Robert Parnell*, S. P. accord.

before "to move it then," made a motion for a prohibition to an Ecclesiastical Court, on behalf of Mrs. Catchside the administratrix.<sup>†1</sup>

The case was this—

Mrs. Catchside, the widow and administratrix, was cited into an Inferior Ecclesiastical Court, at the promotion of Anne Ovington a creditor, "to exhibit an inventory." She brought one in: and the creditor objected to it. There was a decree for the creditor. The administratrix appealed to the Superior Ecclesiastical Court: who affirmed the decree of the Inferior Ecclesiastical Court. His suggestion was, their want of jurisdiction.

Mr. Walker now shewed cause against the prohibition.

[1923] His cause was—that this is after sentence: and therefore they come too late; unless they can shew that the Spiritual Court have determined contrary to law.

Lord Mansfield—It appears upon the face of the proceedings, "that the Spiritual Court have \* no jurisdiction." Therefore the rule must be made absolute.

To which the other Judges agreed.

Rule made absolute, for a prohibition.

WALTON, Assignee, *versus* BENT. 1766. Action upon a bail-bond must be brought in the same Court from whence the writ issued.

It was agreed by Court and counsel, now, (and was so likewise, a few days ago,)

That an action upon a bail-bond must be brought in the same Court where the bail was given; and that this is now the settled practice.<sup>†2</sup>

Therefore, in the present case, the proceedings in this Court were stayed; the bail-bond upon which this action was brought, having been given upon a process out of the Common Pleas.

Rule to stay proceedings here.

The end of Trinity term 1766, 6 G. 3.

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<sup>†1</sup> V. 1 Mod. Cases, p. 168, *Hinton v. Parker*—"that the Spiritual Court cannot falsify an inventory, at the suit of a creditor." Also, *Bewick Executrix of Bewick*, v. *Ord*, H. 1742, 1 G. 2, B. R.

\* V. 21 H. 8, c. 5, § 4, which only requires the executors or administrators to take such an inventory, and to deliver it into the keeping of the bishop or other person having authority to take probate of wills.

<sup>†2</sup> V. ante, vol. 1, p. 642, *Chesterton v. Middlehurst*, S. P. accord. [Also 3 Wils. 348, acc. and 8 Durn. 153.]

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